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*Andrew von Hirsch*

# Proportionality in the Philosophy of Punishment

## ABSTRACT

The principle of proportionality—that penalties be proportionate in their severity to the gravity of the defendant’s criminal conduct—seems to be a basic requirement of fairness. Traditionally, penal philosophy has included a utilitarian tradition (dating from Bentham), which disregarded proportionality concerns, and a retributive tradition (dating from Kant), which did not supply a readily intelligible account of why punishment should be deserved. Recent philosophical writing has focused on penal desert, explained in terms of a just allocation of the “benefits” and “burdens” of law-abidingness, or as a way of expressing blame or censure of criminal wrongdoing. Expressive theories can explain the rationale of the proportionality principle and also account for the distinction between ordinal and cardinal proportionality. Desert models fully abide by the principle of proportionality. Alternative models might be devised that give proportionality a central role but permit limited deviations for other ends.

The last two decades have witnessed continuing debate over the rationales for allocating sanctions among convicted offenders. Various guiding theories or strategies have been put forward: “just deserts,” “limiting retributivism,” “selective incapacitation.” The choice among them is sometimes treated as a matter of deciding allegiances: one adheres to “just deserts” or not, just as one decides to be a Democrat or a Red Sox fan or not. If one opts for just deserts, then one must worry about the scaling of penalties. If one does not, then perhaps one can disregard such issues.

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Such a perspective is, I think, misleading. Sanctioning rationales differ from one another largely in the emphasis they give the principle of proportionality—that is, the requirement that sanctions be proportionate in their severity to the seriousness of offenses. A desert rationale is one that gives the principle a dominant role. Other viewpoints permit proportionality to be trumped, to a greater or a lesser degree, by ulterior concerns such as those of crime control.

If the choice among sanctioning rationales is, in important part, a choice about how much weight to give to proportionality, then any theory must address the proportionality principle. The prediction theorist—who wishes to stress incapacitation in deciding severity of sentences—will differ in his or her conclusions from a desert advocate. That theorist, however, still must worry about how much concerns about desert—about the seriousness of crimes—should limit the scope of predictive judgments (see, e.g., Morris and Miller 1985). And he or she can devise workable limits of this kind only with an understanding of the logic underlying the proportionality principle.

Why should the principle of proportionality have this crucial role—as a principle that any sanctioning theory needs to address? It is because the principle embodies, or seems to embody, notions of justice. People have a sense that punishments scaled to the gravity of offenses are fairer than punishments that are not. Departures from proportionality—though perhaps eventually justifiable—at least stand in need of defense.

Yet how can one tell, beyond simple intuition, that the principle is a requirement of fairness? And how can one discern the principle's criteria for application? These are, ultimately, questions of moral philosophy.

Criminologists are unaccustomed to dealing with philosophical questions, but an impressive body of writing on punishment does exist in the literature of analytical philosophy. That literature is occasionally referred to in penological writing, but a more complete exposition of the recent philosophical debate may be helpful.

In this essay, I undertake two tasks. The first is to show how the philosophical literature provides an understanding of the principle of proportionality and its rationale. The second is to suggest how various penal strategies—ranging from a pure “desert model” to more mixed schemes—can be analyzed in terms of the role they give to the proportionality principle.

Here is how this essay is organized. Section I sketches briefly the

philosophical tradition on punishment: Bentham's penal utilitarianism, Kant's retributivism, and H. L. A. Hart's 1959 synthesis of utilitarian and retributive ideas. Section II addresses the contemporary philosophical discussion: current utilitarian theories are discussed, as are two different versions of penal desert theory. Section III deals with the rationale for the principle of proportionality, drawing on the themes of the preceding sections. Section IV describes the distinction between cardinal and ordinal proportionality and its significance. Sections V–VII sketch three different kinds of sentencing models that differ from one another in the degree of emphasis they give to the principle of proportionality. These are the desert model, Paul Robinson's suggested hybrid (1987) that permits departures from deserved sentences to prevent certain extraordinary harms, and more thoroughly mixed schemes that regularly would permit a certain degree of departure from ordinal desert constraints. Section VIII, finally, draws some conclusions.

### I. The Philosophical Tradition

Traditionally, theories of punishment have been either consequentialist (i.e., concerned with the supposed effects of punishment) or deontological (i.e., concerned with moral considerations other than consequences). Consequentialist theories have tended to focus on the crime-preventive benefits of punishment. The most influential of these have been utilitarian and attempt to “weigh” those preventive benefits against punishment's human and financial costs. The most salient deontological theories have been concerned with penal desert. Until the last two decades or so, utilitarianism largely held sway, at least in English-speaking countries.

The great formulator of penal utilitarianism was Jeremy Bentham, writing two centuries ago. His contemporary and critic, Immanuel Kant, supported retributive sanctions. Two centuries later, in the 1950s, H. L. A. Hart attempted a synthesis of utilitarian and desert-based approaches.

#### A. *Utilitarianism*

Jeremy Bentham's account of punishment rests on the broader social ethic that he also developed: the principle of utility. Social measures are to be judged, he maintains, according to the degree to which they promote aggregate satisfaction (Bentham 1982, chap. 1). The satisfactions and dissatisfactions that a given course of action produces in each person affected are to be considered. The preferable policy or course

of action is that which optimizes satisfaction, considering the number of persons affected, as well as both the intensity and duration of satisfaction or dissatisfaction for each person.

The justification and use of punishment, in Bentham's view, is to be determined according to the principle of utility. Punishment is an evil: it brings harm or dissatisfaction to those punished. Therefore, it can be justified only to the extent that it produces, in aggregate, other benefits or satisfactions to a greater degree. Because the principle of utility is wholly consequentialist, punishment cannot be warranted by the ill deserts of those punished. In gauging punishments' net social benefits, general deterrent effects are deemed of particular importance. Punishment is thus warranted only to the extent that its beneficial effects in discouraging criminal behavior outweigh the harm it produces (Bentham 1982, chap. 13).

To this general account of punishment, Bentham appends a number of "rules," or subprinciples. The most notable of these, perhaps, is the following: "Where two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less" (p. 168). This points to a tariff of penalties, according to which the higher punishments would ordinarily be reserved for the more harmful acts.

Bentham's views have had great influence ever since, even on penologists who did not attempt to apply his utilitarian formula systematically. Testimony to that influence has been the strongly crime-preventive thrust of penal theory, especially in English-speaking countries. Penologists disputed whether general deterrence, incapacitation, or rehabilitation was the most effective preventive technique. Seldom (until recently) was it doubted, however, that the assessment of preventive effects, in some form, is the key to sanctioning policy. (What has too often been forgotten, alas, has been Bentham's restraining principle—that against the preventive benefits of punishing must be weighed the pains to those punished.)

Philosophers, however, have long expressed nervousness about some of the implications of penal utilitarianism. Those doubts crystallized around the punishment-of-the-innocent issue (see Pincoffs 1966, pp. 33–40). If the criterion for punishing is utility, what is to prevent the punishment of a few innocent persons—if their pains are outweighed by the aggregate benefits in deterring crime and reassuring the public? Utilitarians' suggested answers to this query—that the sacrifice of innocents will produce long-run ill effects, or that a practice

of punishing innocents cannot easily be supported in utilitarian terms<sup>1</sup>—seem unconvincing. For what is being demanded is acknowledgment that it is categorically wrong to punish the innocent and, hence, not permissible to do so even if socially useful in some imaginable scenario. This acknowledgment utilitarian penal theory has difficulty giving.

### *B. The Retributivist Tradition*

The most significant challenge to penal utilitarianism came from Kant. That challenge emerges from his general theory of justice—in particular, his injunction (expressed as the Second Categorical Imperative): “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end” (Kant 1964, p. 96). This injunction requires each person to be treated as being of value in him- or herself, and not merely as one among many whose benefits and sufferings may be aggregated for the common good. Penal utilitarianism seems troublesome precisely because it so manifestly treats persons as means. The actor is to be punished in order to induce others to desist from crime, and the severity of his punishment depends on its degree of preventive impact.

Kant did not develop a theory of punishment of his own in any systematic fashion. He makes it plain that he prefers a retributive account—one that would make the person’s punishment depend on his own deserts rather than on the penalty’s societal benefits. However, the details are left unelucidated. Some passages give the initial impression of a starkly retributive theory of punishment, where only the offender’s demerit, and no social utility, can be considered for any purpose. A closer look, however, suggests this is not necessarily so.

Kant’s account provides valuable themes for discussion. It serves to remind us that retributive criteria for punishing are or appear to be grounded in notions of justice, and that sanctions based purely in utility may treat the punished person unjustly, as someone having no intrinsic value. However, he scarcely develops the arguments for his views, and an inadequately explained talionic criterion may have done penal desert theory disservice, in associating it with harsh sanctions.

<sup>1</sup> For discussion of so-called rule utilitarianism—according to which the principle of utility is to be applied to rules or social practices, rather than to individual decisions—see Rawls (1955); Mackie (1977, pp. 136–40).

Kant's most famous statement on punishment is the following passage from his *Rechtslehre*:

Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another. . . . Against such treatment his inborn personality has a right to protect him, even though he may be condemned to lose his civil personality. He must first be found guilty and punishable before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the Pharisaic maxim: "It is better that one man should die than the whole people should perish." For if justice and righteousness perish, human life would no longer have any value in the world. [Quoted in Pincoffs 1966, pp. 2–3]

This passage speaks of the "serpent-windings of utilitarianism," but its focus seems narrower: on punishment of the innocent. It is insistent that punishment may be visited fairly only on offenders and gives a reason why: that doing otherwise would treat punished persons solely as a means to the larger social good and not as beings having value in themselves. Another well-known statement runs as follows:

Even if a civil society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they will all be regarded as participators in the murder as a public violation of justice. [Quoted in Pincoffs 1966, p. 4]

This quotation speaks of a situation where the criminal sanction has already been established, and the question is of its allocation among

convicted offenders. Relieving the last murderer of punishment may, indeed, raise problems of equity if previous murderers have been punished for comparable misdeeds. Some commentators (Scheid 1983; Byrd 1989) have thus interpreted Kant as being a retributivist primarily in the “distribution” of punishments (namely, who should be punished and how much), and not necessarily in his view of why the criminal sanction should exist in the first place.

A third passage of Kant’s runs as follows:

But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. Hence it may be said: “If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself.” This is the Right of RETALIATION (*jus talionis*); and properly understood, it is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict justice. [Quoted in Pincoffs 1966, p. 3]

This statement is more troublesome. Kant simply asserts that talionic equality should be the criterion for deserved punishment, ruling out less draconian criteria such as the principle of proportionality. However, it is not easy to follow his reasons why this should be so.

From Kant’s era until the decades after World War II, a number of other philosophical retributivists have written on punishment—most notably, Hegel (see Pincoffs 1966, pp. 9–14). However, their accounts also tended to lack an intelligible explanation of what is to be understood by “deserved punishment” and why it should be imposed. It is thus not surprising that penal retributivism remained somewhat restricted in its influence during this period.

### *C. Hart’s Clarification*

After World War II, interest in punishment grew among English and American analytical philosophers. The most significant clarification,

perhaps, came in 1959, with the publication of H. L. A. Hart's "Prolegomenon to the Principles of Punishment" (Hart 1968, chap. 1).

Hart wrote his essay in response to the influence of penal rehabilitationism in the 1950s and early 1960s—particularly, the writings of Barbara Wootton, who contemplated a treatment-oriented scheme in which moral considerations would play relatively little role and in which penal desert as a normative matter would disappear entirely.<sup>2</sup> Hart was struggling to develop an account of punishment that rested ultimately on concerns of crime prevention, but in which liability was limited to offenders (typically those to whom fault can fairly be imputed) and in which the amount of the sanction was constrained, at least to a degree, by considerations of proportionality. To this end, he distinguishes the "general justifying aim" of punishment (namely, why the criminal sanction should exist at all) from the criteria for penalties' "distribution" (namely, the criteria governing who should be punished and how much). Relying on crime prevention as the general aim—that is, as the reason for existence of criminal sanction—still leaves room, he suggests, for placing nonutilitarian limits on the distribution of penalties, so long as the latter can be justified independently.

Hart proposes an independent justification for an important retributive limit on the substantive criminal law: the restriction of liability to conduct involving the actor's fault (1968, pp. 22–24). His argument rests on notions of choice. In a free society, citizens should have full opportunity (through their choice to remain law abiding) to avoid the impositions of the criminal law; this they can do only if criminal liability requires volition and fault, because otherwise even purely accidental breaches could trigger criminal liability. (Similar considerations militate against vicarious and strict liability.) This kind of reasoning, however, does not hold when one moves from substantive law to sentencing policy and considers the latter's most important retributive constraint, the principle of proportionality. That principle cannot be based on the idea of a fair opportunity to avoid the criminal law's impositions—since it concerns the quantum of punishment levied on persons who, in choosing to violate the law, have voluntarily exposed themselves to the consequences of criminal liability. Hart therefore supplies an alternative explanation for proportionality: disproportionate sanctions pose the "risk . . . of either confusing common morality

<sup>2</sup> Wootton wrote extensively in this vein during the period cited, but her views are most clearly stated in Wootton (1963).

or flouting it and bringing the law into contempt” (1968, p. 25). That, however, is scarcely a satisfactory explanation. Maintaining respect for law seems, plainly, a consequentialist concern. Laws that are not respected may be less likely to be obeyed, but if obedience is the touchstone, might it not otherwise be achieved—for example, through disproportionate sanctions that are sufficiently intimidating? Finding better reasons to show why the principle is a requirement of fairness is thus a challenge that Hart has left to other penal philosophers.

## II. The Modern Philosophical Debate

During the past two decades, the philosophical debate over punishment has become more intense. Some reformulations of penal utilitarianism have been attempted. Still more has been written on deserved punishment and its possible justifications. This new interest in desert theory has been mirrored by a greater emphasis, in practical penal policy, on proportionate sanctions.<sup>3</sup>

This section summarizes this recent philosophical debate, starting with utilitarian and neo-utilitarian theories and proceeding to two recent versions of retributivism: one concerned with the fair allocation of benefits and burdens, the other with the expressive and censoring features of punishment.

### A. *Utilitarian Accounts*

Modern followers of Bentham, such as Richard Posner (1977, chap. 7), have attempted to make Bentham’s formulations more useable by interpreting “utility” in economic terms. Posner thus subjects punishment to a cost/benefit analysis—a matter of estimating the costs of punishment and weighing them against penalties’ crime preventive yield. The criminal sanction prevents harm by discouraging criminal behavior but also creates harm by making punished offenders suffer and by incurring various expenses of administration. Those various harms incurred and prevented are quantified as costs, and how much to punish is decided by considerations of optimum cost reduction.

Such a formula, however, raises problems of justice. It can support

<sup>3</sup> A number of state sentencing guidelines—most notably those of Minnesota, Washington State, and Oregon—give considerable emphasis to requirements of proportionality; see von Hirsch, Knapp, and Tonry (1987, chaps. 2 and 5). The new English Criminal Justice Act, enacted in 1991, also gives an explicit central role to proportionality (Wasik and Taylor 1991), as does the 1988 Swedish sentencing law (von Hirsch and Jareborg 1989b).

drastic, even disproportionate interventions against the few if the net benefits to the many are great enough. Posner supplies his own vivid illustration. Because deterrent effects depend on the likelihood as well as severity of punishment, the same preventive effect can be achieved by punishing a few offenders very severely or more offenders less harshly. Given that choice, he argues, one should prefer the severe punishment of the few because it is more cost efficient (Posner 1977, p. 170).

Could the utility principle be reformulated to avoid such uncomfortable conclusions? One suggested reformulation has been forwarded recently by two Australian writers, one a sociologist and the other a philosopher (Braithwaite and Pettit 1990). Their proposed solution is to retain the forward-looking and aggregative features of the utilitarian calculus but to change the measure of utility. That measure would no longer be satisfaction or cost-reduction *simpliciter* but the promotion of personal autonomy. The best course of action, on this theory, is one that gives the most people voice in how they live. A harsh system of punishment, they argue, might be efficient in preventing harm, but it will not facilitate choice. Fear-provoking sanctions would diminish, not enhance, citizens' sense of control over their own lives.

Does Braithwaite and Pettit's redefinition of utility help? In certain contexts outside the criminal law, it might. One is in paternalistic interventions—for example, the restraint and treatment of persons with self-destructive tendencies. Conventional utilitarianism might support sweeping powers of compulsion for such persons' own good: it need merely be argued that they benefit more from the intervention than they lose by having their decisions disregarded. A shift to an agency-oriented measure of utility would restrict such interventions because they interfere so much with individual actors' choices.

In the criminal law, however, this redefinition of utility is less helpful. It is true that punishment interferes with the choices of those punished. But it also, to the extent of its preventive efficacy, fosters other persons' choices by protecting them from victimization. When more people are safeguarded than intruded on, why not proceed? The Braithwaite-Pettit theory thus would not necessarily restrict the use of harsh sanctions, provided that only the few suffer and the many have their choices better protected. Such punishments (unlike punishment of innocents) would not necessarily diminish citizens' sense of control over their own lives—because the sanctions would apply only to those

who have chosen to offend and not to anyone in general (see von Hirsch and Ashworth [1992] for fuller discussion).

What remains troublesome about penal utilitarianism, therefore, is its aggregative and purely forward-looking features. The preoccupation with prevention of future offending makes it difficult to explain why the gravity of the crime of conviction is morally relevant to how much punishment is warranted. The theory's aggregative character—its concern with the net balance of benefits over costs—makes it insensitive to how these benefits are distributed: it allows some to suffer, possibly to a disproportionate degree, for the good of others. A penal theory may (as Hart has suggested and as I argue below) contain crime prevention as an important element. But it is doubtful that it can, with even a modicum of fairness, make crime prevention the only criterion.

### *B. Desert Theories*

Traditional retributive theories, such as Kant's, were sketchy. While contending that justice calls for deserved punishments, they seldom explored the grounds of penal desert claims: namely, *why* wrongdoers deserve punishment. Recently, philosophers have been looking for explanations. The two leading accounts today are, respectively, the "benefits and burdens" theory and "expressive" desert theories.

1. *Benefits and Burdens.* The benefits and burdens theory originated in the writings of two contemporary philosophers, Herbert Morris (1968) and Jeffrie Murphy (1973). Both have recently questioned the theory (Morris 1981; Murphy 1985), but a number of other philosophers continue to support it (Gewirth 1978, pp. 294–98; Finnis 1980, pp. 263–64; Davis 1983; Sadurski 1985, chap. 8; Sher 1987, chap. 5).

The theory offers a retrospectively oriented account of why offenders should be made to suffer punishment. The account focuses on the law as a jointly beneficial enterprise: it requires each person to desist from predatory conduct; by desisting, the person not only benefits others but is benefited by their reciprocal self-restraint. The person who victimizes others—while still benefiting from their self-restraint—thus obtains an unjust advantage. Punishment's function is to impose an offsetting disadvantage.

The theory has some attractions. It goes beyond fuzzy notions of "paying back" wrongdoing or "righting" the moral balance. It points to a particular unwarranted advantage the wrongdoer obtains: namely, that of benefiting from others' self-restraint while not reciprocally re-

straining himself. The rationale for the penalty is retrospective in focus, as a desert-oriented account should be: to offset, through punishment, the unjustly obtained benefit.

The theory has difficulties, however. One problem is that it requires a heroic belief in the justice of the underlying social arrangements. Unless it is true that our social and political systems succeed in providing mutual support for all members, including criminal offenders, then the offender has not necessarily benefited from others' law-abiding behavior (Bedau 1978).

The theory also becomes awkward when one uses it to try to decide the quantum of punishments. One difficulty is assessing benefits and burdens (Scheid 1990; von Hirsch 1990a, pp. 264–69). The theory cannot focus on literal benefits the offender obtains—as some of the worst assaultive crimes can be quite unprofitable whereas other (apparently less serious) theft crimes may provide the offender with a considerable profit. What thus must matter, instead, is the additional degree of freedom the offender has unfairly appropriated. But notions of degrees of freedom are unhelpful in making comparisons among crimes. It is one thing to say the armed robber or burglar permits himself actions that others refrain from taking and thereby unfairly obtains a liberty that others have relinquished in their (and his) mutual interest. It is different, and far more obscure, to say the robber deserves more punishment than the burglar because, somehow, he has arrogated to himself a greater degree of unwarranted freedom than the burglar has.

The theory would also seem to distort the way the gravity of crimes is assessed. R. A. Duff (1986, pp. 211–17) has pointed out the artificiality of treating victimizing crimes, such as armed robbery, in terms of the “freedom-of-action” advantage the robber gains over uninvolved third parties, rather than in terms of the intrusion into the interests or rights of actual or potential victims. Perhaps, tax evasion can be explained in terms of unjustified advantage: the tax evader refuses to pay his or her own tax, yet benefits from others' payments through the services he or she receives. Tax evasion, however, is scarcely the paradigm criminal offense, and it is straining to try to assess the heinousness of common offenses such as robbery in similar fashion.

2. “*Expressive*” Theories. “Expressive” theories are those that base desert claims on the censuring aspects of punishment. Punishing someone consists of doing something painful or unpleasant to him, because he has committed a wrong, under circumstances and in a manner that conveys disapprobation of the offender for his wrong. Treating the

offender as a wrongdoer, Richard Wasserstrom (1980, pp. 112–51) has pointed out, is central to the idea of punishment. The difference between a tax and a fine, for example, does not rest in the kind of material deprivation imposed: it is money, in both cases. It consists, rather, in the fact that with a fine the money is taken in a manner that conveys disapproval or censure; whereas with a tax no disapproval is implied.

A sanction that treats conduct as wrong—that is, not a “neutral” sanction—has two important moral functions that, arguably, are not reducible to crime prevention. One is to recognize the importance of the rights that have been infringed. Joel Feinberg (1970, pp. 95–118) has argued that the censure in punishment conveys to victims and potential victims that the state recognizes they are wronged by criminal conduct, that rights to which they are properly entitled have been infringed.

The other role of censure, discussed by R. A. Duff (1986, chap. 9), is to address the wrongdoer as a moral agent, by appealing to his or her sense of right or wrong. This, Duff suggests, is not just a preventive strategy. While it is hoped that the actor will reconsider his actions and desist from wrongdoing in the future, the censure is not merely a means of changing his behavior—otherwise, there would be no point in censuring actors who are repentant already (since they need no blame to make the effort to desist) or who are seemingly incorrigible (since they will not change despite the censure). Any human actor, the theory suggests, is a moral agent, capable (unless clearly incompetent) of evaluating others’ assessment of their conduct. The repentant actor has his own assessment of the conduct confirmed through the disapproval of others; the defiant actor is made to understand and feel others’ disapproval, even if he refuses to desist. Such communication of judgment and feeling, Duff argues, is what moral discourse among rational agents is about. What a purely “neutral” sanction not embodying blame would deny—even if no less effective in preventing crime—is precisely that essential status of the person as a moral agent. A neutral sanction would treat potential offenders much as beasts in a circus—as beings that must be restrained, intimidated, or conditioned into submission because they are incapable of understanding that harmful conduct is wrong (see also von Hirsch 1990a, pp. 271–74).

Such censure-oriented desert theories have some potential advantages. They are less dependent on the supposition that the underlying social system is wholly just: an actor with cause for complaint against the social system may still be to blame, for example, if he know-

ingly injures those who have done him no wrong (von Hirsch 1990*b*, pp. 407–9). Moreover, the theory is more easily squared with notions of proportionality. If punishment is seen as an expression of blame for reprehensible conduct, then the quantum of punishment should depend on how reprehensible the conduct is. The punishment for typical victimizing crimes would depend on how much harm the conduct does, and how culpable the actor is for the harm—and no longer on how much extra freedom of action the actor has arrogated to himself vis-à-vis third parties.

### III. The Principle of Proportionality: Its Justification

The principle of proportionality is said to be a requirement of fairness. But why is this so? Why are proportionate sanctions more just than disproportionate ones? To answer this question, the present section addresses the case for the principle—examining arguments based on general prevention and on censure.

#### *A. Arguments from “Positive” General Prevention*

Can the principle of proportionality be based on notions of crime prevention? Some European theorists have claimed it can—particularly on what they call “positive” general prevention (Roxin 1979; see also Ewing 1970).

“Positive” general prevention differs from simple deterrence in that it looks, not to the intimidating effect of criminal sanctions, but to their “positive” effect in reinforcing citizens’ own moral inhibitions against predatory behavior (Andenaes 1974, pp. 111–28). The idea has been attractive to those wishing to combine a consequentialist penal philosophy with fairness constraints on the pursuit of crime prevention. A penalty structure in which sanctions reflect the relative gravity of crimes, arguably, would be perceived by citizens as more just—and being so perceived, would better reinforce citizens’ sense of self-restraint (Roxin 1979). The argument thus resembles Hart’s suggestion, discussed earlier, that proportionality promotes respect for law.

“Positive” general prevention, even if its existence is not easy to confirm empirically (Schumann 1987), is a plausible notion. It seems likely that the criminal sanction (in some direct or indirect way and at least to some degree) supports citizens’ own moral qualms about victimizing others. The issue, however, is not whether positive general prevention exists, but whether it can serve as the basis for a principle

of proportionate sanctions. That is far from clear, for a number of reasons.

First, the argument from positive general prevention assumes that the citizenry believes proportionate sanctions to be fairer. It is because of such supposed beliefs that the state, in order to safeguard the moral credibility of its sanctions, should levy punishments proportionately with crimes' gravity. But what if citizens care little about whether sanctions are proportionate? Or what if the state undertakes to persuade the citizenry that proportionality is unimportant? To the extent that proportionality is a matter of indifference to the public, disproportionate punishments would not undermine the penal system's credibility.

Second, "positive" general prevention is merely one of a variety of preventive strategies that must compete with others, such as deterrence and incapacitation. If crime prevention is the touchstone, then proportionality might be sacrificed in order to provide room for those other strategies for reducing crime. A system of penalties might be graded very roughly according to the gravity of offenses, but with broad exceptions to allow for deterrent or incapacitative sanctions. No sacrifice of principle would be involved in such a scheme because one is merely substituting among various possible crime-control techniques.

Third, the argument from positive general prevention fails also to account for the sense that proportionality is not just a prudential but an ethical principle. There seems to be something *wrong*, not just counterproductive in the long run, about punishing disproportionately. That sense of wrongfulness cannot be explained merely by arguing that proportionality influences citizens' attitudes in such a way as to reinforce inclinations to law-abidingness.

### *B. The Argument from Censure*

The positive general prevention argument began with the censuring features of punishment, but then relied on arguments of preventive effectiveness to sustain the proportionality principle. It might be preferable to rely on the same censuring features—but then utilize fairness arguments, instead.

Punishment, as explained previously, consists of doing something unpleasant to an offender under circumstances and in a manner that conveys blame or disapprobation. Not only does punishment thus indicate disapproval, but the comparative severity of punishments connotes

the degree of stringency of the implicit disapproval. If crime *X* is punished more severely than crime *Y*, this connotes the greater disapprobation of crime *X*.

When punishments are arrayed in severity according to the gravity of offenses, the disapprobation thereby conveyed will reflect the degree of reprehensibility of the conduct. When punishments are arrayed otherwise, this is not merely inefficient (indeed, it might possibly be more efficient), but unfair: offenders are being visited with more (or with less) censure than the comparative blameworthiness of their conduct would warrant. Equity is sacrificed when the proportionality principle is disregarded, even when this is done for the sake of crime prevention. Suppose that offenders A and B commit and are convicted of criminal conduct of approximately equal seriousness. Suppose B is deemed more likely to re-offend and, therefore, is given a longer sentence. Notwithstanding the possible preventive utility of that sentence, the objection remains that B, through his more severe punishment, is being treated as more to blame than A, though their conduct has the same degree of blameworthiness (von Hirsch 1985, chap. 3; Duff 1986, pp. 277–79; von Hirsch 1990a, pp. 278–81).

This condemnation-based account of the principle of proportionality makes clear that the principle does not depend on hard-to-confirm factual claims that proportionality enhances the general preventive effect of the penal system. Suppose that new psychological evidence suggested that maintaining proportionality does little to enhance people's inhibitions against predatory conduct. Would such evidence mean that we properly could ignore the requirements of proportionality? Not according to this theory. As long as the state responds to violence, theft, and other noxious conduct through the institution of the criminal sanction, it is necessarily treating those whom it punishes as wrongdoers and condemning them for their conduct. If the state thus condemns, then the severity of the response ought to reflect the degree of blameworthiness, that is, the gravity, of the criminal conduct.

One commentator, Johannes Andenaes (1988), asks whether this argument is circular. Punishment entails blaming, he asserts, only in a system where the sentence is tied to moral judgments of the reprehensibility of conduct. If the system's rules for allocating sentences were more utilitarian, would not the link between punishing and blaming disappear?

The link between punishment and blame, however, has much deeper roots than the sentencing rules of the particular jurisdiction.

Censure is integral to the very conception of punishing—as is apparent from the earlier-cited illustration of the difference between a fine and a tax. Punishment’s blaming implications are also reinforced by the substantive criminal law. The core of the criminal law deals with acts commonly considered reprehensible: theft, violence, and the flouting of certain basic duties of citizenship (e.g., tax evasion or environmental crimes). The formal requirements of the substantive law, moreover, call not only for an unlawful act but for personal fault on the part of the offender—namely, intentionality (i.e., purpose, knowledge, or recklessness) or negligence. Harming through intention or negligence is typically reprehensible behavior, for which censure is an appropriate response. Conversely, one of the main reasons why the law should require intention or negligence is because the blame expressed through punishment is inappropriately applied to behavior that is not the actor’s fault (von Hirsch and Jareborg 1989a).

### *C. Proportionality and the “Why Punish?” Question*

The foregoing censure-based argument for proportionality assumes the existence of punishment. It assumes, that is, the existence of a sanction that connotes censure or blame. Why, however, have a sanction with blaming features? Conceivably, the criminal sanction could be replaced by a “neutral” sanction—one designed to visit material deprivation but convey no disapproval (i.e., be akin to a tax on behavior the state wished to discourage). Since such a sanction would not involve blaming, it perhaps would not have to be distributed according to the blameworthiness of the criminal conduct.

Could the censure element in punishment be explained on preventive grounds? Conceivably, it could. Here, the European notion of “positive” general prevention might be invoked. The preventive efficacy of punishment, the argument would run, operates in significant part through its “moral-educational” effect of stigmatizing predatory conduct and thereby making citizens more reluctant to offend. That effect can best be achieved when the sanction visits censure on violators (Mäkelä 1975). A “neutral” sanction would lack this educational effect. It thus would be either less effectual or require more draconian deprivations to achieve a similar effect.

Relying on “positive” general prevention in this fashion—to explain why the state’s sanction should embody blame—still allows one to argue that proportionality is a requirement of fairness. One would be following Hart’s strategy of argument—of distinguishing the general

justification of punishment (“why punish?”) from the principles of distribution (“how much?”). A preventive answer is being offered to the “why punish?” question—namely, that a blaming sanction has better preventive effects than a purely neutral one would. However, a fairness argument, not based on prevention, is being used to explain why punishments should be levied proportionately: namely, that once a blaming sanction is established, equity (not just crime prevention) requires that it be distributed consistently with its censuring implications. An analogy might be drawn to the prize. If one asks why prizes should exist, the answer might be consequentialist: the material benefit in a prize is an incentive, and the approbation conveyed by the prize constitutes an educational message that the conduct is desirable. Once a system of prizes has been established, however, the criteria for their distribution should be retrospective and desert oriented. Since the first prize symbolizes the best performance, justice—not social efficiency—demands that it be awarded to the best contestant.<sup>4</sup>

One might, however, be skeptical of the foregoing prevention-based account—that the censure element in punishment can be derived purely from the aim of reinforcing citizen self-restraint. Suppose it were proposed that the state should penalize adult criminal conduct in as morally “neutral” a way as possible. What objection is there to such a proposal? The preventionist would have to object that it would lead to more criminal behavior: once the state no longer censured the prohibited conduct, people’s moral inhibitions would weaken, and they would become readier to commit crimes. Any such slackening of inhibitions would not be likely to take place right away, however, since people’s moral attitudes would for a time remain supported by social institutions other than the criminal sanction. The preventionist would have to argue that, although the measure was not immediately objectionable, it would have long-run ill effects in diluting punishment’s preventive efficacy.

One might well be inclined to assert, however, that the proposal is immediately obnoxious (regardless of its long-run ill effects). The behavior with which the criminal law mainly deals is wrongful conduct—

<sup>4</sup> Some writers (e.g., Walker 1991, pp. 3–4) argue that comparison between punishments and rewards or prizes is inappropriate because the former are inflicted on an unwilling recipient and the latter are not. However, there are some significant similarities—most notably, these institutions by their nature convey blame or praise. The punishment/prize analogy, in any event, is meant merely to be illustrative—and is not essential to the argument for proportionality.

culpable violation of the rights of other persons. If the state is to carry out the authoritative response to such behavior (as it must if it visits any kind of sanction on perpetrators), then it should do so in a manner that testifies to the recognition that the conduct is wrong. To respond in a morally neutral fashion is objectionable, not merely because it might lead to more crime in the long run, but because it fails to provide that recognition. A sanction that treats the conduct as wrong—that is, not a “neutral” sanction—has, arguably, certain important functions not reducible to crime prevention. Which functions? One might refer here to Feinberg’s and Duff’s views of censure that are discussed above. The censure in punishment recognizes the wrong done to victims (Feinberg’s view). It is also a way of addressing the wrongdoer himself as a rational agent (Duff’s).<sup>5</sup>

A committed general preventionist might try to subsume these functions of censure under positive general prevention. A society has better cohesion, he might assert, if the wrong done to victims is recognized, and if offenders are treated as moral agents. But that involves trying to reduce claims such as Feinberg’s or Duff’s to difficult-to-confirm hypotheses about social cohesion. While one might have some confidence in the ethical judgment that offenders should be treated as agents capable of choice, one can hardly verify that so treating them will lead to a better-integrated or more smoothly functioning society.

So far, I have been discussing the censure element in punishment. But what of the criminal sanction’s “hard treatment” element? Can the pain or deprivation visited on offenders be justified in similar fashion, or need it rest on preventive arguments? Here, the expressive desert theorists disagree among themselves. Some, such as Duff and Kleinig, argue that some degree of hard treatment is needed to make the censure credible (for a summary of their arguments, see von Hirsch [1990a], p. 275). On this view, censure—at least in certain social contexts—cannot be expressed sufficiently in purely verbal terms; some imposition is needed to convey the intended disapprobation adequately. An academic department does not show its disapproval of a serious lapse by a colleague merely through verbal admonition; to convey the requisite disapproval, some curtailment of privileges is needed. A legal system, it is argued, is still less capable of conveying censure purely in words or symbols without action.

<sup>5</sup> For fuller statement of this argument, see von Hirsch (1985, chap. 5; 1990a, pp. 271–74).

Other expressive theorists (including the present author) disagree, and contend that the hard-treatment element in punishment rests on preventive grounds (von Hirsch 1985, chap. 5; Jareborg 1988, chap. 5; von Hirsch 1990a, pp. 275–78). On this view, the reason for punishing (i.e., expressing disapproval through hard treatment) instead of merely censuring has to do with keeping predatory behavior within tolerable limits. Had punishment no usefulness in preventing crime, then one would not need to visit material deprivation on those who offend. True, we might still wish to devise another way of issuing authoritative judgments of censure, for such predatory behavior as occurs. However, those judgments, in the interests of keeping state-inflicted suffering to a minimum, would no longer be linked to the purposeful visitation of deprivation.

A possible objection to this latter view runs as follows: if the deprivation element in punishment rests on consequentialist grounds of crime prevention but the censure element does not, then why cannot one allocate the deprivations on preventive grounds? The reply is that punishment's deprivations and its reprobative connotations are inextricably intermixed. If the deprivations visited for a given type of crime are altered, even for preventive reasons, this changes the severity of the punishment. But changing the severity, relative to other penalties, alters the implicit censure—which would not be justified when the seriousness of the conduct has remained unchanged.

The reader must decide which of these various accounts for the existence of punishment—the one based on general prevention, the one based on censure, or the mixed explanation just discussed—is preferable. Each account, however, calls for a sanction that is condemnatory in character. Given such a sanction, it becomes (for the reasons explained) a matter of equity, not preventive efficacy, that penalties should be proportionate, that is, distributed consistently with their blaming implications.

One can take the question back a step further and ask, whence do such ideas of equity derive? Such a question would draw us deeper into philosophical ethics than we can venture here. Recent Anglo-American analytical moral philosophy has by and large become skeptical of attempts to reduce ethical claims to those of social utility (see, e.g., Smart and Williams 1973, pp. 75–150), albeit there have been some philosophers who still support such attempts (see Smart and Williams 1973, pp. 1–74).

Proportionality in sentencing doctrine, however, does not stand or

fall on the outcome of such debates over the foundations of ethics. The suggested basis of the principle of proportionality is that a censuring sanction must in fairness be allocated according to the blameworthiness of the conduct. That requirement of fairness has to do with moral consistency: with treating people in accordance with ascriptions made of their praise- or blameworthiness; it has nothing necessarily to do with installing inhibitions against predatory conduct more efficiently. Could a committed philosophical consequentialist identify other social utilities that are ultimately served by such a fairness requirement? Perhaps he or she might. Those would have to be complicated utilities, however, connected with the idea that the canons of fairness ultimately help people to lead more fulfilled and self-respecting lives (see Mackie 1977). Philosophical consequentialism of this more sophisticated sort—that attempts to derive justice or ethical imperatives from what is eventually useful to a good existence—is not reducible to ideas of short or long-run crime prevention.

#### IV. Ordinal and Cardinal Proportionality

What does the principle of proportionality require? Does the principle yield only broad outer bounds of punishment? If so, it is rather easily satisfied, by avoiding extremes of severity or leniency. Could the principle yield definite quanta of punishments—and if so, how could those quanta possibly be ascertained? Or is there some third possibility?

The first view, which might be termed the “range only” theory, holds that proportionality, by its logic, can only be a limiting principle. It cannot possibly tell us how much an offender deserves, but can only suggest certain upper and lower limits, beyond which punishment would be manifestly undeserved. Within these broad limits, the sentence would have to be decided on other grounds, say, the likelihood of the defendant’s committing other crimes. Notice that this claim is one about the logic of desert: it is that proportionality cannot supply more than broad ranges. It thus differs from “hybrid” views to be discussed in Section VII, according to which—in order to achieve ulterior ends of one kind or another—desert requirements are to be relaxed to yield ranges.

The “range only” view is open to a fundamental objection, which becomes evident when one tests this view by the censure rationale for proportionality just suggested. Suppose one decides, for a particular offense involving a given degree of harmfulness and of fault on the part of the actor, that less than  $X$  quantum of sentence is undeservedly

lenient and more than  $Y$  quantum is undeservedly severe. Suppose that, pursuant to the “range only” view, one treats the proportionality principle as supplying only these outer limits—that the sentence must fall somewhere between  $X$  and  $Y$ —and then allows the disposition to be decided within these bounds on preventive grounds. This would allow two offenders, whose conduct is equally reprehensible but who are considered (say) to present differing degrees of risk, to receive different punishments. One could receive a punishment close to the lower limit,  $X$ , and the other may receive a sentence at the upper limit,  $Y$ . Through these different penalties, the two defendants would be subject to differing degrees of censure or condemnation, although the reprehensibility of their criminal conduct is *ex hypothesi* the same. In fact, a defendant who commits a less serious crime can receive comparatively the greater penalty if preventive concerns so dictate.

The opposite view, that the proportionality principle furnishes specific quanta of punishments, seems still less plausible. Taken literally, it would presuppose an heroic kind of intuitionism: that if one only reflects enough, one will “see” the deserved quanta of punishment for various crimes. No one, however, seems to have intuitions that are so illuminating.

Is there a way out of this apparent dilemma—that neither outer bounds nor a fixed point seems a plausible interpretation of the proportionality principle? It has been suggested that there is, once the crucial distinction is recognized between the internal structure of a penalty scale and the scale’s overall magnitude and anchoring points (Bedau 1984; von Hirsch 1985, chap. 4; von Hirsch 1990a, pp. 282–86).

#### A. *Internal Structure*

How are punishments to be scaled relative to each other? Here, the requirements of *ordinal*, or relative, proportionality apply. Persons convicted of crimes of comparable seriousness should receive punishments of comparable severity (special circumstances altering the harm or culpability of the conduct in the particular case being taken into account). Persons convicted of crimes of differing gravity should suffer punishments correspondingly graded in their onerousness. These requirements of comparative proportionality are no mere limits, and they are infringed when equally reprehensible conduct is punished unequally in the manner that the “range only” view calls for. The requirements are readily explained on the censure rationale discussed earlier. Since punishing one offense more severely than another expresses

greater disapproval of the former conduct, it is justified only to the extent it is more serious.

### *B. Anchoring Points*

If the penalties for some other crimes have been decided, then the penalty can be fixed for (say) a robbery by comparing its seriousness with those other crimes. But such judgments require a starting point, and there is no quantum of punishment that can be identified as the uniquely deserved penalty for the crime or crimes with which one begins constructing the scale. Why not? The censure theory again provides the explanation. The amount of disapproval conveyed through penal sanctions is a convention. When a penalty scale has been devised to reflect the comparative gravity of crimes, altering the scale's overall punishment levels by making pro rata increases or decreases in all penalties would represent just a change in that convention.

Not all conventions are equally acceptable, however. There should be limits on the severity of sanction with which a given amount of disapproval may be expressed, and these constitute the limits of *cardinal*, or nonrelative, proportionality. Consider a scale in which penalties are graded to reflect the comparative seriousness of crimes, but in which overall penalty levels have been so much inflated that even the lowest-ranking crimes are visited with prison terms. Such a scale would embody a convention in which even a modest disapproval appropriate to low-ranking crimes is expressed through drastic intrusions on offenders' liberties. Such a convention would be objectionable on grounds that it depreciates the importance of the rights of which the defendant is being deprived. There might be a comparable lower limit against deflating overall punishment levels so much that even the most serious crimes are visited only with small intrusions.

This ordinal/cardinal distinction appears to provide the solution to the dilemma just mentioned. The leeway that the proportionality principle allows in deciding the anchoring points of the scale explains why we cannot perceive a single right or fitting penalty for a crime. Whether  $X$  months or  $Y$  months, or somewhere in between, is the appropriate penalty for a given offense depends on how the scale has been anchored and what punishments have been prescribed for other crimes of greater and lesser gravity. Once the anchoring points of the scale have been fixed, however, the more restrictive requirements of ordinal proportionality begin to apply. These explain why the proportionality principle would not authorize giving shorter prison terms to some and longer

terms to others convicted of the same offense (even within supposed outer bounds of desert), on the basis of factors not reflecting its gravity.

The parallel that comes readily to mind is that of university grades. The anchoring points of a grading system cannot precisely be set. We know that first-class honors should be reserved for high-quality work, but just how high that quality should be cannot precisely be fixed and may depend on the character and traditions of the educational institution. Once the anchoring points of the grading scale are fixed, however, students' comparative ratings should be determined by the quality of their academic performance.

Where do these distinctions leave us? They suggest the following conclusions. First, there are no uniquely deserved punishments. Whether *X* is the appropriate, proportionate sanction for a given crime depends on how the penalty scale is anchored and how other crimes are punished. Second, in anchoring the scale and deciding the overall punishment levels, the proportionality principle provides at most only certain outer limits: that the scale as a whole may not be justly inflated above certain levels of punitiveness, and possibly (but more debatably)<sup>6</sup> that it may not be deflated below certain (rather low) levels. So here—in speaking of “cardinal,” or nonrelative, proportionality—it makes sense to speak of imprecise outer limits. Third, once the anchoring points have been decided, however, the requirements of ordinal, or relative, proportionality apply, and these are more restrictive. To maintain ordinal proportionality, comparative severities of punishment would need to be decided according to the relative gravity of the criminal conduct involved.

Does this mean that sentences must always be ordered according to these requirements? Of course not. I am considering here what the proportionality principle calls for. Proportionality, however, is not the only value involved—there may be countervailing reasons of various sorts for departing from proportionality. Indeed, I suggested at the outset that sentencing theories can be classified by the extent to which they treat proportionality requirements as binding. I next examine a variety of sentencing models, distinguishable chiefly by the role and weight they assign to proportionality. One such view—or perhaps, spectrum of views—aims at abiding by proportionality requirements in full: the desert model. A second type of view (e.g., Robinson 1987) generally adheres to desert principles but allows departures to prevent

<sup>6</sup> For the questions involved, see von Hirsch (1990a, pp. 285–86, 1993, chap. 4).

exceptional types of harm. A third would relax proportionality constraints more regularly in setting punishments.

## V. The Desert Model

A desert model is a sentencing scheme that observes the proportionality principle: punishments are scaled according to the seriousness of crimes. While speaking of a “desert model” might suggest a unique scale, that is not the intent. A variety of scales of differing overall severity and differing sanctions might satisfy the requirements of this model. It is the core elements of a desert model that are sketched here. Fuller accounts of the model and its rationale are available elsewhere (von Hirsch 1985, chaps. 3–8; Ashworth 1989), as are discussions of the use of the model in scaling noncustodial sanctions (von Hirsch, Wasik, and Greene 1989; von Hirsch 1993, chap. 6).

### A. Ordinal Proportionality

Ordinal proportionality is the requirement that penalties be scaled according to the comparative seriousness of crimes. Two main sub-requirements are involved. First, parity. The proportionality principle permits differences in severity of punishments only to the extent these differences reflect variations in the degree of blameworthiness of the conduct. Accordingly, when offenders have been convicted of crimes of similar seriousness, they deserve punishment of similar severity—unless special circumstances (i.e., of aggravation or mitigation) can be identified that render the offense, in the particular context, more or less deserving of blame than would normally be the case. Second, rank ordering. Punishing one crime more than another expresses more disapproval for the former crime, so that it is justified only if that crime is more serious. Punishments thus are to be ordered on a penalty scale so that their relative severity reflects the seriousness rankings of the crimes involved. This restricts the extent to which the arrangement of penalties on the scale can be varied internally for crime preventive purposes. Imposing exemplary penalties for a given type of offense to halt a recent upswing in its incidence, for example, would throw the ranking of offenses out of kilter unless other penalties are adjusted accordingly.

While these two requirements of parity and rank ordering seem straightforward enough, there have been a number of issues raised concerning ordinal proportionality that are worth mentioning.

1. “*A Year Is Not a Year.*” It has sometimes been objected that

parity can never be achieved because of the difficulty of comparing onerousness of penalties among individuals (Morris and Tonry 1990, pp. 94–95). Each person will suffer differently from any penal deprivation, depending on his or her age, personal sensitivities, and so forth. The reply is that law generally deals with standard cases—and should do so here as well. Notwithstanding the fact that individuals experience penalties differently, it still is possible to gauge and compare the characteristic onerousness of various sanctions. Deviations from those standard judgments could then be warranted in special situations, such as illness or advanced age, that give the penalty a manifestly uncharacteristic punitive impact (von Hirsch 1991*a*). Taking this approach, of course, means aiming at approximate rather than exact parity, but that seems a reasonable concession to the realities of legal classification.

2. *Substitution and Interchangeability.* How much interchangeability among penalties would a desert model permit? The proportionality principle addresses only the severity of penalties, not their particular forms. This permits substitution among penalties, provided those substituted are of comparable severity. If *A* is the sanction assumed ordinarily to be applicable to crimes of a given degree of seriousness, and *B* is another type of sanction of approximately equal onerousness, then *B* can be substituted for *A* without infringing ordinal desert requirements. This means one might even substitute between short stints of confinement and the more substantial noncustodial sanctions—provided the severity-equivalence test has been met (von Hirsch 1991*a*).

Where the test of severity equivalence is met, it would also be permissible to substitute among penalties on crime-preventive (e.g., predictive) grounds. Day fines could be given to most offenders convicted of a given middle-level crime, but probation to those offenders especially in need of supervision, provided the two sanctions are of comparable severity. Ordinal proportionality is infringed only if invoking probation substantially alters the comparative severities for those involved (von Hirsch, Wasik, and Greene 1989).

3. *Prior Convictions.* Another issue concerns the appropriateness of considering prior convictions. Some desert theorists (Fletcher 1978, pp. 460–66; Singer 1979, chap. 5) maintain that the presence or absence of prior convictions is irrelevant to offenders' deserts. Others (von Hirsch 1985, chap. 7; Wasik 1987; von Hirsch 1991*b*) support a penalty discount for the first offense—as a way of recognizing human fallibility in the criteria for punishment. By giving the first offender

a somewhat scaled-down punishment, their argument runs, the first offender is censured for his act but nevertheless accorded some respect for the fact that his inhibitions against wrongdoing appear to have functioned on prior occasions and some sympathy or tolerance for the all-too-human frailty that can lead to such a lapse. With repetition, however, this extenuation diminishes and eventually is lost. To the extent that first offending is seen as extenuating, it modifies the parity requirement: among those convicted of comparably serious offenses, some differentiation would be made on the basis of the prior record. The operative word, however, is “some”: only a modest adjustment would be permitted on the basis of the record. This view thus would emphasize the gravity of the present offense of conviction.

4. *Grading Crimes’ Seriousness.* The rank-ordering requirement presupposes a capacity to grade crimes according to their seriousness. As a practical matter, ranking crimes’ gravity has not been an insuperable problem—as witness the experience of some state sentencing commissions, particularly those of Minnesota, Washington State, and Pennsylvania. These bodies were able to fashion systematic rankings of seriousness for use in their numerical guidelines. The commissions established seriousness gradations from, say, 1 (the least serious) to 10 (the most serious), and then assigned the various statutory crime categories or subcategories to one or another of these gradations. While the grading task proved time-consuming, it did not generate much dissension within the commissions, and the resulting seriousness rankings were not among the features that attracted public controversy when the guidelines were published (von Hirsch, Knapp, and Tonry 1987, chap. 5). One might debate the particular rankings these bodies adopted, but their experience does suggest that a rule-making agency is capable of agreeing on the seriousness ranking of crimes.

Less satisfactory, however, has been the state of the theory. What criteria should be used for gauging crimes’ gravity? That question is only beginning to be addressed.

The seriousness of crime has two main elements: the degree of harmfulness of the conduct and the extent of the actor’s culpability (von Hirsch 1985, chap. 6). The problem is to develop criteria for harmfulness and culpability that are more illuminating than simple intuition.

If we began with culpability, the substantive criminal law could provide considerable assistance—because its theories of fault have their analogs for sentencing. The substantive criminal law already distin-

guishes intentional (i.e., purposive, knowing, or reckless) conduct from negligent conduct (see, e.g., Model Penal Code 2.02 [American Law Institute 1962]). For sentencing purposes, however, more attention could be paid to the degree of the actor's purposefulness, knowledge, indifference to consequences, or carelessness. The substantive doctrines of excuse could also be relied on to begin to develop analogies of partial excuse: for example, partial duress and provocation (Wasik 1983; von Hirsch and Jareborg 1987).

With harm, the problem is to compare the harmfulness of criminal acts that invade different interests. How is car theft to be compared with burglary, when the former involves a substantial property loss, and the latter typically involves a smaller financial setback but an invasion of privacy as well? Making such comparisons would seem to require a common criterion for assessing the importance of the interests involved. One criterion that has been suggested is that interests are to be compared in importance according to the degree to which they characteristically affect choice—that is, people's ability to direct the course of their own lives (Feinberg 1984; von Hirsch 1985, chap. 6). Violence and certain economic crimes, on this view, would qualify as particularly harmful because persons who suffer serious bodily injury or are rendered destitute have their choices so drastically curtailed. A choice-based standard, however, seems somewhat artificial: mayhem obviously involves grievous harm, but is that merely because the person's choices have been curtailed? It might seem more natural to assert that the quality of the maimed person's life has been drastically set back. Accordingly, it has recently been suggested (von Hirsch and Jareborg 1991a) that interests should be ranked in importance according to how they typically affect a person's standard of living—understood in Amartya Sen's (1987) broad sense of that term, including noneconomic as well as economic concerns.<sup>7</sup>

5. *Spacing*. Ordinal proportionality includes a spacing requirement. Suppose that crimes *X*, *Y*, and *Z* are of ascending order of seriousness, but that *Y* is considerably worse than *X* but only slightly less serious than *Z*. Then, to reflect the conduct's comparative gravity, there should be a larger space between the penalties for *X* and *Y* than for *Y* and *Z*. Spacing, however, would depend on how precisely com-

<sup>7</sup> This analysis is proposed for crimes such as robbery or burglary that involve natural persons as victims. Crimes affecting societal interests primarily, such as tax evasion, may require a different and more complex treatment (see von Hirsch and Jareborg 1991a, pp. 32–35).

parative gravity can be calibrated, and serious gradations are likely to be matters of inexact judgment (von Hirsch and Jareborg 1991a). In any event, the spacing issue has scarcely been addressed by desert theorists.

Ordinal proportionality thus presents a number of theoretical questions, some of considerable interest and difficulty. None of these issues, however, would prevent a rule maker, using his or her best commonsense judgment, from ranking crimes according to their apparent gravity; deciding what weight is to be given prior offenses; and scaling comparative severities of sanction accordingly (see von Hirsch 1985, pp. 74–76; von Hirsch, Knapp, and Tonry 1987, chap. 5).

### *B. Scale Anchoring and Cardinal Proportionality*

Cardinal proportionality requires that a reasonable proportion be maintained between overall levels of punitiveness and the gravity of the criminal conduct. The scale should not, for example, be so inflated that even lesser criminal conduct is penalized with substantial deprivations.

Since cardinal proportionality places only broad—and imprecise—constraints on how much the penalty scale can be escalated or deflated, substantial leeway remains for locating the scale's anchoring points. What other factors would be relevant?

The penal traditions of the jurisdiction would be a starting point. Since the censure expressed through punishment is a convention, it, like any other convention, will be influenced by tradition. Normative considerations, however, may justify altering this convention. One such consideration is the goal of reducing the suffering visited on offenders (Ashworth 1989; von Hirsch 1990a, pp. 286–88).

Should crime prevention also be considered in setting the anchoring points? Certain preventive strategies would alter the comparative rankings of punishments and thus infringe ordinal proportionality. Selective incapacitation, for example, calls for the unequal punishment of offenders convicted of similar offenses on the basis of predictive criteria that do not reflect the seriousness of the criminal conduct (von Hirsch 1985, chap. 11).

Other preventive strategies, however, would not necessarily be open to this objection. Consider general deterrence. Were the penalties for particular offense categories to be set by reference to those penalties' expected deterrent effects, it would infringe ordinal proportionality, as it would no longer be the seriousness of crimes that determined the

ordering of sanctions. Suppose, instead, that deterrence were used differently: penalties might be ordered according to the crimes' seriousness on the scale, with the scale's overall magnitude being decided (in part) by its expected net impact on crime. Were the requisite empirical knowledge available (which it is not today),<sup>8</sup> it might be possible to compare the overall deterrent impacts of alternative scale magnitudes. That information could then be used to help anchor the scale, without disturbing the ordering of penalties. Moreover, this approach would not necessarily lead to increases in severity. Penalties might be cut back below their historical levels, on grounds that no significant loss of deterrence would occur (von Hirsch 1990a, pp. 286–88).

Were deterrence data available, could an optimum solution for setting anchoring points be found? Why not invoke the utilitarian calculus here? The objection to straightforward penal utilitarianism, we saw, is that it can violate proportionality requirements. Here, this would not be so, since utility would be relied on to decide between two alternative possible scales, either of which satisfy ordinal and cardinal proportionality constraints. Why not, then, decide between the two scales by comparing their deterrent yields against their human and financial costs? The answer is that, even here, the aggregative character of the calculus remains troublesome. Suppose that penalty scale *A* is considerably more severe overall than penalty scale *B*, that both scales have about the same impact on the more serious crimes, but that scale *A* is much more efficient than scale *B* in preventing lesser offenses. When aggregate impacts are considered, scale *A* might prove to yield higher net utilities. This would mean making convicted offenders suffer considerably more in order to provide modest but widespread benefits to the rest of the citizenry. It is at least debatable whether this should be the preferred result (see von Hirsch 1993, chap. 4).

Where does this leave us in fixing anchoring points? Almost certainly without a unique solution. Crime-prevention (particularly deterrent) concerns may furnish no single answers even if there were the requisite knowledge of the comparative preventive effects of different scales—and that knowledge is largely lacking today. Setting anchoring points will be a matter of judgment—in which concerns about reducing overall penal suffering need to be considered, along with the jurisdiction's penal traditions (see Ashworth 1989).

<sup>8</sup> For the difficulty of making estimates of deterrent impact, see, e.g., Blumstein, Cohen, and Nagin (1978).

A desert-based scheme is necessarily somewhat confining—in its requirement that offense seriousness, and not a variety of possible other considerations, should decide comparative punishments. Its confining character makes it easier to scale penalties in a coherent fashion, but it also limits the possibilities of achieving various other goals or objectives. Moreover, the proportionality principle rests on a particular value—that of equity. Other values of various sorts might be thought to override equity considerations, in at least some situations. Hence, we need to consider the “hybrid” models: those that, to a lesser or greater extent, allow departures from ordinal desert requirements in order to achieve other purposes.

#### VI. Desert Scaling with Exceptional Departures

In examining hybrid models, Paul Robinson's (1987) offers a good starting point, as it is perhaps the simplest—as well as being the nearest to a desert model. Under Robinson's scheme, penalties ought ordinarily to be scaled according to crimes' seriousness, consistent with the principle of proportionality. Departures from ordinal desert requirements would be permitted, however, in exceptional circumstances—if needed to prevent an “intolerable level of crime.” However, Robinson would impose a further limitation on such departures: that even when the prevention of major criminal harm is at issue, gross deviations from proportionality would not be permitted.

How could one argue for such a model? The case in its favor can be stated schematically as follows (Robinson 1987; see also von Hirsch 1987).

First, ordinal proportionality is a requirement of fairness. This fairness constraint ought therefore to restrict the pursuit of crime-prevention policies. If desert may be disregarded routinely for the sake of crime prevention, it is no constraint at all. If desert is an important fairness constraint, moreover, then it should be observed up to the point of a major loss of utility.

Second, desert principles may be overridden, at least to some extent, when such major losses of utility occur. The idea is that fairness requirements may exceptionally be trumped if the stakes are high enough—that the world need not perish so that justice is done. Punishment policy scarcely involves the end of the world, but, Robinson suggests, avoiding a very large increase in seriously harmful conduct may be an important enough goal (assuming one had the requisite knowledge) to warrant at least some sacrifice of fairness. This position

differs, nevertheless, from plain penal utilitarianism in that departures from desert requirements could be invoked only exceptionally, when extraordinary losses of prevention would otherwise occur.

Third, beyond a certain point, moreover, the disregard of desert would become unconscionable; hence, Robinson's suggested limitation that gross departures from ordinal desert should not be permitted. Such manifestly disproportionate sanctions would misrepresent wholly the degree of the person's blameworthiness and thus would be inappropriate in a system that purports to hold citizens answerable and subject to censure for their actions.

How much guidance does Robinson's model supply? For most situations, it calls for penalties that are graded to reflect ordinal desert requirements. The escape clauses, however, are couched in general terms: a decision maker may depart from desert exceptionally to avoid an "intolerable" increase in crime, but the departure itself may not visit intolerable injustice on the defendant. What is tolerable is a matter of judgment, and Robinson is not so much offering a criterion as a way of thinking of departures. However, the following two illustrations (von Hirsch 1987) suggest how the model might be applied.

Sweden's new sentencing statute, enacted in 1989, ordinarily bases the sentence on the gravity of the criminal conduct (Swedish Penal Code, chaps. 29 and 30, discussed in von Hirsch and Jareborg [1989*b*]). However, an exception was made to continue Sweden's policy of jailing, for a period of weeks, drivers who were found with more than a stated (rather substantial) blood alcohol level. From a desert perspective, such a penalty was problematic because many who drink and drive suffer from chronic alcoholism, and their culpability may be diminished. The penalty was imposed, however, as a deterrent. This exception might be arguably sustainable under Robinson's theory because heavy drinking and driving seems so especially hazardous. The amount of deviation from desert, moreover, is not very great: offenders were to receive a short period of confinement in lieu of the somewhat less rigorous noncustodial penalty that the less culpable drinking drivers would otherwise be deemed to deserve.

Selective incapacitation advocates in the United States proposed giving convicted robbers who are classified as high risks lengthy extensions of their prison terms: as much as eight years' imprisonment for allegedly high-risk robbers, as contrasted with as little as one year's confinement for lower-risk robbers (Greenwood 1982). Large preventive benefits have been claimed for such a strategy (Greenwood 1982;

Wilson 1983, chap. 8), although these claims are now in dispute (Blumstein et al. 1986; von Hirsch 1988). Smaller disparities between high-risk and lower-risk robbers would cause the projected preventive effects largely to disappear. Even if such a policy had the preventive effects its advocates claim, however, it would seem questionable under Robinson's model because it would involve routinely imposing a very large penalty increase on grounds wholly ulterior to the seriousness of the conduct. That would seem to constitute the kind of gross infringement of proportionality that is ruled out under the Robinson scheme.

Robinson would restrict departures to the most drastic kind of case—namely, where the conduct involved is not only very harmful to those affected, but a significant incidence of that conduct is also involved. In the Swedish drunk-driving policy, for example, it is not merely the rare victim but many victims that potentially may be affected. This, however, sharply limits the scope of the exception since it is so seldom that sound empirical grounds exist for believing that a departure from desert would reduce the incidence of the conduct involved. While there is some reason to believe that Sweden's policy of penalizing drinking and driving has achieved some preventive impact, it is far from clear that it requires presumptive resort to imprisonment for those with over a stated quantity of blood alcohol (see Ross 1982). It is thus worthy of note that in 1991 the Swedish parliament repealed the presumptive imprisonment exception, so that those who drink and drive are now treated according to general desert principles of the 1989 sentencing law.

If the requirement of traceable aggregate effects presents these difficulties, might it be dropped? Anthony Bottoms and Roger Brownsword (1983) have suggested so, using reasoning somewhat (albeit not entirely) comparable to Robinson's. In Bottoms and Brownsword's view, persons who constitute a "vivid danger" of seriously injuring others could be given a period of extra confinement, even if such a policy has no measurable impact on overall violence levels. However, these authors emphasize that such an exception should be invoked only when there is a high and immediate likelihood of the most serious injury otherwise occurring. "Vivid danger," in other words, must truly be vivid.

The Robinson model has undeniable attractions. While abiding by desert constraints ordinarily, it permits departures where the case for them seems the most plausible. What, then, are the potential problems? Three come to mind.

First, are the stakes high enough? The basic idea is that justice requirements may be overridden when the stakes are high enough. Consider the quarantine of persons with deadly and easily communicable diseases. Quarantined persons surely do not deserve to lose their liberty, for it is not their fault that they have become disease carriers. They lose their liberty, perhaps indefinitely, solely in order to protect the health of others. The reason for tolerating quarantine—despite its unfairness to those confined—is that community survival is considered paramount. Similar considerations are supposed to sustain Robinson's model, but do they? Punishing offenders as much as they deserve might sometimes entail loss of crime prevention, but seldom if ever would it cause harm comparable to epidemic diseases. Moreover, punishment, unlike quarantine, involves blaming. It would be obnoxious to treat quarantined individuals as bad persons who deserved their confinement. David Wood (1988) has thus suggested that the quarantine analogy could support only the civil detention of still-dangerous offenders after completion of their deserved term of punishment.

Second, are the factual inferences reliable enough? If prevention of extraordinary harm is to warrant departing from fairness constraints, there need to be reliable grounds for confidence that the departure is capable of preventing the harm. For quarantine, that confidence may exist, given what is known about certain communicable diseases. But can it exist today in relation to sanctioning policy? How reliable are estimates that an individual, or group of individuals, is likely to commit serious harm that can be prevented by imposing extended sentences? Even if such estimates have some degree of empirical support, it is open to debate whether that support is unequivocal enough for the present purpose.<sup>9</sup> Someone who concurred in principle with Bottoms and Brownsword's idea of extending sentences in cases of "vivid danger" might still doubt our present capacity to assess "vivid danger" (with its requirements of immediacy and high likelihood) with the requisite assurance.

Third, can a narrow departure standard be maintained? Critical to Robinson's model is a narrow departure standard: that desert requirements may be overridden only to prevent the most serious criminal harms. Eroding that standard, so as to admit lesser harms, compromises his whole idea that desert constraints, as important requirements

<sup>9</sup> For problems of estimating incapacitative effects, e.g., see von Hirsch (1985, chap. 10; 1988); Blumstein et al. (1986).

of justice, may be disregarded only in exigent circumstances. Yet how realistic is it to be confident (given the political dynamics of crime legislation in most jurisdictions) that narrow departure standards can be maintained? May not a narrow exception be expanded too easily in the name of more efficient crime prevention? Someone might support the Robinson model in theory if its narrow departure limits could be sustained and still be worried about implementing the model because of that “if.”

## VII. “Range” Models

Robinson’s hybrid allows departures from ordinal desert only in exceptional cases. An alternative would be to allow relaxation of ordinal desert constraints more routinely. Desert considerations would be treated as setting an applicable range of punishments, but within that range the penalty could be fixed on consequentialist grounds. There are two different versions of such a model, both having different rationales and different practical implications.

### A. “Limiting Retributivism”

This view is identified with the writings of Norval Morris (1982, chap. 5). Desert, according to his suggested model, is to be treated as providing no more than broad ranges of permissible punishment. Within these broad ranges, the “fine tuning” (as he calls it) is to be decided on the basis of other reasons. German penologists have urged a comparable view, termed the “Spielraumtheorie” (e.g., Bruns 1985, pp. 105–9).

In some passages, Morris suggests that his model is required by the logic of desert itself. Desert, he argues, is indeterminate: it suggests only how much is undeserved in the sense of being excessive or manifestly too lenient. Within these bounds, reliance on nondesert grounds is appropriate because the claims of desert have been exhausted (see Morris 1982, pp. 198–99).

The difficulty of this argument has been suggested earlier in Section IV. It overlooks the requirements of ordinal proportionality, particularly, the requirement of parity. When two defendants commit comparably culpable robberies, giving one a larger sentence than the other for the sake of (say) crime prevention visits more blame on one for conduct that is *ex hypothesi* no more reprehensible than that of the other. To say that desert, by its very logical structure, imposes mere limits disregards this demand for parity.

In other passages, Morris seems to concede that desert supplies not only outer bounds but also ordering principles including a parity requirement. This latter requirement, however, is said to be weak and easily overridden: it is no more than a “guiding principle” (1982, pp. 202–5). Parity concerns may thus be trumped by competing values—some preventive (deterrence, incapacitation) and some humanitarian (reduction of penal suffering). This version seems somewhat more credible, but it still does not address the commonly held intuition that there is something important—not just marginal—about punishing similarly those who have committed comparably serious offenses.

Abandoning or watering down comparative desert requirements also leaves little guidance on how the only remaining desert constraints—Morris’s supposed desert limits—are to be ascertained. Not surprisingly, neither Morris nor the German advocates of the “Spielraumtheorie” have been able to suggest, even in principle, how those limits might be located (see von Hirsch 1985, chap. 12; Schünemann 1987; von Hirsch and Jareborg 1991*b*). It is thus unclear whether “limiting retributivism” would make desert or crime prevention the principal determinant of the sentence.

### *B. “Range” Models Recast as a Hybrid*

There is, however, another way of conceptualizing a “range” model: one that would make it explicitly a hybrid theory. This version concedes that ordinal proportionality does require comparably severe punishments for comparably reprehensible conduct—that unequal punishment involves a sacrifice of equity. The extent of that sacrifice, however, depends on how great the inequality is. Why not, then, allow preventive (or other consequentialist) considerations to override desert, but only within specified, fairly modest limits? Variations in punishment for a given offense would be countenanced, provided the specified limits were not exceeded. The idea is to permit the pursuit of those objectives without “too much” unfairness (von Hirsch 1987).

This model differs from Morris’s “limiting retributivism” in that it requires closer scrutiny of inequalities in punishment. Since parity is regarded as an important constraint, not just one of marginal significance, it matters how much deviation from parity is involved—and how strong the ulterior reasons are. Only fairly modest deviations, to achieve fairly pressing other objectives, would be permissible.

Under such a model, two major questions arise. The first concerns specifying the limits: how much variation from parity is to be permit-

ted? The second is the identification of the ulterior ends: for what goal (crime prevention or what else) should such variations be warranted?

1. *Specifying the Limits.* One objection to “limiting retributivism,” just noted, has been the difficulty of delineating the applicable desert limits. On the alternative model of an explicit hybrid, the fixing of limits becomes conceptually easier. A specified degree of deviation from ordinal desert constraints is simply set as the applicable limit. Since the governing idea is that there should be only modest derogations of ordinal desert, those limits would have to be reasonably constrained. Perhaps a 15–20 percent deviation might be permissible, but not a 50–60 percent one. In such a model, the gravity of the criminal conduct would thus substantially shape (albeit not fully determine) the gradation of punishment severity. Penalties might be classified into several bands according to their degree of onerousness. Substitutions would be permitted within a band—even if the penalties differ somewhat in punitive bite—but would be restricted among different bands involving substantially differing severities. Thus, short prison terms and home detention might be substituted for one another as both are fairly onerous (albeit not necessarily of equal severity), but such prison terms could not be interchanged with lesser financial penalties because the disparity in punitiveness would be too large (von Hirsch 1991a).

2. *Identifying the Ulterior Ends.* For what purpose should such moderate deviations from ordinal desert be allowed? In the literature to date, the end usually mentioned is that of crime control, particularly, incapacitation (compare Morris and Miller [1985] with von Hirsch [1988]). Applying this to the hybrid would permit reliance on offender risk, provided the applicable limits on deviation from ordinal desert were not exceeded. The end, then, is enhanced crime prevention.

This strategy encounters, however, a fairness-effectiveness dilemma. A substantial incapacitative effect is achievable only when the sentence differential between low- and high-risk individuals is large (see, e.g., von Hirsch 1988). Large differentials, however, mean infringing ordinal desert constraints to a great degree—and not the limited degree that the model contemplates. Keeping the differentials modest, moreover, means restricted preventive benefits. That, in turn, raises a further question. If ordinal proportionality is a demand of fairness, even limited deviations become justifiable only by a showing of strong countervailing reasons. It is questionable whether merely modest preventive benefits could qualify as such strong reasons.

Another possible ulterior end is “parsimony,” that is, reduction in

severity of punishments. Advocates of “limiting retributivism” claim that relaxing desert constraints permits milder sanctions (Morris and Tonry 1990, pp. 104–8). Suppose that penalties are scaled on a desert model and that the prescribed penalty for a given, fairly serious offense is  $X$  months’ imprisonment. Suppose one were to allow a 20 percent penalty reduction for nondangerous offenders. Then, some high-risk offenders will receive  $X$  months, and the remainder only 80 percent of that period. Has not a penalty reduction been achieved?

The alternative, however, is to reset the anchoring points of the scale so as to reduce the prescribed penalty for the crime by 20 percent and to reduce the penalties for other offenses correspondingly.<sup>10</sup> Then, proportionality is not sacrificed. Moreover, parsimony is better achieved—because all, not just some, of those convicted of the crime get the benefit of lesser penalties. So why cannot parsimony be sought while adhering to, rather than departing from, desert principles? One possible response is that across-the-board reductions would increase the risk to the public—because even the higher-risk individuals will have shorter periods of confinement. This, however, would reduce the departure rationale to the just-discussed one of crime prevention.

Alternatively, political considerations might be invoked: rule makers in most jurisdictions, it is argued, may be more willing to accept penalty reductions for nondangerous offenders than across-the-board reductions. If politics are to be taken into account, however, is it realistic to expect the deviations to be in a downward direction? The demand is likely to be not merely for less punishment for the low risks, but also added punishments for the supposed high risks. Then, the question becomes “parsimony for whom?” Some offenders may well receive significantly more punishment than they would have had parity been observed (see von Hirsch 1984, pp. 1105–7). Political claims are also not easy to generalize. If such a strategy ever can lead to reduced punishments, it will only be in a particular jurisdiction where the political constellation happens to be propitious.

What other reasons might there be for deviating from desert constraints? One might be to facilitate the scaling of noncustodial penalties. Under a desert rationale, substitution among sanctions is permitted only where the penalties are about equally onerous. In order to give day-fines to some offenders convicted of a given intermediate-level offense, and probation to others, the penalties must have equivalent

<sup>10</sup> This assumes that the initial, desert-based penalties have not been set so low that further pro rata reductions would infringe cardinal proportionality.

penal bite, and this condition is not so easy to satisfy. Relaxing desert constraints a bit would allow these substitutions to be made more easily. It might also make it somewhat easier to devise back-up sanctions for offenders who violate the terms of their punishments (e.g., refuse to pay their fines). (For problems of devising back-up sanctions on a desert rationale, see von Hirsch, Wasik, and Greene [1989].) This approach may have the attraction of requiring only quite modest departures.

### VIII. Conclusion

This essay has examined the principle of proportionality and its rationale, drawing on recent philosophical writing. Particular attention has been paid to the “expressive” account of proportionality, according to which penalties should, in fairness, be distributed depending on their blaming implications.

Three models for scaling punishments have also been sketched (Secs. V–VII). Each gives the principle of proportionality a central role in structuring penalties, and they differ from one another in whether, and to what degree, departures from ordinal proportionality are permitted to achieve other ends.

Are these the only possible sanctioning models? Of course not. Were the role of proportionality reduced, alternate schemes could be constructed, giving prominence to other aims—most notably, crime control. Such schemes, moreover, may differ from one another, depending on which preventive strategy is invoked. A deterrence-based model would produce a different array of penalties than one emphasizing restraint of potential recidivists (cf. Posner [1977, chap. 7] with Wilson [1983, chap. 8]).

Any such larger shift away from proportionality, however, would raise problems of justice. Proportionality is (if the arguments discussed in this essay are believed) an important requirement of fairness. If so, reducing its role in the determination of penalties would make the resulting scheme less just. To sustain such a scheme, it would be necessary to contend that proportionality is a less important fairness demand than has here been suggested; or that its criteria are weaker; or that other aims, such as crime prevention, are ethically paramount. Such questions relate, ultimately, to what values are to be upheld.

There is also the question of the degree of guidance a theory provides for the scaling of penalties. The proportionality principle, we have seen, offers no unique solutions, particularly because of the leeway it allows in the setting of a scale’s anchoring points. However, the princi-

ple does offer considerable structure (although not unique solutions) for the comparative ordering of penalties. If proportionality is dislodged from this central, organizing role, it may not be easy to develop alternative (e.g., prevention-based) rationales that can provide much guidance.<sup>11</sup> While a considerable body of theory exists concerning the principle of proportionality, lacunae remain. More thought needs to be given to the following topics, among others.

*The Criteria for Gauging the Seriousness of Crimes, Particularly the Harm Dimension of Seriousness.* A “living-standard” conception of harm (see Sec. V) may be a start, but it requires further scrutiny and elaboration.

*Spacing.* Proportionality calls not only for penalties ranked according to the gravity of crimes but also for spacing among penalties that reflects degrees of difference in crime seriousness. The spacing question, however, has received little attention.

*Anchoring the Scale.* If penalties are graded according to offense seriousness and the scale as a whole is not inflated or deflated unduly, the requirements of ordinal and cardinal proportionality have been satisfied, and one must look elsewhere for grounds for anchoring the scale. What these grounds might be remains largely to be explored.

There are also a number of practical issues needing further thought. One concerns back-up sanctions. Under any punishment theory emphasizing proportionality, noncustodial sanctions (rather than the severe penalty of imprisonment) should be employed for crimes other than serious ones (von Hirsch, Wasik, and Greene 1989). Using such sanctions raises the question of what should befall defendants if they violate the terms of the penalty—for example, if they refuse to pay a fine or complete a stint of community service. How much added punitive bite may the back-up sanction legitimately entail?<sup>12</sup>

<sup>11</sup> One such alternative might be Posner’s utilitarian, deterrence-based scheme (see Sec. II). This purports to provide optimum sentence levels, once punishment costs and deterrent benefits are known. Aside from any ethical objections, the requisite empirical information about the magnitude of deterrent effects is largely lacking. See n. 8 above. Another might be Norval Morris’s “limiting retributivism.” Morris and Miller (1985) have suggested relying on offender risk, within broad desert limits. However, these proposed desert limits are indeterminate. Morris has offered no account of how wide or narrow the desert limits should be, or of what principles should be employed for setting them. (See discussion in Sec. VII and also von Hirsch [1985, chap. 12]). Without a rationale for fixing the limits, it is not clear whether such “limiting retributivism” would make desert or predictions the main determinant of the sentence.

<sup>12</sup> It has been suggested (von Hirsch, Wasik, and Greene [1989, pp. 609–10]) that incarceration would ordinarily be disproportionately severe as a back-up penalty and that only a moderate increase in severity would be appropriate. The topic, however, requires further exploration.

The principle of proportionality continues to attract the attention of legal philosophers as well as penologists. Thus, some of these unresolved issues may well receive more scrutiny. Whether they can satisfactorily be resolved remains to be seen.

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