The Metric of Punishment Severity:

A Puzzle about the Principle of Proportionality

Douglas Husak

Abstract

The principle of proportionality, a cornerstone of retributive penal philosophy, seemingly requires that the severity of the punishments to be imposed to be a function of the seriousness of the crimes that are committed. This principle cannot be applied unless we have a metric or common denominator to assess whether two impositions of punishment are equal or unequal in severity. To do so, we must decide whether the metric of severity is wholly objective or involves an essential reference to the psychological responses of the persons who are punished. Once this issue is taken seriously, we may conclude that no single measure of punishment severity exists. Instead, all we might be able to say is that a given instance of punishment is more severe along one dimension and less severe along another, with no means to specify which is more or less severe all-things-considered. This conclusion has potentially grave implications for the adequacy of a retributive theory of punishment that takes desert and proportionality as central. No solution is readily available without a substantial retreat from ideal theory. Perhaps the best way to minimize the worries I raise is to adopt a deflationary role for desert in a theory of punishment rather than to abandon retributivism and proportionality altogether.

I: INTRODUCTION

I hope to move directly to my topic by making three admittedly controversial assumptions: (1) retributivism is a plausible (and, I think, correct) theory of the justification of state punishment and sentencing; (2) desert is essential to any respectable retributive theory; and (3) sentencing according to the principle of proportionality is crucial if the state is to treat offenders as they deserve. Therefore it is of the utmost importance for the retributivist school to offer a detailed and attractive explication of the principle of proportionality.[1] Although many distinct formulations of this principle have been advanced, my preferred version states that *ceteris paribus, the severity of the punishment should be a function of the seriousness of the crime*. In what follows, I struggle to provide content to this principle as so construed.

[1] I take retributive theories of punishment to be those that afford a central and indispensable role to desert. Elsewhere, I have argued that a host of familiar problems in the philosophy of punishment can be avoided by contrasting two questions: (1) what punishment p is deserved, and (2) should the state actually impose p?[1] I believe the significance of judgments of desert in sentencing is not especially great; more weight should be placed on consequentialist considerations when we turn to question (2).

I will not examine (and barely mention) any number of questions that must be answered before this principle can be applied in the real world. Some of these topics are familiar; others are less-often discussed. The following are four examples of issues I will *not* discuss: (1) What makes one crime more serious than another? Since some crimes are wrong because of the harms they cause and others are wrong for other reasons, is there a single scale along which the seriousness of all crimes can be ranked? Are violent crimes, for example, generally more serious than those that are non-violent? (2) What is the function that relates the seriousness of crime to the severity of punishment? Is it linear, or shaped in some other way? (3) How is the punishment system anchored so that *cardinal* proportionality can be established? What role, if any, do social conventions play in the answer? (4) What specific issues does the *ceteris paribus* clause preclude from consideration under the scope of proportionality? Can this clause be explicated in a way that does not beg questions against arguments that purport to reject proportionality? Instead of exploring the above topics, I will mostly focus on a single problem---a problem generally thought to be *easier* than any of the foregoing. Rather than *solving* the problem I will identify, however, I will at best only be able to minimize its significance in a theory of punishment. But I do not regard my lack of success as a powerful reason to abandon proportionality altogether. After all, nearly all penal theorists, including consequentialists, accept this principle in some guise or another.[2] Instead, I construe my failure as an invitation to legal theorists to try to meet the challenges I will present.

The primary issue I will discuss is that of specifying the *metric* of punishment severity---that is, the *currency* in which to express whether one punishment is more or less severe than another. In other words, by what common denominator are the punishments imposed on, say, Peter and Paul equal of unequal in severity? An (admittedly imperfect) analogy might be helpful to understand this problem. Suppose we are interested in losing weight. We know, for example, whether or not a plate of ice cream contains more food than a bowl of pasta because we can express the amount of each in terms of their caloric content. We can make this determination this even though calories are not *defined* as food or are *identical* to it; they are the common measure in which different quantities of food can be compared. Now suppose we are interested in punishing two offenders according to their desert. What unit plays the role in gauging punishment severity that calories play in comparing the quantity of foods? Unless we have a tolerably clear idea of *in virtue of what* the sanction imposed on Peter is more severe than that imposed on Paul, I see no prospects for applying the principle of proportionality beyond cases that are intuitively obvious. No one would contest, for example, that a lifetime sentence of imprisonment without parole is more severe than a period of probation. Any such example, however, conceals the difficulty of my topic, inasmuch as we are unlikely to be forced to explain exactly *what it is* that makes the first sentence so clearly more severe than the second.

Unfortunately, I will not succeed in identifying my own candidate for a single metric in which to express the severity of a punishment. Instead, I argue that the problem might well be insoluble. All we might be able to say is that a given instance of punishment is more severe along one dimension and less

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[2] Even consequentialist penal theorists typically seek to accommodate intuitions that favor proportionality. See Ian P. Farrell: "Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment," 55 *Villanova Law Review* 321 (2010).

severe along another, with no clear means to specify which is more or less severe all-things-considered. But my position is not entirely negative. I indicate *why* this problem is so difficult and describe the hard decisions that must be made before any progress can be expected. I also indicate how a retributive theory might be salvaged despite the enormous problems applying proportionality in the absence of a single metric in which units of severity can be expressed.

II: EARLIER EFFORTS AND THEIR SHORTCOMINGS

It may be surprising that contemporary theorists do not agree about how to answer my question, and all too often proceed as though it need not be answered at all. The issue has not always been neglected, however. Theorists in the 1980s exerted a fair amount of effort to assess whether two instances of punishment were equally severe. The scholarly occasion was the need to decide when *alternative sanctions*---different modes of punishment such as fines and probation---were equally severe.[3] Perhaps the two most well-known such attempts were undertaken by Paul Robinson and Andrew von Hirsch. Robinson painstakingly described a sentencing scheme that employs "sanction units" to decide whether two modes of punishment are interchangeable.[4] He proposed that a sanction of unit 1, for example, might be expressed either in two weeks imprisonment or in 160 hours of community service.[5] He admitted, however, that the "preliminary empirical research on the proper assignment of sanction values to particular sanctioning methods" has so far "resulted in mere informed speculation."[6] What "empirical research" could Robinson have in mind that would resolve this problem? If it is amenable to an empirical solution at all, perhaps we could solicit the preferences of individual defendants through questionnaires.[7] If two offenders were indifferent between undergoing alternative m and n---as when they are offered a choice between, say, "ten lashes or a thousand dollars"---then m and n should be assessed as comparably severe.

Notice that this method can be employed to measure the relative severity of punishments even without a clear metric in which units are expressed. After all, we can decide whether 100 Israeli sheckles is more or less than 25 British Pounds because they are traded on a market, even though there is no single currency to which each can be reduced. If this empirical device were employed, perhaps we could apply the principle of proportionality without identifying the metric I seek. But can the metric of severity really remain unspecified simply by relying on personal preferences to move from one mode of punishment to another? Doesn't the question resurface in the inevitable situation in which one offender prefers m to n and the other prefers n to m---or when their preferences between suffering m as opposed to n shift from one time to another?

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[3] In light of what has come to be our current political consensus that the state relies too much on imprisonment and should look for a different means to punish criminals, it is disappointing that theorists have not returned to this problem. See Douglas Husak: "Modes of Punishment," (forthcoming).

[4] Paul Robinson: "A Sentencing Scheme for the 21st Century," 66 *Texas Law Review* 1 (1987).

[5] *Id.,* p.55.

[6] *Id.,* p.54.

[7] See David C. May and Peter B. Wood: Ranking Correctional Punishments: Views from Offenders, Practitioners, and the Public (Carolina Academic Press, 2010).

Rather than evade the issue, let us try to confront it head-on. Exactly what is a "sanction unit" a unit *of*? Of course, it is a unit of *punishment.* But what is *that*? By what common denominator can we express the severity of different tokens of punitive sanctions, whether or not they involve different types? The answer proposed by Andrew Von Hirsch is more helpful. He proposed that two instances of punishment should be deemed equally severe by reference to much the same measure used to assess the seriousness of two different crimes. I suspect that a viable means to gauge crime seriousness is every bit as problematic as a device to measure punishment severity. Von Hirsch, however, famously contended that one offense is as serious as another when each intrudes on the interests victims typically need to lead a good life.[8] Analogously, then, one punishment is as severe as another when each has a comparable impact on the living-standards of offenders.[9] More particularly, he thought we should rank the severity of punishments "according to the degree to which they typically affect the punished person's freedom of movement, earning ability, and so forth."[10] Von Hirsch hastened to add, however, that "such an analysis, examining the living-standard impacts of various intermediate sanctions, has yet to be undertaken." Thus he explicitly retreated to "the aid of common sense."[11] But even common sense, I am afraid, offers little guidance on this matter.[12]

This issue is conceptually formidable partly because of the lack of consensus about the nature of punishment itself. Unless we agree what punishment *is* and why it has proved so hard to justify, we are unlikely to concur about what makes one instance more or less severe---and thus more or less difficult to justify---than another. I contend without much argument that any response we should countenance as a form of punishment involves an intentional deprivation intended to express censure. We should not characterize a response as punitive unless it constitutes a deprivation or (in terms I will use interchangeably) hard treatment. In addition, according to my definition, a response is not punitive unless it expresses censure and imposes stigma. As Joel Feinberg famously observed, a punishment is "a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation."[13] In the absence of this latter feature, an account of punishment would be overinclusive. We could not distinguish a tax (which rarely is punitive) from a genuine punishment unless the latter were used to censure the person on whom it is imposed. Nor could we distinguish a genuine punishment from a requirement to pay damages in tort (which usually is compensatory). Finally, it is important to stress that a response does not amount to a punishment because it *happens* to

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[8] Andrew von Hirsch and Nils Jareborg: "Gauging Criminal H arm: A Living-Standard Analysis," 11 *Oxford Journal of Legal Studies* 1 (1991).

[9] Andrew von Hirsch: Censure and Sanctions (Oxford: Clarendon Press, 1993), p.60.

[10] Andrew von Hirsch: "Seriousness, Severity, and the Living Standard," in Andrew von Hirsch and Andrew Ashworth, eds.: Principled Sentencing 185, 189 (Oxford: Hart Pub. Co., 2d.ed., 1998). The "and so forth" clause reveals the vagueness in this standard.

[11] *Op.Cit.* Note 9, p.60, note *.

[12] The social science of the last few decades has turned up some relatively surprising results about the impact of punishments on individuals. For a discussion, see John Bronsteen, Christopher Buccafusco, and Jonathan Masur: "Happiness and Punishment," 76 *University of Chicago Law Review* 1037 (2009).

[13] Joel Feinberg: "The Expressive Function of Punishment," in Feinberg, ed.: Doing and Deserving (Princeton: Princeton University Press, 1970), p.95, 98.

deprive and to censure. Real punishments are *intended* to have these effects.[14] In any event, a punishment necessarily contains two essential features, each of which must be taken into account when assessing its severity.

The measurements of hardship and censure each turn out to raise distinct conceptual and normative problems. Even when both components are taken into account, however, the full significance of the difficulty of justifying punishment may escape our notice. All too often, philosophers focus solely on what punishers are permitted to intend to do. The alleged issue, according to this train of thought, is whether and under what circumstances legal officials are permitted to harm offenders---to deliberately deprive and censure them. But this way of conceptualizing the problem threatens to neglect the perspective of the persons who are punished. As one commentator indicates, "One natural way of understanding the amount of punishment we inflict is to consider the amount of suffering our punishments cause."[15] Punishment has proved so hard to justify partly because of what it *does* to offenders, and not merely because of what officials are permitted to intend to do to them. In gauging the severity of a punishment, should we adopt the point of view of the punisher or that of the individual who is punished---or some combination of each? To phrase the issue differently, we must decide whether the units to express the severity of a punishment are wholly objective, making no essential reference to the psychological or phenomenological state of the person who is punished, or are partly subjective, requiring such a reference.[16] Our answer to whether and to what extent a particular offender has been punished can differ radically depending on which of these perspectives we take.

The various collateral consequences of conviction provide a dramatic example of how these two perspectives can diverge. Countless commentators have noted that offenders bear not only the hardship and censure sentencing officials intend to impose, but also a host of harms resulting from decisions by other state actors as well as by private persons. Offenders can be denied any number of benefits, such as student loans, employment opportunities, the right to vote or own a gun, and a great many more.[17] I believe it is futile to ask whether any or all of these collateral consequences should be conceptualized within the ambit of punishment itself.[18] The best reply may be that they are *not* a part of punishment if we adopt the perspective of the punisher, but *are* a part of punishment if we adopt the perspective of the person who is punished. If we focus not merely on what punishers intend but also on what happens to offenders as a result, these collateral consequences must be included in any attempt

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[14] The difficulty of discerning the intentions of sentencing authorities---or even of knowing *whose* intentions are relevant---helps to explain why so many cases of sanctions are borderline, difficult to categorize as punitive or non-punitive.

[15] Adam J. Kolber: "Punishment and Moral Risk," (forthcoming), p.23.

[16] This way of expressing the debate is admittedly clumsy, since psychological states---intentions---ere essential to either perspective. The issue, then, is not *whether* mental states matter, but *whose* mental states matter.

[17] See Zachary Hoskins: Beyond Punishment? A Normative Account of Collateral Restrictions on Offenders (forthcoming, 2018).

[18] See Sandra G. Mayson: "Collateral Consequences and the Preventive State," 91 *Notre Dame Law Review* 301 (2015).

to answer the justificatory questions philosophers of law have posed about punishment since the time of Plato.[19]

To be sure, selecting the appropriate perspective hardly settles the question of what metric to use. But this decision advances the inquiry and indicates the direction in which an answer can be found. If objective matters are all that are relevant in assessing the severity of a punishment, we need a political theory that identifies our rights and liberties and ranks them in degree of importance. Moral philosophers might also be consulted inasmuch as they have struggled to defend objective theories about what is important or valuable in a life. If subjective matters are important, however, the foregoing political and moral theories must be supplemented by a psychological or phenomenological theory about how given stimuli are felt and experienced. Some small progress on this matter has been attempted. Moral philosophers have tried to assess the conditions under which persons have a *complaint* about how they are treated, and how the strength of their complaint might be measured.[20] Health care professionals, to cite another example, sometimes ask patients to rank the severity of their pain on a scale of one to ten. Although such devices are obviously crude and imperfect, they are probably better than nothing. More to the point, they would be completely irrelevant to the present inquiry if the units to express punishment severity were wholly objective and indifferent to their actual effects on individuals.

We need different metrics when different perspectives are taken. Even so, *some* metric is needed to express the severity of hard treatment and censure, the two components of punishment I have mentioned. I discuss each of these two elements separately. I begin with the first, turning to special problems involving the censuring component of penal sanctions in Part IV.

III: MEASURING DEPRIVATION

Measures to quantify the relative extent of a given deprivation or imposition of hard treatment would appear to be the easier of the two components to specify. Still, questions arise immediately. I have already introduced the most basic decision that must be made before we can identify the relevant units: whether to adopt the perspective of the punisher or that of the person who is punished. Return to the earlier efforts to assess severity I described in Part II. Impact on a *typical* living standard would seem to be wholly objective in that it is indifferent to the phenomenology of particular offenders. Presumably, my living standard could erode without my noticing or caring. Should we really represent two tokens of hard treatment as equally severe by a metric that is completely objective in this sense---that is, that does not consider their impact on the mental states of the individuals on whom they are imposed? Jeremy Bentham, as I construe him, is clear on this matter. He famously contended that punishments necessarily involve an *evil* that could be justified only by the prevention of a greater evil. All evils, in turn, involve *disutility,* by which Bentham himself meant *pain* or *unhappiness.* Thus Bentham would not have recognized a response as a punishment unless it caused pain or unhappiness for the person on whom it is inflicted. Pain and unhappiness are paradigm examples of psychological states; we

[19] See Adam J. Kolber:"Unintentional Punishment," 18 *Legal Theory* 1 (2012).

[20] See Larry S. Temkin: Inequality (New York: Oxford University Press, 1985), esp. Chapter 2.

feel unhappy and *experience* pain. As a result, he would rank one deprivation as more severe than another when it causes more of these negative states for the person on whom it is imposed. Bentham could not have conceptualized a state response as a punishment if the offender neither knew nor cared about whether it had been inflicted.

I regard H.L.A. Hart as more evasive about whether the units of severity are objective or partly subjective.[21] In the first clause of his celebrated definition, Hart indicated that "standard cases" of punishment "must involve pain or other consequences normally considered unpleasant."[22] The first disjunct of this clause ("pain") is clearly subjective; the second ("other consequence normally considered unpleasant") is not. Hart himself did not elaborate about why a consequence should count as hard treatment because it is "normally considered" unpleasant, even when it is not regarded as such by the particular person on whom it is imposed. I would think that the imposition of a sanction "normally considered" to be unpleasant to which a given offender is indifferent should be treated as a *failed attempt* to punish. Any sensible response to this worry, I suspect, would reveal Hart's ambivalence about whether the units in which to express the quanta of deprivations are wholly objective or at least partly subjective.

If it is true that we should not countenance a response as a mode of hard treatment unless it produces a negative psychological state,[23] we must concede to a point made throughout philosophical history: persons have radically different subjective reactions to whatever treatments qualify as "objectively similar" deprivations.[24] Adam Kolber presents a wealth of examples to illustrate this point; I will summarize only two.[25] Suppose two offenders vary significantly in height. The first is seven-feet tall; the second is five-feet tall. No one would doubt these two offenders would experience different quanta of unhappiness, disutility, pain or suffering if each were confined to the same six feet-high cell. Or suppose two offenders differ radically in weight and have different needs for food. A similar diet of 1200 calories a day for each would have a markedly different impact on their respective levels of subjective utility. In light of their distinct psychological responses, would anyone insist that these individuals suffer the same quanta of deprivation when their sentences are calculated objectively?

How should sentencing authorities accommodate this uncontestable point? As I have indicated, Hart's reference to what is "normally considered unpleasant" represents something of a compromise on this issue. I regard Robinson's response similarly. Obviously, different defendants would offer different

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[21] Hart's definition seems to neglect censure, and focuses solely on the deprivation or hard treatment aspect of punishment.

[22] H.L.A. Hart: Punishment and Responsibility (Oxford: Oxford University Press, 1968), pp.4-5. Although Hart professes to borrow this definition from Stanley Benn and Antony Flew, he does not mention how or why he has altered the original version. Benn, for example, does not include *pain* in his definition. See S.I. Benn: "An Approach to the Problems of Punishment," 33 *Philosophy* 325 (1958).

[23] If subjective states matter, we need to specify *which* subjective states should count. Given deprivations may cause pain, suffering, boredom, regret, anguish, and a plethora of others. How might these subjective states be represented on a common scale? It is tempting to fudge this matter by expressing each of these states under a single label of *disutility.*

[24] See E.A.C. Raaijmakers: "The Subjectively Experienced Severity of Imprisonment,: Determinants and Consequences" (forthcoming, 2017).

[25] Adam J. Kolber: "The Subjective Experience of Punishment," 109 *Columbia Law Review* 182 (2009).

answers to whether ten lashes are more or less severe than a thousand dollar fine. Some would suffer more disutility from the former; others from the latter. Robinson implicitly proposes to compile an average from the responses of all (possible or actual?) offenders. But what is the argument for using an average rather than for assessing the impact on the particular defendant? Von Hirsch, in turn, contends that the "living standard" analysis used to gauge the severity of punishments "refers to the means and capabilities that *ordinarily* assist persons in achieving a good life"---even though the offender himself may be indifferent about them.[26] But why should we decide how severely a given deprivation punishes a particular offender because of how a typical or standard offender would be affected by it? In most other contexts, our system of criminal justice goes to enormous lengths to do justice in individual cases without recourse to objective standards.[27] I take these efforts to point to an ideal to which institutions of penal justice should aspire.

What, then, is the bridging premise that connects the severity of what a given defendant receives to what is received by the average, ordinary, or typical offender? Is this generalization embraced for principled or pragmatic reasons? Legal philosophers should always strive to distinguish what *is* an ideal from what is a necessary but regrettable *retreat* from an ideal. Admittedly, pragmatic worries are astronomical; efforts to calibrate particular tokens of punishment to the sensibilities of individual offenders would encounter a host of practical problems. They may be too costly, violate privacy, fail to give offenders adequate notice, encourage deceit, or lead to unjust discriminations on the basis of wealth and privilege.[28] In addition, if punishment severity is to be measured *ex ante,* when a sentence is announced, it cannot be too sensitive to its actual impact because it would require constant recalibration. Although each of these obstacles is formidable in the real world, I will not discuss whether and under what conditions they can be surmounted. We need not even *attempt* to overcome them unless we have a good reason to try to do so. If we have a principled basis for making the extent of a deprivation sensitive to phenomenological differences between particular offenders, but practical problems prevent us from succeeding, we should at least be candid that our sentencing practices involve a compromise with an ideal. Thus I ask the philosophical question that must be answered before we need to confront these real-world problems: should we aspire as best we can to ensure that any mode of deprivation or hard treatment produces whatever quantum of negative psychological response our best theory of proportionate sentencing tells us to impose?

Unlike Kolber, I believe that retributivism provides the better theory of sentencing in which this question should be addressed. Thus I ask whether we should aspire to ensure that any mode of deprivation or hard treatment produces whatever amount of negative psychological reaction is *deserved.* Kolber himself believes that a retributive framework is especially ill-suited to accommodate subjective differences among offenders. He reaches this conclusion because he thinks (correctly) that retributivists have a special commitment to a principle of proportionality. He seemingly believes that

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[26] Von Hirsch: *Op.Cit.* Note 9, p.189 (italics added).

[27] I regard the rarity of criminal liability for negligence as well as holdings about the unconstitutionality of various presumptions (e.g., defendants intend the natural and probably consequences of their conduct) to demonstrate a commitment to subjective standards in individual cases.

[28] See Kolber: *Op.Cit.* Note 25, p.187.

proportionality is impossible to preserve while taking account of the extent to which a given deprivation causes different psychological responses among offenders.[29] The decision to build a higher cell for the tall offender than for the short has nothing to do with the seriousness of their respective crimes, which, we can stipulate, are identical. Thus Kolber concludes that retributivists must disregard proportionality if they hope to accommodate the fact that individual offenders have different psychological responses to given deprivations. Retributivists, as a result, must depart from what is foundational to their theory. Since consequentialists have little or no attachment to the principle of proportionality in the first place, they can abandon it without theoretical inconsistency. Hence Kolber believes he has provided a powerful reason to prefer a consequentialist theory of punishment to its retributivist counterpart.

Is Kolber correct to invoke his commitment to subjective differences between offenders as a reason to reject proportionality and thereby resist retributivism? I think not---even though I share much of his skepticism about our ability to apply the principle of proportionality as I have formulated it. One flaw in his reasoning is his failure to understand that the principle of proportionality contains a *ceteris paribus* clause. My formulation makes the severity of the punishment a function of the seriousness of the offense only when all other relevant variables are held equal. If two offenders differ in the ways Kolber describes---in their height or caloric need, for example---we should not assume that the principle of proportionality requires they be treated identically.[30] But an even greater flaw, it seems to me, is the metric to which Kolber seems curiously committed when gauging punishment severity. If a psychological state such as suffering is used to measure severity, Peter *is* punished more severely than Paul when he experiences more suffering. Thus two offenders who commit the same crime but suffer to different degrees when sentenced to the same term of imprisonment are punished unequally rather than equally. If the metric of severity is partly subjective, as Kolber himself believes it to be, the principle of proportionality supports rather than opposes his claim that subjective experience matters.

But *is* the unit of severity at least partly subjective? As I have indicated, the hard treatment or deprivation component of punishment need not be characterized in terms of a psychological state at all. A totally "objective," non-mental characterization of severity would render irrelevant the concerns that individual recipients react differently to given deprivations. On objective accounts, phenomenological reactions turn out to be quite beside the point. According to John Rawls, for example, "a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen."[31] Pursuant to this suggestion, we simply identify "normal rights," and quantify the extent of a deprivation by determining how many of them a defendant has lost. I regard objectivist measures of severity as orthodox among philosophers of sentencing, although they rarely are explicit about this matter. I

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[29] "What is most endangered by recognizing the comparative nature of punishment, I will suggest, is the appeal of punishment proportionality, which holds that offenders who are equally blameworthy should be given punishments equal in severity." Adam J, Kolber: "The Comparative Nature of Punishment," 89 *Boston University Law Review* 1565, 1568 (2009).

[30] As Ronald Dworkin famously remarked in a different context, justice requires treatment as an equal, not equal treatment. See his "Taking Rights Seriously," in Dworkin, ed.: Taking Rights Seriously (Cambridge: Harvard University Press, 1977), esp. pp.226-229.

[31] John Rawls: "Two Concepts of Rules," 64 *Philosophical Review* 3 (1955), p.10.

suspect that a great part of the appeal of objectivist metrics is the desire to avoid the deep quagmire into which we would be plunged if the units we adopt are even partly subjective.

How, then, should we decide whether the units of deprivation severity ultimately refer to a psychological state of individuals or to something that can be characterized wholly objectively? To my mind, no single argument is likely to settle the matter. Both objectivists and subjectivists contend that their side has intuitive support; they marshal examples in which respondents are likely to concur with their judgments.[32] Some cases involve deprivations that are objectively severe but cause no subjective effect. Suppose, for example, that a defendant is sentenced to a term of house arrest for the duration of her life. Her doors are locked and her whereabouts are monitored. But she is unaware she has been confined, is delighted to remain at home, and never makes an attempt to leave.[33] Other cases involve deprivations that are objectively lenient but cause substantial negative subjective reactions. The example of the seven-foot tall defendant confined in the six-foot high cell is illustrative. Although reasonable minds may disagree, I suspect most respondents would concur that the subjective rather than the objective dimension is more significant when assessing the severity of these deprivations. But intuitions about other cases tug in the opposite direction. Suppose one prisoner manages to spend much more time asleep than another, and experiences far less distress throughout her incarceration as a result. Is the extent of her deprivation less than that of the latter? Presumably not.[34] Perhaps we can defend plausible positions about whether the metric of punishment is wholly objective or partly subjective while explaining why we should not be overly troubled by the foregoing alleged counterexamples to whatever answer we provide. To my mind, however, these examples serve to demonstrate our ambivalence and uncertainty about the matter.

IV: SUBJECTIVE METRICS AND DAY FINES

A commitment to a wholly objective metric used to gauge the severity of a given deprivation unduly constricts our efforts to decide *which* modes of deprivation to employ. The unchallenged assumption that the severity of hard treatment can only be expressed by an objective unit has blinded reformers to the very real possibility of alleviating the epidemic of mass incarceration by substituting monetary fines for imprisonment. Perhaps the most telling objection to the more widespread use of monetary fines is that they are inadequate. If they are set too high, poor defendants are unable to pay them. If they are set too low, wealthy defendants are insufficiently deterred because they are regarded as a cost of living or doing business. But this problem is not intractable. The best solution is to implement a system of *day fines*, capitalizing on familiar ideas about the diminishing marginal value of money by relativizing the amount of the payment to the income or wealth of the particular offender. Day fines, of course, take a substantial step away from construing the metric of a deprivation objectively. They do not resort directly to statistical averages or typical cases, but seek to measure the

[32] Subjectivist accounts are critiqued by Leo Katz: Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law (1996), p.156.

[33] Such cases resemble "Frankfurt-type" counterexamples to the principle of alternative possibilities in the literature about free will and responsibility.

[34] See David Gray: "Punishment as Suffering," 63 *Vanderbilt Law Review* 1619 (2010).

severity of a deprivation by reference to its impact on the welfare of the particular offender in question.[35]

A system of day fines does not exclusively involve subjective experience, however, inasmuch as its administration involves two-steps.[36] First, a day fine "unit" is assigned to an offender depending on the seriousness of her offense. This unit is independent of the person's income. The unit-rate system, or a system of "benchmark scales," is invoked to determine the number of units that are appropriate for each offense. Hence the same number of day fine units is applied for each instance of the same offense. The second step identifies the value of the day fine unit for the particular defendant. This calculation takes into account the offender's personal income or wealth. The total fine amount is then calculated by multiplying the number of day fine units by the value of the unit. To be sure, no efforts are made to assess whether a given fine affects a particular defendant more or less negatively than another with the same wealth or income. Generalizations are made about the probable impact of a fine on the population of similarly situated offenders. As a result, day fines seemingly involve a hybrid of objective and subjective elements.

It is unfortunate that day fines are not employed more frequently in light of their many advantages. Traditional systems of fixed fines have proved disappointing. Monetary penalties with some prospects of deterring members of the middle class are often beyond the ability of the poor to pay. As a result, a great many fixed fines are uncollected, requiring a device to ensure some mode of hard treatment is actually imposed. All too often, this device involves incarceration. Moving to a system of day fines would increase state revenue, reduce the need for imprisonment, and lessen the differential impact of a deprivation on the rich and poor. Thus this system should appeal both to retributive and to consequentialist schools of penal thought. If I am correct, the outstanding question is why the United States rarely implements systems of day fines rather than fixed fines or incarceration. *One* possible answer is the unexamined commitment to an objective metric of deprivation severity.

The replacement of fixed fines by day fines is probably the most promising innovation if we agree that the metric of the severity of a deprivation should be partly subjective. But the possibilities for replacing one mode of deprivation with another are endless if we continue down this path. To my knowledge, however, few theorists have seriously proposed that two offenders who commit the same crime should be sentenced to different amounts of time in prison because the hardships of incarceration are likely to be greater for one than the other. Why is this idea so rarely entertained if the rationale for day fines is so powerful? Perhaps our theory of the diminishing marginal utility of money has no clear counterpart with other deprivations. But I can only speculate that day fines are seen as especially attractive because their implementation would benefit the poor and disadvantaged---classes of people who have most often been treated unfairly by our criminal justice system. By contrast, a plan to reduce

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[35] My appreciation of the advantages of day fines is largely due to my supervision of Daisy Lee, a Rutgers undergraduate who produced "*Day Fining: Its Justifications, Effects, and Place in a Democratic Society*" (unpublished manuscript on file with author).

[36] Douglas C. McDonald, Judith Greene, and Charles Worzella: "Day Fines in American Courts: The Staten Island and Milwaukee Experiments." National Institute of Justice, Department of Justice, Washington, DC. (1992).

a prison term for offenders who are predicted to suffer disproportionately is more likely to benefit the rich and powerful---the very persons who already receive favorable treatment by our criminal justice system.

Still, why do those legal philosophers who hold a partly subjective metric of the severity of a deprivation not express more enthusiasm for day fines as a replacement for incarceration? The most respectable answer, I believe, is that a more extensive use of day fines would not adequately censure or stigmatize defendants who commit serious crimes.[37] It is to this second aspect of punishment I now turn.

V: MEASURING CENSURE AND STIGMA

The hard treatment or deprivation component is only one of the two dimensions along which the severity of a punishment must be measured. Whatever difficulties are encountered in deciding whether to construe this feature objectively or subjectively are replicated (and probably enlarged) when we turn to the censuring or stigmatizing aspect of punishment. This part of punishment has always been the more elusive, receiving less scrutiny from philosophers of criminal law than its counterpart of hard treatment. Still, its significance for purposes of applying the principle of proportionality cannot be exaggerated. Joel Feinberg goes so far as to contend "it is social disapproval and its appropriate expression that should fit the crime, and not hard treatment (pain) as such."[38] I am inclined to disagree; I believe *both* aspects are equally important when assessing whether the principle of proportionality is satisfied. The point I wish to stress, however, is that Feinberg's contention is barely intelligible unless the censuring of stigmatizing component of punishment is quantifiable. If we are to make meaningful judgments that one defendant has been censured and/or stigmatized more or less than another, we must be able to explain what these judgments mean.

Since even the terminology used to describe this dimension of punishment is non-standard, I begin with what may (or may not) be a stipulation. I take *censure* to be a judgment expressed by a sentencing authority, and *stigma* to be the intended effect on those who are censured.[39] I begin this Part with some difficult questions that must be addressed if the principle of proportionality is to be applied to this dimension of punishment. If a response must be intentional to qualify as a punishment, and an expression of censure is an essential component of punishment, it too must be intentional. Thus we must decide *whose* intentions should be taken as decisive in categorizing an expression as an instance of censure.[40] Should we focus on the intentions of legal officials, the person to whom the expression is directed, the public at large, or some other agent(s) altogether? Even if we restrict our attention to the expressions of legal officials---probably the most common answer---we must decide what to say when their intentions diverge. The problem is not simply that of locating a single intention

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[37] See Dan Kahan: "What Do Alternative Sanctions Mean?" 63 *University of Chicago Law Review* 591 (1996).

[38] Joel Feinberg: *Op.Cit.* Note 13, p.118.

[39] See the discussion in Katerina Hadjimatheou:"Criminal Labelling, Publicity and Punishment," 35 *Law and Philosophy* 567 (2016), esp. pp. 571-577.

[40] Some of these complexities are explored by Richard H. McAdams: The Expressive Powers of Law (Cambridge: Harvard University Press, 2015).

in a legislative body composed of several individuals. Even if this familiar difficulty can be overcome, the intentions of the legislature and that of a judge (not to mention those of other legal officials) might well differ in a particular case. For example, if a legislator enacts a drug statute because she believes that users deserve condemnation, but a judge with the authority to place the offender on probation exercises her discretion to send him to prison because she believes he is an addict who needs treatment that is available there, has the offender been censured?

I do not mean to minimize these difficulties, but I put them aside in order to focus on the topic at hand. What possible units can be used to describe whether or not one instance of censure and/or stigmatization is greater than another? To answer this question, we must again decide whether to evaluate the quantum of this dimension of punishment by adopting the perspective of the punisher or that of the person punished. In other words, is the amount of censure intended by the punisher decisive, or must we also consider the degree of stigma experienced by the person who is censured? The difficulty of answering this question mirrors that examined in the context of deprivations: identical expressions of censure do not stigmatize all recipients equally, and may not succeed in stigmatizing a given person at all. No one doubts that offenders vary greatly in whether and to what extent they are actually stigmatized when censured. Some are wracked with guilt and remorse and driven to the brink of suicide; others are unfazed. How should we deal with this fact? Arguably, in order for a sanction to qualify as a clear and uncontroversial instance of punishment, it not only must be imposed with the *intention* to censure, it must also *succeed* in creating stigma. If this assumption is correct, new difficulties in categorizing a sanction as punitive---and in gauging the extent of its severity---are presented. Consider an example. If an authority believes a shaved head is a badge of disgrace, but a person whose head is shaved regards it with indifference or pride, does this mode of treatment satisfy this definitional component of punishment? This question does not simply involve persons with unconventional or idiosyncratic beliefs. Efforts to generalize over a diverse population are not especially meaningful when applied to individual cases---even less so, I believe, than in the case of deprivations in which variations among persons are probably less extreme. Although the relevant authorities may have a punitive intent, entire groups within a single jurisdiction may not regard given kinds of treatment as especially stigmatizing.

As before with hard treatment, this problem can be bypassed by embracing an objectivist conception of this component of punishment. Thus the actual attitudes or reactions of those who are censured would again turn out to be irrelevant in measuring the severity of this aspect of punishment. If the particular offender reacts with a shrug and does not believe he is stigmatized at all, he has been punished as long as the relevant authorities hold whatever intentions are needed. After all, sentencing is a public act frequently accompanied by stern pronouncements about the offender, his offense, and law and order generally. Sentencing judges often take advantage of these occasions to express indignation and reprobation. No doubt these official expressions of opinion are painful to many offenders and, under ordinary circumstances, constitute an important source of the stigma they experience. Even if they fail to produce the intended reaction, objective accounts entail that the offender has been censured and thus punished. I suspect the majority of legal philosophers probably

regard this component of punishment as satisfied when offenders are censured, irrespective of how these expressions of censure are received.

An objective focus, however, again threatens to neglect an aspect of punishment that makes it especially hard to justify: its impact on the person punished. Restricting our attention to the intentions of legal officials in order to gauge whether and to what extent this feature of punishment is present encounters all of the foregoing difficulties in addition to a problem not replicated in the parallel question about deprivation: there is only so much the state *can* do to ensure that a given mode of treatment stigmatizes. In fact, stigma itself rarely results solely from the pronouncements of legal officials, or even from state action more generally. The state can deprive an offender of one or more rights and inflict pain, but whether and to what extent a particular mode of treatment causes stigma is not comparably within the power of the government to control. It can change the conditions of confinement to make them more or less pleasant, but the state has a limited ability to ensure that these effects will be experienced as stigmatizing. For better or worse, stigma cannot be created so easily.

It is not hard to devise alternatives to imprisonment that impose an appropriate amount of hardship. The greater challenge, however, is to identify alternatives that involve the requisite degree of disapprobation. Proposed solutions to this problem are limited by the requirement that deprivations not be 'degrading to human dignity'. Liberal states can and do recognize strict limits on what can be done to ensure that offenders are stigmatized when they are censured.[41] Options thus are limited. The familiar alternative of community service, for example, may be inadequate as a punishment because it is not sufficiently stigmatizing. After all, most persons are praised for community service; it is unclear how this activity becomes stigmatizing simply because an individual is 'sentenced' to perform it. And once alternative modes of punishment are available, by what criteria do offenders become eligible to participate in them? The most plausible means to distinguish those to be imprisoned from those to be punished by alternative means is that the former should be reserved for offenders whose crimes are serious and/or violent. But if stigma less often results from the alternative sentences for which non-violent offenders will qualify, it becomes difficult to successfully punish them at all.[42] Day fines, for example, are of limited use because they are inadequate for the most serious offenses. If stigma could be manufactured at will, as is more or less the case with deprivation, these problems would be solved far more easily.

It should be clear that the question of whether or not a particular form of treatment is stigmatizing is dependent on social conventions in a way that the question of whether a particular mode of treatment imposes a hardship or deprivation is not. Whether and to what extent treatment stigmatizes is largely a function of the relationship between the offender and the community in whose name the sentencing authority acts. Some legal philosophers go as far as to suggest that it is impossible to punish persons who are totally outside of a given community. Andrew Oldenquist writes: 'It is impossible to punish some people, for if they are completely alien or sufficiently alienated, they cannot

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[41] See R.A. Duff: Punishment, Communication, and Community (Oxford: Oxford University Press, 2001), esp. pp.81-82.

[42] See Dan Kahan: *Op.Cit.* Note 37.

be disgraced and they welcome rather than fear ostracism."[43] But one need not be totally alienated from a community in order to fail to regard traditional modes of deprivations as stigmatizing. History is replete with examples of persons who, for one reason or another, did not attach stigma to attempts to punish them. Henry David Thoreau famously maintained that "under a government which imprisons any unjustly, the true place for a just man is also in prison … The only house in a slave State in which a free man can abide with honor."[44] According to this train of thought, imprisonment in an unjust state, or even for an unjust law, is simply not to be construed as a punishment; it is a source of pride rather than stigma. If Thoreau chose to adopt this perspective about his sentence, it is hard to see how the state could succeed in persuading him that his treatment is, in fact, stigmatizing.

Since stigma is not created by the state in quite the way it imposes hard treatment, but depends far more upon social conventions that may or may not be shared, legal philosophers must pay more attention to the social conventions from which stigma derives. Following this suggestion will yield important insights. For example, I suspect that many discussions of collateral consequences among legal philosophers will turn out to be incomplete or misplaced. Instead of the narrow preoccupation with whether and to what extent non-state actors impose deprivations on offenders, philosophers should also be attentive to the myriad ways in which non-state actors are a source of stigma. *This* is perhaps the greater worry raised by the problem of collateral consequences.

Until we decide whether to measure censure (intentionally expressed by the state) as opposed to stigma (experienced by the offender who is censured), attempts to quantify this second aspect of punishment do not even get off the ground. We have little idea how to proceed even though proportionality determinations require (ceteris paribus) the severity of this component of punishment to be a function of the seriousness of the offense.

VI: THE INTERPLAY BETWEEN DEPRIVATION AND CENSURE

Despite the enormity of the foregoing problems, I fear that the greatest challenge in applying the principle of proportionality lies ahead. To describe it, imagine the above difficulties have been solved. Imagine, that is, that we somehow succeed in specifying a metric to represent the severity of a deprivation (d) and censure (c) (or stigmatization (s)). How should these units be combined in a single measure of the all-things-considered severity of a punishment? To my mind, this is the hardest question that must be answered if we hope to decide whether and to what extent one instance of punishment is more or less severe than another. No possible solution to this problem turns out to be unproblematic. As a result, I suspect that no *single* measure of punishment severity exists. Instead, all we might be able to conclude is that a given instance of punishment is more severe along one dimension (d) and less severe along another (c), with no clear means to specify which it is more or less severe simpliciter. This conclusion has potentially unsettling implications for the adequacy of any theory of sentencing, but is especially worrisome for a retributive theory that takes desert and proportionality to be central.

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[43] Andrew Oldenquist: "An Explanation of Retribution," 85 *Journal of Philosophy* 468-469 (1988).

[44] Henry David Thoreau: "Civil Disobedience," in The Writings of Henry David Thoreau (New York: AMS Press, 1968), pp.370-371.

I gather these two analytically distinct definitional components of punishment---deprivation d and censure c---*can* be disentangled for purposes of gauging the overall severity of a punishment. That is, it is conceptually possible for a given sanction to impose a substantial deprivation but only to express a relatively small amount of censure. The converse is possible as well: a sentence can involve enormous censure but inflict only a minor hardship. Both scenarios seem coherent, although it would be convenient to pretend they are conceptual impossibilities. The most straightforward way to deny their coherence is to adopt a simplifying hypothesis: the imposition of the deprivation *just is* the means by which censure is expressed and offenders are stigmatized. Although they are rarely explicit, many philosophers of punishment apparently take this hypothesis to be true.[45]

For three reasons, I reject this simplifying hypothesis as inaccurate and unhelpful. First, even if it were true in the case of censure, it is false in the case of stigma. Once we include the perspective of the person who is punished, stigmatization may or may not result from the expression of censure and the imposition of the deprivation. The example of Thoreau shows that conventional attempts to deprive can be unsuccessful in creating stigma and may instead be a source of pride. Second, when understood in its historical context, contemporary modes of punishment, less public than in previous eras, almost seem designed to *divorce* censure from hard treatment. Defendants are not required to wear scarlet letters or comparable badges of infamy, and the use of such practices as branding and other visible mutilations, or of such devices as the stocks and pillory, have long been rejected as barbaric and unconstitutional. A third and final ground to doubt that either censure or stigma is created by the same means as the deprivations that are imposed is that the former can and do survive long after the hardship has ended. In case there is doubt, one need only consider the long-standing use of criminal records exhaustively documented by Jim Jacobs.[46] As Jacobs explains, online permanent registries exist or have been proposed for sex offenses, persons convicted of drug trafficking, domestic violence, hate crimes, arson, and animal abuse.[47] As a result of such efforts, the censure and stigma experienced by many offenders is destined to persist throughout the course of their lives. This effect is a deliberate or foreseeable consequence of the way criminal records are kept and used, at least in the United States.

The contempt to which some persons are subjected after having committed criminal offenses often qualifies as an important source of the stigma that, from their perspective, comprises part of their punishment. Since persons who commit certain kinds of offenses such as rape and child molestation are ostracized so frequently and systematically, the issue of whether sentencing should be influenced by the stigma imposed by private parties arises more often than the parallel issue of whether sentencing should be influenced by the hard treatment imposed by non-state actors. After all, the state has some power to reduce the likelihood that offenders will be subjected to deprivations at the hands of persons who lack lawful authority. Still, I have speculated elsewhere about how the severity of a sentence

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In *Op.Cit.* Note 13, p.99, Feinberg suggests that "unpleasant treatment itself expresses the condemnation.' He [45] adds that "given our conventions, of course, condemnation is expressed by hard treatment." *Id.,*p.118. Duff maintains that "censure is communicated by hard treatment.: *Op.Cit.* Note 41, p.132. I do not construe these remarks to entail that the severity of whatever hard treatment is inflicted on an offender cannot diverge from how severely he is stigmatized.

James B. Jacobs: The Eternal Criminal Record (Cambridge: Harvard University Press, 2015).[46]

Id., p.51.[47]

should be affected by a case in which the state was unable to prevent private parties from imposing hard treatment upon an offender for an offense.[48] Consider an example in which a convicted criminal who deserves two years' imprisonment is abducted by vigilantes before he can be sentenced. To prevent what they fear will be an injustice, they 'sentence' the offender to a lifetime of solitary confinement in a prison of their own construction. Suppose that after two years the police discover and release this victim of 'vigilante justice'. Surely this person would be expected to plead that he had been 'already punished enough' if he were finally brought before the appropriate legal authorities for sentencing. It seems callous to reply that the defendant's ordeal cannot be allowed to reduce the severity of his sentence because it had not been imposed by the state. Civil remedies against the vigilantes for the tort of false imprisonment are little comfort to the offender if he is subsequently required by the state to serve the full term of his deserved sentence as though he had not already suffered a hardship in which his rights had been deprived.

Clearly, states make substantial efforts to prevent persons from exacting their brand of vigilante justice. If so, one might be puzzled about whether the state should exercise a comparable power to ensure that offenders are not subjected to excessive ostracism at the hands of persons who lack authority. If the stigma that results from ridicule is to be construed as part of punishment, and the principle of proportionality limits the amount of stigma that a given defendant should experience, it seems to follow that the state may occasionally have reason to intervene to limit the extent to which a defendant is ridiculed. In the absence of state action to protect criminal defendants, our society can hardly count upon self-imposed restraint to ensure that individuals are not ostracized well beyond their deserts. To be sure, it is hard to imagine a liberal state using its police power to silence tasteless and vindictive comedians. Still, excessive censure at the hands of private persons can provide a basis to reduce the severity of what is imposed by the state. If stigma is a necessary part of punishment, and stigma is rarely created solely by the state, but depends upon social convention, it must be true that what is not imposed solely by the state can be punishment---at least when judged from the perspective of the offender.[49] The stigma experienced by many offenders should not be deemed immaterial to their sentences simply because it is not a product of state action. In such cases, stigma emanates from the very source that is most effective in producing it.

Suppose, then, that the forgoing scenarios are conceptually possible. If so, legal philosophers who try to apply a principle of proportionality to particular cases must confront an enormous challenge. To my mind, this challenge is the greatest single obstacle to applying the principle of proportionality as I have formulated it. If the deprivation d1 imposed on Peter is great but the stigma s1 that he experiences is trivial, and the deprivation d2 imposed on Paul is small but the stigma s2 that he experiences is significant, has Peter been punished more or less severely than Paul overall? That is, on

[48] Douglas Husak: "Already Punished Enough," in Husak, ed.: The Philosophy of Criminal Law (Oxford: Oxford University Press, 2010), p.433.

[49] See Douglas Husak: "Does the State Have a Monopoly to Punish Crime?" in Chad Flanders and Zachary Hoskins, eds.: The New Philosophy of Criminal Law (New York: Rowman & Littlefield, 2016), p.97.

what common scale are different amounts of deprivation and stigma weighed to form a single judgment of the all-things-considered severity of punishment?[50]

On the assumption that an offender deserves a quantum of deprivation d as well as a quantum of stigma *s*, can the excessive amount of one component ever be a good reason to reduce the other below what would otherwise be deserved? The answer to this question depends in part upon which of two theories is used to describe the relationship between the stigmatization and hard treatment components of punishment. According to the first approach, these two components are entirely *independent*. The fact that an offender receives more or less of one component of punishment than she deserves is not a good reason to adjust the amount of the remaining component. According to the second approach, these two components are *dependent*. The fact that an offender receives more or less of one component of punishment than she deserves is a good reason to adjust the amount of the remaining component. Suppose a defendant deserves *d* and *s.* If the independent theory is accepted, any increase in d or *s* beyond what she deserves is not a good reason to reduce the amount of the remaining component, so no offender should be heard to complain that the excessive amount of humiliation she has endured is a good reason to reduce her hard treatment below what would ordinarily be deserved. If the dependent theory is accepted, however, the contrary would be true.

Is the independent or dependent theory preferable? Intuitions probably pull in both directions, but at least two arguments favor the dependent theory. First, if the stigma a defendant suffers is less than she deserves, there may be no adequate means by which the state can compensate her for her excessive punishment unless the hard treatment component is increased above that which she deserves and should otherwise receive. The dependence theory allows the state to make whatever adjustments in either component are needed to ensure that the overall quantum of punishment satisfies the demands of proportionality. A second reason to hold that the two components of punishment are dependent is as follows. The principle of proportionality requires the severity of punishment to increase with the seriousness of the crime. Ideally, both the hardship component d and the stigmatization component *s* would increase as crimes become more serious. Unfortunately, this generalization has any number of exceptions. Persons who commit a few kinds of offense are likely to suffer extraordinary stigmatization, even though their crimes are not especially serious and do not merit very severe punishments. Some kinds of sexual offenses provide the best examples of this phenomenon. In our society, a defendant who is convicted of indecent exposure is likely to be stigmatized to a much greater degree than a defendant who commits the more serious offenses of burglary. How should sentencing policy respond to this fact, given the inability of the state to effectively regulate the extent to which stigma is experienced by offenders? On the independence theory, sentencing judges should not take this disparity into account in deciding upon the amount of hard treatment that should be imposed upon defendants convicted of these crimes. In other words, the sentence to be imposed upon this defendant would not differ from the sentence that would be imposed were the stigmatization for his offense an accurate reflection of its real seriousness. As a result of this approach, the total quantum of punishment to be imposed upon this offender would exceed his desert. The best way to avoid the resulting injustice

[50] For earlier thoughts on many of these difficulties, see Husak: *Op.Cit.* Note 48.

is to treat the two components of punishment as dependent, so that the undue stigma provides a good reason to decrease the amount of deprivation that is otherwise deserved.

In principle, the amount of either d or *s* actually inflicted may be greater than that deserved by the defendant, but I suspect the latter is a more likely possibility than the former. As described above, the state is usually in a better position to limit the amount of hardship visited upon an offender to ensure it is kept within the boundaries required by proportionality. But it is more probable that the degree to which an offender is stigmatized will exceed the quantum she deserves. When defendants are stigmatized beyond their desert, the dependence theory provides a good reason to reduce the amount of hardship that should otherwise be imposed.

The precise nature of the relationship between the stigmatization and hard treatment components of punishment might be more complex than the labels of *dependence* or *independence* suggest. It may be reasonable to cap the extent to which increases beyond what is deserved in one component of punishment should be used to justify decreases in the other. Perhaps the proper punishment for a serious crime should involve a minimum amount of deprivation regardless of whether the offender has been stigmatized beyond her desert. The important point, however, is to understand the appeal of treating these two dimensions of punishment dependently.

VII: A DEFLATIONARY ROLE FOR PROPORTIONALITY

If most or all of the foregoing arguments are sound, the difficulties applying the principle of proportionality are enormous. We should probably conceptualize the metric of severity as partly subjective, although it is hardly obvious how to do so. Moreover, we have little idea how punishments imposed in excess of desert along one dimension should affect applications of proportionality generally. How should philosophers of criminal law respond if they are persuaded of these difficulties and unable to overcome them? The most radical option would be to jettison the principle of proportionality as entirely unworkable in a scheme of sentencing. I grudgingly accept that this alternative should be taken seriously.[51] Indeed, problems similar to those I have raised are sometimes cited as a basis for rejecting theories that afford a central place to desert. Nonetheless, I believe we should seek a less drastic response. If a difficulty cannot be solved, one can limit the damage it inflicts. The foregoing problems loom large to the extent that sentencing policy is alleged to be governed by desert. I am skeptical that any scheme of sentencing can pretend to be shaped solely or even primarily by such considerations. Thus we can adopt what might be called a *deflationary* account of the role of proportionality in sentencing theory. That is, we can continue to accept this principle with all of its imprecisions but limit its *strength* in our theory of sentencing. As I construe it, proportionality is a principle of desert, requiring offenders to be punished according to the seriousness of their offense. But this requirement does not entail that defendants must be punished according to their desert all-things-considered. Any given desert principle competes with other desert principles, as well as with principles that have nothing to do with desert. The latter are of special significance in this context. Even without abandoning

[51] Some theorists denounce proportionality as a "chimera," although their reservations more often stem from the notorious inability to assign *cardinal* numbers to proportionality determinations. See Nicola Lacey and Hanna Pickard: "The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems," 78(2) *Modern Law Review* 216 (2015).

retributivism and proportionality altogether, non-desert factors should permit substantial deviations from the elusive requirements of proportionality.

In determining whether a given sentence should be imposed, proportionality considerations provide only a small part of the answer. We must also consider the impact of the sentence on other parties who are affected. In cases of personal self-defense, for example, maiming a villain who threatens only to slap the face of an innocent victim is disproportionate and thereby unjustified. By contrast, maiming a villain who attempts to rape is proportionate. But even though the amount of force used by the innocent victim may be proportionate to whatever harm is threatened by the wrongful attacker, the force may still be unjustified because its infliction would cause more harm than it would avert overall. Suppose, for example, that the use of proportionate force against the wrongful attacker would cause his dependent children to suffer enormously. The use of proportionate force might well produce more harm than good, and thus be unjustified all-things-considered.[52]

The same phenomenon I have mentioned in the context of personal self-defense is also familiar in the context of penal sentencing. Variables that are hard to reconcile with the desert of the offender have always been invoked to justify punishments less severe than the principle of proportionality would seem to allow. Reasonable minds can and do differ about what non-desert factors should play this role. But different criminal histories provide the most familiar reason to impose different punishments on such persons. Few theorists contest the intuition that first-time and repeat offenders should be punished with unequal severity, although the nearly-universal policy that reflects this intuition has proved difficult to justify.[53] I doubt that this policy *can* be justified in terms of desert at all, but may be justifiable nonetheless. In any event, this probable exception to proportionality is not trivial. *Most* actual sentences in the real world involve recidivists and/or defendants charged with several crimes or multiple counts of the same crime. The principle of proportionality struggles to apply to these cases.[54] In any event, factors even more clearly irrelevant to desert than criminal history are routinely invoked to justify departures from proportionality.[55] Suppose an offender is terminally ill, for example, or old and infirm. Or suppose he has been seriously injured and permanently incapacitated in the very crime he perpetrated. Or suppose another has evaded capture for decades and has shown himself to be able to live respectably. It may be overly formalistic to insist that these factors *must* be immaterial to sentencing just because they cannot be reconciled with desert.

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[52] Jeff McMahan subsumes the considerations to which I refer as raising questions of *broad* rather than *narrow* proportionality. I am unsure these considerations should be thought to involve *proportionality* at all, but I take the debate to be purely terminological. See Jeff McMahan: Killing in War (Oxford: Oxford University Press, 2008).

[53] See the contributions in Julian V. Roberts and Andrew von Hirsch, eds.: Previous Convictions at Sentencing (Oxford: Hart Pub..Co., 2010).

[54] See Michael Tonry: "Human Dignity and Individualized Moral Responsibility in Punishment for Multiple Crimes," (forthcoming).

[55] The U.S. Sentencing Guidelines explicitly indicate that a number of factors, such as "lack of guidance as a youth," cannot be invoked to justify a departure from the sentence required by the Guidelines. See §5H1.12 in Departure and Variance Primer.
(http://www.ussc.gov/sites/default/files/pdf/training/primers/2014_Primer_Departure_Variance.pdf).

Recognizing these exceptions does not require that we reject the principle of proportionality as I have construed it. A different strategy is advisable: we should preserve the principle but weaken its strength. The weight of a principle, as I understand it, is a function of how easy or difficult it is to outweigh in its competition with other principles.[56] The above discussion might be construed to demonstrate that the principle of proportionality is not especially weighty. We can maintain what we roughly believe proportionality to require while allowing exceptions, as long as we find a good rationale to do so. If the force of proportionality can be outweighed without too much difficulty, it turns out to have fewer implications for the severity of the punishment to actually impose than many retributivists appear to believe. If we often have a good reason to inflict different quanta of punishment on two offenders who have committed the same crime with the same amount of culpability, we should not be overly worried that one sentence or the other may not implement proportionality. If I am correct, sentencing officials can appeal to all kinds of non-desert or consequentialist factors with little opposition from retributivists.[57]

Perhaps those cases in which disproportionate punishments are justifiable can be subsumed under the *ceteris paribus* clause that I have included in my formulation of the principle of proportionality. Clearly, "other things" almost never are equal. Again, however, the point is that the desert considerations represented by proportionality play a relatively small role in overall judgments of punishment severity. The weakness of the principle supplies the best explanation of how sentencing authorities are able to get by in the real world despite being unable to solve the problems I have identified. These problems do not really need to be solved with any precision because desert plays only a minor role in sentencing. Instrumentalist concerns play (and ought to play) a far larger role.

Recent history in sentencing drug offenders might illustrate the general strategy I have in mind. Since the introduction of drug courts, some defendants have been diverted to treatment programs while others have not. At one point, I questioned how this disparity could possibly be justifiable in light of the fact that the treatment program mandated by a drug court and the punishment imposed by a traditional court are almost certain to differ in their severity.[58] Drug court enthusiasts have been sensitive to this difficulty, and have felt enormous pressure to ensure that treatment regimes are onerous so they do not deviate from proportionality.[59] But a different response to this problem is not to increase the severity of treatment regimes, but to acknowledge the weakness of the principle of proportionality. A reasonable belief that different offenders are likely to respond favorably to different sanctions may be all that is needed to warrant a deviation from proportionality.

My conclusion is not that proportionality should play only a *limiting* role. It does not merely set an upper bound or range within which other considerations operate. Instead, my point is that our

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[56] Many of the complexities are discussed in Errol Lord and Barry Maguire, eds.: Weighing Reasons (Oxford: Oxford University Press, 2016).

[57] See Adam J. Kolber: "Against Proportional Punishment," 66 *Vanderbilt Law Review* 1141 (2013).

[58] Douglas Husak: "Retributivism, Proportionality, and the Challenge of the Drug Court Movement," in Michael Tonry, ed.: Retributivism Has a Past. Has It a Future? (Oxford: Oxford University Press, 2011), p.214.

[59] See James L. Nolan: Reinventing Justice: The American Drug Court Movement (Princeton: Princeton University Press, 2001.

inability to make precise proportionality determinations is less worrisome to the extent that it plays a smaller role in overall judgments of sentencing severity. Even if we somehow were able to make accurate proportionality calculations, we still would have a great many other grounds for departing from the sentence it would require. If this approach is generally sound, imprecision in the principle of proportionality is not a cause for panic. I hope this attempt to salvage a role for proportionality is not entirely *ad hoc.* The weight of proportionality is weak because proportionality is a principle of desert, and the weight of desert is weak in our all-things-considered judgments about how persons (offenders or otherwise) should be treated. Elsewhere, I have argued that a host of familiar problems in the philosophy of punishment can be avoided by contrasting two questions: (1) what punishment p is deserved, and (2) should the state actually impose p?[60] I believe the significance of judgments of desert in sentencing is not especially great; more weight should be placed on consequentialist considerations when we turn to question (2). Thus we should be willing to accept a deflationary role for proportionality if we regard it as part of a general theory of desert. I encourage retributivists to try to solve the problems I have presented. But they can stumble along tolerably well in the meanwhile, accepting a less central role for proportionality and desert without abandoning their relevance in a just theory of sentencing.

VIII: CONCLUSION

If the weight of the principle of proportionality is not especially great, is it nonetheless true that desert figures centrally in the justification of punishment---which I hold to be the defining mark of a retributivist theory? I doubt that a definitive answer can be given. If retributivism is defined simply as the claim that desert is indispensable to a theory of punishment, it is nearly impossible to *refute* it; a demonstration that desert does not play a given role in the justification of punishment is compatible with supposing it plays another.[61] No definitive answer can be given unless we know *how* central desert must be in order for a theory to qualify as a version of retributivism. We should probably understand a commitment to retributivism to admit of degrees, so that some theorists turn out to be more retributivist than others. One theory is more retributive than another not because it recommends harsher punishments across the spectrum of offenses, but rather because it affords a more central role to desert in sentencing philosophy. This way to conceptualize retributivism strikes me as all but inevitable once we admit that not everything of importance about the justification of punishment should be derived from considerations of desert. As I believe the arguments in this paper indicate, not all that is important about the justification of punishment *can* be derived from principles of desert.

[60] See Douglas Husak: "Why Punish the Deserving?" in Husak, ed.: *Op.Cit.* Note 48, p.393.

[61] Only those philosophers who produce arguments against the existence of (negative) desert can take themselves to have refuted retributivism. See, for example, Derek Parfit: On What Matters (Oxford: Oxford University Press, 2011), pp.263-272.