Risk-Based Sentencing and the Principles of Punishment

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RISK-BASED SENTENCING AND THE PRINCIPLES OF PUNISHMENT

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Risk-based sentencing regimes use an offender's statistical likelihood of returning to crime in the future to determine the amount of time he or she spends in prison. Many criminal justice reformers see this as a fair and efficient way to shrink the size of the incarcerated population, while minimizing sacrifices to public safety. But risk-based sentencing is indefensible even (and perhaps especially) by the lights of the theory that supposedly justifies it. Instead of trying to cut time in prison for those who are least likely to reoffend, officials should focus sentencing reform on the least advantaged who tend to be the most likely to reoffend.

INTRODUCTION

Over the last decade, prison populations in the United States began to decline for the first time since the early 1970s.[1] Fiscally conservative policymakers and redemption-focused Evangelical advocacy groups joined criminal justice reformers on the traditional liberal left in a growing bipartisan movement to replace the "tough on crime" tactics of the previous four decades with a new "smart on crime" approach.[2]

The key political challenge for this movement is to find ways to reduce the number of people in American jails and prisons without jeopardizing public safety. Elected officials contemplating various methods for reducing prison populations must balance considerations of fairness and efficiency with the kinds of populist appeals to punitive, racially charged, and alarmist narratives about crime that can hurt them at the polls.[3] Reformers, academics, and policymakers have latched onto the idea of doing this by expanding the

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[1] Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, SENT'G PROJECT (Sept. 17, 2019), https://www.sentencingproject.org/ publications/u-s-prison-population-trends-massive-buildup-and-modest-decline/ [https: //perma.cc/86EJ-3T8Y].

[2] JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 4 (2017). *But see* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 260–73 (2018) (arguing that this consensus is more limited than appearances suggest). The arguments I make below support Levin's thesis.

[3] *See, e.g.*, MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 77–114 (2014).

use of statistical risk assessment in policing,[4] prosecution,[5] pretrial detention,[6] and sentencing.[7]

Risk-based sentencing, in particular, has been central to recent law reform efforts.[8] Proponents see risk-based sentencing as an efficient way to shrink the social and economic footprint of American criminal justice systems while minimizing sacrifices to public safety.[9] Many states already have statutes that require sentencing officials to use risk-assessment tools,[10] and those that do not are "seriously considering" adopting similar statutes.[11]

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[4] *See, e.g.*, THOMAS ABT, BLEEDING OUT: THE DEVASTATING CONSEQUENCES OF URBAN VIOLENCE—AND A BOLD NEW PLAN FOR PEACE IN THE STREETS 115–33 (2019); LESLIE W. KENNEDY, JOEL M. CAPLAN & ERIC L. PIZA, RISK-BASED POLICING: EVIDENCE-BASED CRIME PREVENTION WITH BIG DATA AND SPATIAL ANALYTICS 71–100, 118–24 (2018).

[5] Andrew Gutherie Ferguson, *Predictive Prosecution*, 51 WAKE FOREST L. REV. 705, 716–27 (2016).

[6] Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 507–18 (2018).

[7] Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 63 (2018); Cecilia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV., 537, 539 (2015).

[8] *See, e.g.*, MODEL PENAL CODE: SENTENCING § 6B.09 (AM. L. INST., Proposed Final Draft 2017); 42 PA. CONS. STAT. § 2154.7 (2021); TENN. CODE ANN. § 41-1-412(b) (2021); WASH. REV. CODE § 9.94A.500(1) (2021).

[9] Christopher Slobogin, *Limiting Retributivism and Individual Prevention*, in THE ROUTLEDGE HANDBOOK ON THE PHILOSOPHY AND SCIENCE OF PUNISHMENT 49, 49–61 (Farah Focquaert, Elizabeth Shaw & Bruce N. Waller eds., 2020) [hereinafter Slobogin, *Limiting Retributivism*]; Christopher Slobogin, *A Defence of Modern Risk-Based Sentencing*, in PREDICTIVE SENTENCING: NORMATIVE AND EMPIRICAL PERSPECTIVES 107, 107–25 (Jan W. de Keijser, Julian V Roberts & Jesper Ryberg eds., 2019) [hereinafter Slobogin, *Modern Risk-Based Sentencing*]; Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680, 680 (2016); RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 63 (2013); Michael Marcus, *MPC—The Root of the Problem: Just Deserts and Risk Assessment*, 61 FLA. L. REV. 751, 776 (2009); Douglas Husak, *Why Legal Philosophers (Including Retributivists) Should Be Less Resistant to Risk-Based Sentencing*, in PREDICTIVE SENTENCING: NORMATIVE AND EMPIRICAL PERSPECTIVES 33, 33–55 (Jan W. de Keijser, Julian V Roberts & Jesper Ryberg eds., 2019); John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCH. 489, 493–94 (2016).

[10] *See, e.g.*, KY. REV. STAT. ANN. § 533.010(2) (West 2017); ARK. CODE ANN. § 16-93-615(a)(1)(B) (West 2015); TENN. CODE ANN. § 41-1-412(b) (2012); VT. STAT. ANN. tit. 28, § 204a(b)(1) (2009); N.H. REV. STAT. ANN. § 504-A:15(I) (2011); WASH. REV. CODE § 9.94A.500(1) (2021); *cf.* ALA. CODE § 12-25-33(6) (2021); 42 PA. CONS. STAT. ANN. § 2154.5(a)(6) (2009).

[11] Douglas A. Berman, *Are Costs a Unique (and Uniquely Problematic) Kind of Sentencing Data?*, 24 FED. SENT'G REP. 159, 160 (2012).

The Supreme Court held in *Jurek v. Texas* that even death sentences based on determinations of dangerousness pass constitutional muster,[12] noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."[13]

According to its to proponents, risk-based sentencing is justified by the "limiting retributivist" theory developed by Norval Morris and adopted in the Model Penal Code (MPC) sentencing provisions.[14] The MPC states that "no crime-reductive or other utilitarian purpose of sentencing may justify a punishment outside the 'range of severity' proportionate to the gravity of the offense, the harm to the crime victim, and the blameworthiness of the offender."[15] Nonetheless, on this view it is morally permissible to use risk-based sentencing as an efficiency-maximizing allocation mechanism for distributing punishment *within* the range of deserved sentencing severity. Furthermore, according to risk-based sentencing proponents, that range can be wide enough to permit large sentencing disparities between people convicted of similar offenses.[16]

This article, however, shows that risk-based sentencing cannot be vindicated even if one assumes the core theoretical premises that proponents take to be sufficient for its justification. For the sake of argument, as such, this article grants the following three premises:

1. Limiting retributivism is the best theoretical framework to determine the moral permissibility of risk-based sentencing.
2. Current methods of risk assessment yield reliable information about every offender's individual risk of recidivism.

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[12] Jurek v. Texas, 428 U.S. 262, 275–76 (1976).

[13] *Id*. at 275.

[14] MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (AM. L. INST., Proposed Final Draft 2017). The Model Penal Code eschews the "retributivist" label but nonetheless adopts the substance of the limiting retributivist theory part and parcel. Norval Morris develops the limiting retributivist theory in *The Future of Imprisonment*, though he does not take that theory to provide strong justification for risk-based sentencing (or what in the 1980s was called "selective incapacitation") until almost a decade later. *See* Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1, 36–37 (1985).

[15] MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (AM. L. INST., Proposed Final Draft 2017).

[16] *See, e.g.*, Slobogin, *Limiting Retributivism*, *supra* note 9, at 49 ("[A] system of relatively wide sentence ranges derived from retributive principles, in combination with short minimum sentences that are enhanced under limited circumstances by statistically-driven risk assessment and management, can alleviate many of the inherent tensions between desert and prevention, between deontology and political reality, and between the desire for community input and the allure of expertise.").

3.   Risk-based sentencing will be used solely to allocate reductions in sentencing severity from current levels, not to increase the amount of time spent in prison for anyone.

This Article demonstrates why risk-based sentencing is unjust, and potentially inefficient, even if one takes all three of these premises as given. In Part I, this Article outlines the argument in favor of risk-based sentencing under the Limiting Retributivist theory developed by Norval Morris and adopted in the MPC's new provisions on sentencing.

Part II examines the range of normative arguments against risk-based sentencing in the existing literature and illustrates some of their logical and empirical shortcomings. As it stands, recent criticisms cannot completely undermine the prevailing rationale without further explication and extension. Furthermore, Part II builds on the existing critical literature and shows that risk-based sentencing is ultimately indefensible, even by its proponents' own standard of evaluation.

Part III dissects the idea that risk-based sentencing is an efficient way to maximize the "incapacitation effects" of incarceration at the lowest possible cost. Criminological measures of incapacitation effects fail to account for replacement effects, crime inside of prisons and jails, and the corrosive and sometimes counterproductive effects of concentrated incarceration in disadvantaged neighborhoods. As such, policymakers do not have a clear picture of the effects of risk-based sentencing on public safety or aggregate social wellbeing more generally.

Part IV lays out this Article's central normative argument against risk-based sentencing, starting from the same core premises and theoretical framework that its proponents take to justify the practice. The argument proceeds in the following five steps, with the key principles derived at each step in bold font:

a.   First, this Article shows that the Limiting Retributivist framework that supposedly justifies risk-based sentencing is motivated by **Uncertainty about Desert**: the premise that it is impossible to know the precise level or severity of punishment an offender deserves in any given case.

b.   Second, this article shows that **Uncertainty about Desert** entails **Skepticism About Sentencing Guidelines**: that existing guidelines cannot ensure that sentencing severity falls within the morally permissible or "not undeserved" range.

c.   Third, this Article provides an independent defense of **Asymmetry**: the idea that judges should strongly favor punishing people *less* than they deserve over punishing them *more* than they deserve.

    d. Fourth, this Article briefly defends **Disadvantage as a Mitigating Factor**, according to which social and economic disadvantage should mitigate one's liability to legal punishment for most crime.[17]

    e. Finally, this Article shows that based on these four principles, officials should focus sentence reductions on the least socially and economically advantaged—who also tend to pose the greatest risk of reoffending—rather than those who pose the lowest risk.

There are five important caveats about the scope of this argument. First, this Article argues against risk-based sentencing as a normative matter rather than on constitutional or doctrinal grounds.[18] Second, the argument against risk-based sentencing does not apply specifically to "algorithmic" or "statistical" risk-assessment methods. Instead, it applies whenever risk is calculated with reference to proxies for socio-economic status regardless of whether the calculation is done by a statistical instrument, clinical psychologist or social worker, or sentencing judge. Third, this Article sets aside questions about the morality and efficiency of using risk assessments based on both gender and age at sentencing.[19] Those questions are addressed

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[17] For a detailed defense of this premise, see generally Christopher Lewis, *Inequality, Incentives, Criminality, and Blame*, 22 LEGAL THEORY 153 (2016).

[18] For a critique of risk-based sentencing on constitutional grounds, see Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 821–42 (2014).

[19] Men are much more likely to commit crime than women. *See, e.g.*, Darrell Steffensmeiser & Emilie Allan, *Gender and Crime: Toward a Gendered Theory of Female Offending*, 22 ANN. REV. SOC. 459, 463 (1996); MEDA CHESNEY-LIND & LISA PASKO, THE FEMALE OFFENDER: GIRLS, WOMEN AND CRIME 97–119 (2013); Karen Heimer & Stacy De Coster, *The Gendering of Violent Delinquency*, 37 CRIMINOLOGY 277, 293–94 (1999). And gender is often heavily weighted in risk-based sentencing and parole decisions. *See* Starr, *supra* note 18, at 823 ("Many of the risk prediction instruments now used for sentencing and parole decisions incorporate gender."). Similarly, offenders tend to "age out" of crime. *See, e.g.*, Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOCIOLOGY 552, 581 (1983) ("Age is everywhere correlated with crime. Its effects on crime do not depend on other demographic correlates of crime. Therefore it cannot be explained by these correlates and can be explained without reference to them. Indeed, it must be explained without reference to them."); Elizabeth P. Shulman, Laurence D. Steinberg & Alex R. Piquero, *The Age-Crime Curve in Adolescence and Early Adulthood is Not Due to Age Differences in Economic Status*, 42 J. YOUTH & ADOLESCENCE 848, 848 (2013). Like gender, age is heavily weighted in risk-based sentencing. *See, e.g.*, Megan T. Stevenson & Christopher Slobogin, *Algorithmic Risk Assessments and the Double-Edged Sword of Youth*, 96 WASH. U. L. REV. 681, 688–700 (2018) (showing that age explains over half of the variation in the individual risk scores rendered by a number of risk-assessment instruments commonly used in criminal sentencing, including the COMPAS Violent Recidivism Risk Score).

elsewhere in the literature.[20] Fourth, this Article avoids the broad spectrum of normative questions one might have about the use of prior criminal convictions in risk-based sentencing.[21] Prior convictions are one of the strongest predictors of future crime.[22] Much of the analysis to come does, in my view, applies to risk assessment based on prior criminal convictions.[23] But showing that society should stop punishing people with prior convictions more severely than first-time offenders, *ceteris paribus*, requires arguments separate from the ones offered here.[24] Fifth, and finally, there are reasons to be skeptical of the idea that punishment can ever be "deserved,"[25] but this

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[20] *See, e.g.*, Stevenson & Slobogin, *supra* note 19, at 682 ("[R]isk assessment algorithms should be transparent about the factors that most influence the score. Only in that way can courts and legislators engage in an explicit discussion about whether, and to what extent, young age should be considered a mitigator or an aggravator in fashioning criminal punishment."); Gina Schouten, *Are Unequal Incarceration Rates Unjust to Men?*, 3 L. ETHICS & PHIL. 136, 149 (2015) (defending the plausibility of the premise that "men are victims of injustice because their genetic or social endowment makes them likelier to end up in prison.").

[21] I take on this task in Christopher Lewis, *The Paradox of Recidivism*, 70 EMORY L.J. 1209 (2021).

[22] *See, e.g.*, Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 CRIMINOLOGY 575, 575 (1996); Shawn D. Bushway, Paul Nieuwbeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27, 28 (2011) ("[Y]oung novice offenders are redeemed [(i.e., have a similar probability of future offending as otherwise similar people with no prior convictions)] after approximately 10 years of remaining crime free. For older offenders, the redemption period is considerably shorter. Offenders with extensive criminal histories, however, either never resemble their nonconvicted counterparts or only do so after a crime-free period of more than 20 years."). Having a record of past convictions is also a proxy for low socio-economic status. *See, e.g.*, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 17 (2013).

[23] In *The Paradox of Recidivism*, *supra* note 21, at 1246–56, I argue that given how severely the collateral consequences of a criminal conviction often narrow people's life prospects, those with prior convictions face stronger incentives to commit future crime than people with no criminal record. If and when they re-offend, as such, their crimes manifest less ill-will than an otherwise similar crime committed by a first-time offender would and are thus less blameworthy. Given the many ways in which a mere arrest can similarly narrow one's life prospects, this analysis could be extended even further to risk assessment based on arrests or other contact with the criminal justice system that does not always lead to a criminal conviction. *See, e.g.*, Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826–44 (2015) (documenting the negative consequences of having an arrest record for people's immigration status, eligibility for public housing, job stability, child custody, and educational opportunities).

[24] *See* Lewis, *supra* note 21, at 1215–40.

[25] As Scanlon puts it, "a desert-based justification for treating a person in a certain way . . . holds this treatment to be justified simply by what the person is like and what he or she has done, independent of (1) the fact that treating the person in this way will have good

article's evaluation of risk-based sentencing does not depend on this skepticism.

I. THE RATIONALE FOR RISK-BASED SENTENCING

From a pure consequentialist perspective—where punishment is warranted if and only if the future benefits of any given sentencing decision outweigh the costs—risk assessment should be given free reign.[26] Under some background circumstances, risk-based sentencing might be more harmful than beneficial.[27] But on such a view, there is no reason to be skeptical of risk assessment in principle.

Alternatively, according to an orthodox retributive theory of punishment (or at least a caricature of such a view), a sentencing decision is justified if and only if it gives the offender what they deserve based on the seriousness of the offense and how blameworthy the offender is for committing it without regard to the future consequences that might flow from that sentencing decision.[28] Under this theory, risk assessment should play no role in determining the length or severity of criminal sentences except, insofar as the factors that make one more likely to also make one more blameworthy.[29]

As such—especially if the options under consideration are limited to the orthodox consequentialist and retributive theories that American law students are introduced to in the first-year criminal law course—the moral permissibility of risk-based sentencing may appear completely dependent upon abstract questions about the justification of punishment.[30] This is not

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effects (or that treating people like him or her in this way will have such effects); (2) the fact that this treatment is called for by some (justified) institution or practice; or (3) the fact that the person could have avoided being subject to this treatment by choosing appropriately, and therefore cannot complain of it." Thomas M. Scanlon, *Giving Desert Its Due*, 16 PHIL. EXPLORATIONS 101, 101 (2013). I am doubtful that state punishment under the criminal law can ever be justified in this way. *See also id.* at 103–05; *cf.* VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 60–87 (2011).

[26] *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME 133–50 (1975).

[27] *See infra* Part III.

[28] For perhaps the most uncompromising version of this view, *see* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 104–52 (1997).

[29] *See infra* Part II.A; *cf.* John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 428 (2006) (arguing that prior convictions ought to play a role at sentencing since they are relevant to both the offender's risk of future recidivism as well as his or her present blameworthiness).

[30] *See, e.g.*, JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 29–71 (6th ed. 2008); SANFORD KADISH, STEPHEN SCHULHOFER, CAROL STEIKER & RACHEL BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 89–106 (9th ed. 2012).

the theoretical landscape upon which risk-based sentencing debates take place, however.

A.   MORAL PERMISSIBILITY AND LIMITING RETRIBUTIVISM

By and large, risk-based sentencing proponents are not pure consequentialists, and critics are not orthodox retributivists. Rather, proponents argue that risk-based sentencing is justified under the "limiting retributivist" theory which is, as Richard Frase calls it, "the de facto consensus theoretical model of criminal punishment" in the United States[31] Critics, on the other hand, do not (for the most part) explicitly adhere to any theoretical framework, and the underlying normative basis for their criticism is often inchoate, as this article will demonstrate in Part II.

According to the limiting retributivist view set out in the MPC, crime control should be the guiding aim of punishment.[32] But the maximum (and sometimes minimum) severity of punishment that is permissible in any individual case is limited by the offender's moral desert, hence the "limiting" label.[33] As the MPC notes, sentencing officials should "render decisions in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."[34]

Orthodox consequentialist and retributive sentencing theories both face a number of seemingly intractable and well-worn objections. For example, a sentencing regime guided solely by consequentialist considerations could in principle condone the punishment of innocent people, the extremely harsh punishment of people convicted of minor offenses, or total leniency toward offenders convicted of extremely heinous acts, if doing so could promote social welfare or aggregate utility.[35] This strikes some as an intolerable theoretical result.[36] Similarly, a pure retributive sentencing theory would seemingly mandate punishing a "deserving" or blameworthy offender even

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[31] FRASE, *supra* note 9, at 4; MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (AM. L. INST., Proposed Final Draft 2017).

[32] MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (AM. L. INST., Proposed Final Draft 2017).

[33] *Id.*; NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 73–77 (1974).

[34] MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (AM. L. INST., Proposed Final Draft 2017).

[35] *See, e.g.*, Saul Smilansky, *Utilitarianism and the 'Punishment' of the Innocent: The General Problem*, 50 ANALYSIS 256, 257 (1990) ("[I]n the creation and daily application of the criminal law we are constantly facing a general situation in which utilitarians would be obliged to promote the 'punishment' of the innocent.").

[36] *Id.*

if it were certain that no good consequences would follow from doing so.[37] It is difficult to explain how making an offender suffer could be intrinsically, rather than merely instrumentally, valuable.[38] And even if it were intrinsically valuable to punish people who deserve it, it may not follow that *the state* is morally required (or even permitted) to spend public resources on that objective.[39]

These problems led a number of theorists before Morris—most notably John Rawls and H.L.A. Hart—to advance various forms of "hybrid" or "mixed" theories of punishment.[40] In Rawls' view, institutions and systems of punishment should be evaluated according to consequentialist considerations;, while the individual conviction and sentencing decisions rendered by juries and judges should be justified and evaluated in light of retributive, or non-consequentialist, considerations.[41] In Rawls' words, , punishment should be given "only to an offender for an offense."[42] Hart argued, similarly, that crime control should be the "general justifying aim" of penal institutions but that the "distribution" of punishment should be governed by retributive principles, prohibiting the punishment of the innocent.[43]

Norval Morris was animated by similar concerns to those that underlie Rawls' and Hart's "hybrid" theories.[44] But Morris was more concerned than Rawls and Hart were with the principles that should govern sentencing decisions; and Morris saw a criminal trial's sentencing phase more distinctly from the conviction phase than Rawls and Hart did. Whereas Rawls and Hart posited that retributive principles could determine decision-making at both the sentencing and conviction phases of the trial, Morris was skeptical. Morris was concerned about another problem of retributivism that Rawls and Hart paid less attention to: the difficulty of measuring *how much* punishment

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[37] As Kant famously put it, "Even if a civil society were to be dissolved . . . the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment." IMMANUEL KANT, THE METAPHYSICS OF MORALS 106 (Mary Gregor ed., Cambridge Univ. Press 1996) (1797).

[38] TADROS, *supra* note 25, at 60–87.

[39] *See, e.g.*, *id.* at 78–83; David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1627–30 (1992).

[40] John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–7 (1955); H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 1–28 (1968).

[41] Rawls, *supra* note 40, at 4–7.

[42] HART, *supra* note 40, at 9.

[43] *Id.* at 1–28.

[44] MORRIS, *supra* note 33, at 58–85.

any given offender "deserves." This difficulty is especially acute at sentencing, though not at the conviction phase.

Criminal law theorists often call this the "anchoring problem" for retributive sentencing theory.[45] "Cardinal proportionality"—requires sentences to be proportionate to the seriousness of the crime and the extent to which the offender is blameworthy for it, without reference to how others might be sentenced for similar offenses. This demands a kind of moral currency-exchange: time in prison must be weighed against the nature of the crime and the extent to which the offender is blameworthy for committing it. But there is no consensus on what the appropriate "exchange rate" ought to be.[46] For example, should someone convicted of assault and battery with no apparent justification or excuse get five weeks, five months, or five years in prison? Opinions vary widely on such questions and limiting retributivism does not provide criteria to resolve them.

According to Morris, it is impossible to *know* exactly how severely any given offender deserves to be punished, because judgements about desert are inherently imprecise. But, Morris argued, there are certain broad parameters outside of which punishment would seem patently unjust to almost anyone.[47] These parameters, in Morris' view, are "overlapping and quite broad."[48]

This view underlies the way that proponents think about the justification of risk-based sentencing. As Skeem and Lowencamp put it, an offender's future risk of reoffending "is considered—and in our view *should* be considered—within bounds set by moral concerns about culpability."[49] Specially, "retributive concerns set a permissible range for the sentence (e.g., five to nine years), and risk assessment is used to select a particular sentence from within that range (e.g., eight years for high risk)."[50] Crucially, Skeem and Lowencamp state, "Risk assessment should never be used to sentence offenders to more time than they morally deserve."[51] Limiting retributivism thus supplies the moral principles under which proponents think that risk-

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[45] *See, e.g.*, Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 83 (1992).

[46] Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 94–96 (2013); *cf.* William Samuel & Elizabeth Moulds, *The Effect of Crime Severity on Perceptions of Fair Punishment: A California Case Study*, 77 J. CRIM. L. & CRIMINOLOGY 931, 945 (1986) (arguing that "there *is* widespread agreement among various demographic and political groupings in the general population concerning what constitutes fair punishment for crimes.").

[47] MORRIS, *supra* note 33, at 59.

[48] NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 151 (1982).

[49] Skeem & Lowenkamp, *supra* note 9, at 682.

[50] *Id.* at 683.

[51] *Id.*

based sentencing is rendered *permissible*. But proponents think that risk-based sentencing is *desirable*, or economically efficient, not merely permissible.

B.   ECONOMIC EFFICIENCY AND INCAPACITATION EFFECTS

Within the broad limits set by inevitably imprecise judgments of what people deserve, Morris thought sentencing decisions should efficiently promote crime control. The "parsimony principle," as Morris calls it, is the idea that at sentencing, the "least restrictive (punitive) sanction necessary to achieve defined social purposes should be imposed."[52]

The "parsimony principle" is central to contemporary defenses of risk-based sentencing under the limiting retributivist outlook. The newly revised MPC provisions on sentencing make this argument explicitly:

> If used as a tool to encourage sentencing judges to divert low-risk offenders from prisons to community sanctions, risk assessments conserve scarce prison resources for the most dangerous offenders, reduce the overall costs of the corrections system, and avoid the human costs of unneeded confinement to offenders, offenders' families, and communities.[53]

In other words, risk-based sentencing seems like an efficient allocation mechanism for scarce prison resources. The fact that one inmate is more likely to reoffend than another is unlikely to have much effect on how much it *costs* to feed or house the prisoner, for example. But the *benefits* of incarcerating any given offender would seem to vary enormously depending on how likely he or she is to commit future crime. This is primarily due to "incapacitation effects."[54] The more likely one is to commit crime, the thought goes, the greater threat one poses to public safety outside of prison. Incarceration shields the public from those in prison;; so there is much less

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[52] MORRIS, *supra* note 33 at 60–62.

[53] MODEL PENAL CODE: SENTENCING § 6B.09 cmt. d (AM. L. INST., Proposed Final Draft 2017).

[54] *See, e.g.*, Alex Piquero & Alfred Blumstein, *Does Incapacitation Reduce Crime*, 23 J. QUANTITATIVE CRIMINOLOGY 267, 267–68 (2007). Deterrence (either "specific" or "general") could potentially be thought of as a secondary avenue through which risk assessment might contribute to crime control. If 'riskier' offenders are given harsher sentences, they may be more strongly deterred from reoffending. But these effects are likely to be much weaker than any incapacitation-related effects since the severity of a potential punishment is much less powerful as a deterrent than the likelihood of being caught, which sentencing and corrections officials cannot control. *See, e.g.*, Daniel Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECON. 83, 85 (2013).

benefit associated with incarcerating someone who is unlikely to reoffend than there is with locking up someone who is at a high risk of recidivism.[55]

As such, cutting prison sentences for lower-risk offenders appears to be both morally permissible and economically efficient. On its face, risk-based sentencing seems like the most efficient way to reduce the fiscal burden of prison systems with the lowest possible cost to public safety.

II. INCONCLUSIVE ARGUMENTS AGAINST RISK-BASED SENTENCING

Risk-based sentencing has, however, come under intense criticism in both the popular media and the scholarly literature.[56] This criticism largely focuses on various forms of racial disparity that risk-based sentencing might engender or exacerbate.[57]

Risk-assessment instruments rely on demographic information that is constitutive of or correlated with socio-economic status—and thus, with race—to predict how likely any given offender is to return to crime when they re-enter the public.[58] The factors that drive these predictions include

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[55] *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME 145–61 (1975); PETER W. GREENWOOD, SELECTIVE INCAPACITATION x–xii (1982).

[56] *See generally* Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, Machine Bias, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/838D-Q6C8] (arguing that risk-based sentencing is biased against Black defendants); Starr, *supra* note 18 (arguing that risk-based sentencing violates the Equal Protection Clause of the 14th Amendment); BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007) (arguing that "actuarial methods" in the administration and enforcement of criminal law may be counterproductive to crime control aims, aggravate the social costs of punishment, and distort conceptions of "just punishment"); Michael Tonry, *Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again*, 48 CRIME & JUST. 439 (2019) (arguing that risk-based sentencing unfairly penalizes defendants for personal characteristics they have no control over).

[57] The literature has focused mostly on disparities between Black people and White people. *But see* Melissa Hamilton, *The Biased Algorithm: Evidence of Disparate Impact on Hispanics*, 56 AM. CRIM. L. REV. 1553, 1563–77 (2019) ("[R]eporting on an empirical study about risk assessment with Hispanics at the center.") The literature has virtually ignored class-based inequality, except insofar as class is a proxy for race. This is understandable in the constitutional evaluation of risk-based sentencing, given that race is a protected category under the 14th Amendment, while class is not; but the lack of attention to class is less justifiable in the broader normative policy analysis of risk-based sentencing.

[58] Seena Fazel, Zheng Chang, Thomas Fanshawe, Niklas Langstrom, Paul Lichtenstein, Henrik Larsson & Susan Mallett, *Prediction of Violent Reoffending on Release from Prison: Derivation and External Validation of a Scalable Tool*, 3 LANCET PSYCHIATRY 535, 540 (2016); Grant Harris, Marnie Rice & Catherine Cormier, *Prospective Replication of the* Violence Risk Appraisal Guide *in Predicting Violent Recidivism Among Forensic Patients*, 26 LAW & HUM. BEHAV. 377, 378 (2002); Martin Grann, Henrik Belfrage & Anders Tengstrom,

education level, employment history, "high neighborhood deprivation" (which is measured according to *per capita* educational attainment), welfare recipiency, immigration status, marital history, residential stability, neighborhood crime rates, social isolation, home ownership, whether one lived with their biological parents until age sixteen, and whether one has been a *victim* of crime themselves.[59] Offenders who are well-off on these measures—who are more likely to be White—will present a lower risk of recidivism than those who are comparatively disadvantaged—who are more likely to be Black.[60] As a result, many White offenders will get lighter sentences than Black people convicted of the same sorts of crime.

Critics claim that, insofar as risk-based sentencing tends to exacerbate racial disparity, it is unjust and potentially inefficient.[61] Part II canvases the range of existing normative arguments given for this position and illustrates some of their shortcomings.

A. ALGORITHMIC FAIRNESS

Policy analysts and data scientists offer technical critiques of risk-based sentencing due to concerns about the predictive power of our current statistical instruments. The most highly publicized critique was a 2016 exposé written by investigative journalists and researchers at the nonprofit organization ProPublica.[62] The report declares stridently that "[t]here's software used across the country to predict future criminals. And it's biased against [B]lacks."[63]

But the ProPublica report is remarkably congenial toward the idea that risk-based sentencing could be justified in principle.[64] Indeed, the authors accept similar normative principles to those that animate proponents of risk-based sentencing.[65] As the ProPublica report puts it, "If computers could accurately predict which defendants were likely to commit new crimes, the criminal justice system could be fairer and more selective about who is incarcerated and for how long."[66]

Actuarial Assessment of Risk for Violence: Predictive Validity of the VRAG *and the Historical Part of the* HCR-20, 27 CRIM. JUST. & BEHAV. 97, 98 (2000).

[59] *See* sources cited *supra* note 58.

[60] *See, e.g.*, Bernard Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237 (2015).

[61] *See* sources cited *supra* note 56.

[62] Angwin, Larson, Mattu & Kirchner, *supra* note 56.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

Implicit in the ProPublica authors' stance is the idea that if our algorithmic risk instruments *were* able to predict future crime in an "unbiased" way, then it would be fair and efficient to base our sentencing decisions on the forecasts those instruments deliver. "The trick, of course, is to make sure the computer gets it right"[67] "If it's wrong in one direction, a dangerous criminal could go free. If it's wrong in another direction, it could result in someone unfairly receiving a harsher sentence or waiting longer for parole than is appropriate."[68] But the report argues that these instruments—in particular, the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) tool, which is used in several state sentencing systems—deliver unfair predictions because they produce racially disparate error rates.[69]

Specifically, COMPAS was significantly more likely to classify Black defendants as "high risk" even if they would not subsequently be rearrested than White defendants who also avoided future arrests.[70] COMPAS was also much more likely to classify defendants as "low risk" who *did* subsequently get rearrested if they were White than if they were Black.[71] Thus, COMPAS produced a higher percentage of "false positives" for Black defendants and a higher percentage of "false negatives" for White defendants.

Northpointe (now Equivant), the company that developed COMPAS, published a response to the ProPublica report which argued that COMPAS is completely unbiased because rates of rearrest for those it classified as "high risk" were equal for Black and White defendants, thus satisfying the principle of "predictive parity."[72]

Computer scientists and legal scholars continue to debate what measures of "fairness" or "equality" risk-assessment instruments and other algorithmic decision-making tools should incorporate and prioritize.[73] It is impossible for these technologies to achieve "predictive parity," Northpointe's preferred measure of algorithmic fairness, while simultaneously equalizing error rates (producing the same percentage of false

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[67] *Id.*

[68] Angwin, Larson, Mattu & Kirchner, *supra* note 56.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

positives or false negatives) between constitutionally protected groups.[74] Thus, sentencing officials must choose which standard to prioritize.

This technical literature by and large takes for granted the premise that if risk-assessment instruments satisfied the appropriate standard of "algorithmic fairness," it would be fair and efficient for sentencing officials to base their decisions on the predictions they produce.[75] This premise logically motivates inquiries about algorithmic fairness in the first place. After all, if risk-based decision-making in sentencing were inescapably unfair or inefficient, then there would be no point in fine-tuning the algorithms in order to meet some internal standard of algorithmic fairness. The very idea of algorithmic fairness would be absurd.

Thus, the technical literature on algorithmic fairness largely bypasses the fundamental normative questions one must answer in order to know whether officials should base sentencing decisions on assessments of an offender's future risk of recidivism and what constraints (if any) should limit decisions made on such a basis. This Article seeks to shed light on these more fundamental questions.

B. ORDINAL PROPORTIONALITY

The principle that crimes of equal moral severity should be punished alike and that a crime of greater severity should be punished more harshly than one that is relatively less severe—the principle of **Ordinal Proportionality**[76]—seems clearly inconsistent with risk-based sentencing.

Andreas von Hirsch provides the most in-depth defense of ordinal proportionality.[77] In von Hirsch's view, the principle of ordinal proportionality can be derived from the conceptual nature of punishment itself.[78] Punishment, according to the prevailing view, necessarily conveys censure, disapprobation, or blame (he uses these three terms synonymously).[79] As von Hirsch finds, "punishing consists of doing

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[74] Richard Berk, Hoda Heidari, Shahin Jabbari, Michael Kearns & Aaron Roth, *Fairness in Criminal Justice Risk Assessments: The State of the Art*, 50 SOCIO. METHODS & RSCH. 3, 23 (2018).

[75] *Id.*

[76] *See* ANDREAS VON HIRSCH, DESERVED CRIMINAL SENTENCES: AN OVERVIEW 55–62 (2017).

[77] *Id.*

[78] *Id.* at 17–22.

[79] As Joel Feinberg famously put it, "Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those 'in whose name'

something unpleasant to someone, because he has committed a wrong, under circumstances and in a manner that conveys disapprobation of the person for his wrongdoing."[80]

This expressive function is a necessary feature of punishment in any context rather than a contingent feature of criminal punishment in contemporary Anglo-American legal systems, on the standard view.[81] For example, punitive incarceration is supposedly distinguished from involuntary civil commitment to a psychiatric hospital because the former conveys censure while the latter does not—even if the physical conditions of life in an asylum are otherwise more or less the same as life in prison. This expressive function is salutary, according to von Hirsch.[82] It gives victims an acknowledgement that they were wronged, and it gives offenders an opportunity to recognize the wrongfulness of their crimes, make efforts not to reoffend, or to provide a justification for what they have done—which acknowledges their status as a moral agent.[83]

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the punishment is inflicted." Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965). Feinberg does not use the word "blame" here, but the now-standard view in moral philosophy about the psychological nature of blame is that it is constituted by the same "attitudes of resentment and indignation" and "judgments of disapproval and reprobation" he says that punishment expresses. *See, e.g.*, R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 51–84 (1994); Susan Wolf, *Blame, Italian Style*, *in* REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T.M. SCALON 332–47 (R. Jay Wallace, Rahul Kumar & Samuel Freeman eds., 2011); Leonhard Menges, *The Emotion Account of Blame*, 174 Phil. Stud. 257, 257 (2017). These authors generally take themselves to be following P.F. Strawson's famous essay *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1 (1962). *But c.f.* T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, AND BLAME 122–23 (2008) (defending a "relational" conception of blame according to which "[t]o blame a person for an action . . . is to take that action to indicate something about the person that impairs one's relationship with him or her, and to understand that relationship in a way the reflects this impairment.") In other work, I defend an argument for the principle of ordinal proportionality that does not depend on the "mereological" premise about the conceptual nature of punishment that von Hirsch rests on, and instead grounds that principle on a political norm of equal regard. The grounding of the principle of ordinal proportionality is not of central importance here, so I do not explicate those arguments here.

[80]   VON HIRSCH, *supra* note 76, at 17.

[81]   This view is shared by a number of prominent criminal law theorists. *See, e.g.*, Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L. J. 775, 800–06 (1997); Feinberg, *supra* note 79, at 400; VON HIRSCH, *supra* note 76, at 17–22. *But see* Ambrose Y. K. Lee, *Arguing Against the Expressive Function of Punishment: Is The Standard Account That Insufficient?*, 38 LAW & PHIL. 359, 359 (2019) ("[T]he standard account of punishment, according to which punishment is a kind of hard treatment that is imposed on an alleged offender in response to her alleged wrongdoing, can already properly account for punishment and distinguish it from other kinds of hard treatment when it is properly clarified and understood.").

[82]   VON HIRSCH, *supra* note 76, at 18.

[83]   *Id.*

von Hirsch infers that "since punishment does and should convey blame, its amount should reflect the degree of blameworthiness for the criminal conduct."[84] von Hirsch tells us, "[b]y penalizing one kind of conduct more severely than another, the punishing authority conveys the message that the conduct is worse—which is appropriate only if the conduct is indeed worse," and goes on to say "[i]f penalties were ordered in severity inconsistently with the comparative seriousness of crime, the less reprehensible conduct would, undeservedly, receive the greater reprobation."[85]

The problem with risk-based sentencing, then, is that it does precisely what the principle of ordinal proportionality forbids: it conveys different degrees of blame or censure to people who committed equally reprehensible crimes.[86] As Michael Tonry puts it, "No one should be punished more severely than [they] would otherwise be because [they are] rich or poor, well or inadequately educated, married or single, working or unemployed."[87] But these are exactly the factors that risk-assessment instruments use to predict recidivism.

Proponents, however, argue that risk-based sentencing should and does operate within the "'range of severity' proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders" which is also the MPC's criteria for permissible punishment.[88] It does not matter, under this limiting retributivist view, whether "high risk" offenders are more or less blameworthy or culpable than "low risk" offenders convicted of similar offenses.[89] As long as officials render sentencing decisions within the permissible *range* of severity, then the *relative* severity with which one person is punished compared to one another is irrelevant.[90] Cardinal Proportionality—ensuring that the severity of any given offender's sentence is appropriate in *absolute* terms, without reference to how severely anyone else is punished—trumps Ordinal Proportionality, according to this line of thought.[91]

The following hypothetical illustrates this reasoning:

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[84] *Id.* at 49–50.

[85] *Id.* at 51.

[86] Tonry, *supra* note 56, at 459.

[87] *Id.*

[88] MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (AM. L. INST., Proposed Final Draft 2017).

[89] *Id.*

[90] *Id.*

[91] *Id.*

Petty Thieves: Mundungus and Peeves are petty thieves. Each of them breaks into empty homes and steals some personal items worth $500. They are caught, and eventually convicted of burglary. Mundungus is from a poor family and was homeless and unable to find legitimate work at the time of the offense. Peeves is well-off and from a wealthy background, but simply enjoys the thrill of breaking into other peoples' homes and stealing things on the weekends. We can safely stipulate that Peeves is the more blameworthy of the two, as such.

Now consider three potential sentencing options for the pair of burglars:

Option 1: Peeves gets probation on the grounds that, statistically, he poses less of a future risk of reoffending given his wealthy background. Mundungus gets a year in prison given his higher risk of recidivism.

Option 2: Mundungus gets ten years in prison, and Peeves gets a life sentence without the possibility of parole on the grounds that he is much more blameworthy for the offense than Mundungus.

Option 3: Mundungus gets one year in prison and Peeves gets two.

For all but the most extremely punitive readers, Option 1 is likely to seem less unfair than Option 2—despite the fact that it is safe to assume Mundungus is less blameworthy for the burglary than Peeves. Option 1 certainly seems unfair in that the less blameworthy person gets the harsher sentence. But while Option 2 may preserve Ordinal Proportionality, it does so at a cost to Cardinal Proportionality. And in both scenarios, *neither* of the two burglars receives a proportional punishment in an absolute sense.

Option 3 preserves Ordinal Proportionality, but less clearly (or at least less enormously) exceeds the bounds of Cardinal Proportionality. It may be unclear to some readers whether Option 3 is preferable to Option 1. But proponents of risk-based sentencing will argue that choosing Option 3 over Option 1 amounts to demanding *harsher* punishment for the well-off with no apparent benefit for the badly-off who are the supposed objects of critics' concern.[92] After all, Mundungus gets the same sentence in both scenarios.

Critics thus face a form of the "levelling down objection."[93] "Positive" retributivists could respond that the relatively well-off offenders, who would stand to benefit most from risk-based sentencing reform (like Peeves),

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[92] *See* sources cited *supra* note 9.

[93] *See, e.g.*, Larry Temkin, Inequality 247–48 (1993); G.A. Cohen, *How to do Political Philosophy*, *in* On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy 228–29 (Michael Otsuka ed., 2011).

deserve to be punished more harshly than such reforms would allow.[94] But liberal and progressive critics of risk-based sentencing do not, for the most part, endorse retributivism (at least not explicitly).[95] Many on the progressive and liberal left consider retributivism overly punitive,[96] vulnerable to racially biased application,[97] and even outright barbaric.[98] And even those who are sympathetic to the view may not think that giving people the punishment they deserve outweighs the potential drawbacks of punishment, such as the fiscal burden it imposes on the citizenry.[99]

Thus, it is not clear how Ordinal Proportionality should be weighed against other potentially competing values in assessing the case for and against risk-based sentencing. The fact that risk-based sentencing seems inconsistent with Ordinal Proportionality does not *alone* provide a compelling reason to reject the former.[100]

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[94] The underlying basis of such a response could be either (1) a concern with the *absolute*, or "cardinal" degree of severity with which we punish the well-off, or (2) a concern with the *relative*, or "ordinal" degree of severity with which we punish them compared to the badly-off. *See, e.g.*, ANDREAS VON HIRSCH, DESERVED CRIMINAL SENTENCES § 5 (2017).

[95] *See supra* Parts II.A, II.C–E.

[96] *See, e.g.*, Barbara H. Fried, *Beyond Blame*, BOSTON REV. (June 28, 2013), https://bostonreview.net/forum/barbara-fried-beyond-blame-moral-responsibility-philosophy-law/ [https://perma.cc/P6R5-XG3Z] (arguing that, despite scientific research on the determinants of human behavior, which casts doubt on the idea of free will, recent decades have been "boom years for blame," and that "[r]etributive penal policy, which has produced incarceration rates of unprecedented proportions in the United States, has been at the forefront of the boom."); James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 94–95 (2003) ("It is not entirely an accident that retributivism has come to the fore during the period of our crackdown."); Robert Weisberg, *Barrock Lecture: Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1204, 1221 n.92 (2012) (asserting that retributivism is "the very rationale for punishment most associated with the specific legal changes of recent decades that are the most obvious causes of the great increase in incarceration," but noting separately that "much of the new sentencing legislation is probably better explained by an angry devotion to incapacitation, especially in terms of 'three strikes' and other habitual offender laws.").

[97] *See, e.g.*, Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1293 (2006) (arguing that judgments about desert are "*opaque*: they appear to be influenced in some cases by racial bias or other extralegal considerations, but such bias is cloaked by the moral authority of desert claims.").

[98] VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 73–78 (2011).

[99] *See, e.g.*, Douglas N. Husak, *Why Punish the Deserving?*, 26 NOÛS 447, 450–52 (1992).

[100] Part III of this article will demonstrate that the comparative blameworthiness of low- and high-risk offenders undermines the prevailing rationale. But this argument requires more than simply showing that risk-based sentencing is inconsistent with Ordinal Proportionality.

C.   DISPARITY AND COMMUNITY

Perhaps the most powerful objection to risk-based sentencing is that it is likely to increase race and class-based disparity in prison populations, and that it will thus have harmful effects on poor, predominantly Black communities where incarceration is already concentrated.[101] As Starr puts it, "[T]he mass incarceration problem in the United States is drastically disparate in its distribution. This unequal distribution is a core driver of its adverse social consequences, because it leaves certain neighborhoods and subpopulations decimated."[102]

There is a large literature documenting the harmful effects of concentrated incarceration in poor, predominantly Black communities.[103] But the fact that risk-based sentencing leads to increased race- and class-based disparity does not entail that it will necessarily increase the concentrated incarceration of poor, Black people. After all, proponents cast risk-based sentencing as a way to sensibly *reduce* prison populations, not as a way to increase sentencing severity for Black people or the poor.[104] So, if risk-based sentencing were used solely as a mechanism for allocating reductions in sentencing severity from the status quo, this objection would hold little weight.

Critics are skeptical that risk-based sentencing could ever be used solely to reduce imprisonment, however. As Starr says, "Although we do not know whether [risk-based sentencing] will reduce incarceration on balance, the most intuitive expectation is that it will increase incarceration for some people (those deemed high risk) and reduce it for others (those deemed low risk). If so, it will further demographically concentrate mass incarceration's impact."[105]

More recent empirical research supports Starr's and other critics' skepticism: judges who are given algorithmic predictions of an offender's likelihood of future recidivism are more likely to impose longer sentences on high-risk offenders than they would in the absence of such predictions.[106]

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[101]   Starr, *supra* note 18, at 836–39; HARCOURT, *supra* note 56, at 160–68.

[102]   Starr, *supra* note 18, at 837.

[103]   *See infra* Part III.A.

[104]   *See, e.g.*, Skeem & Lowenkamp, *supra* note 9.

[105]   Starr, *supra* note 18, at 837. Erin Collins also argues that risk-based sentencing in fact is not (and will not be) used solely to reduce prison populations. Erin Collins, *Punishing Risk*, 107 GEO. L. J. 57, 91–108 (2018).

[106]   Megan T. Stevenson & Jennifer Doleac, Algorithmic Risk Assessment in the Hands of Humans, 17–19 (Dec. 2019) (unpublished manuscript), http://hdl.handle.net/10419/215249 [https://perma.cc/6689VHX].

But what if sentencing officials were constrained so that risk-based sentencing could only be used to reduce sentence length? If the problem with risk-based sentencing is that it exacerbates the concentrated incarceration of the Black urban poor, then critics would be left without a reason to reject it, assuming an effective set of constraints.[107]

Starr, however, identifies some obstacles to implementing such constraints.[108] For example, she argues that it would be difficult to enforce the unidirectional use of risk assessments for mitigation or diversion from incarceration.[109] Judges and prosecutors are likely to push for longer sentences for defendants perceived as high-risk, even if they are not given risk-assessment data until a preliminary sentence is chosen.[110] Such a practice would simply substitute a lay assessment of risk for an algorithmic one. But if bipartisan enthusiasm for criminal justice reform and reducing reliance on incarceration continues to grow, these obstacles might be easier to overcome than Starr suggests.

However, the objection outlined here could retain some force even if risk-based sentencing were used solely as a mechanism for allocating reductions in sentencing severity. The benefits of risk-based sentencing are disproportionately realized by the low risk (and better-off) among the population of convicted offenders.[111] Those better-off offenders may thus gain an advantage in subsequent competitions for "positional goods," gaining access to future jobs and other opportunities for advancement of which there is a limited supply.[112] As a result, higher risk offenders are objectively worse off than they otherwise would be.[113]

But risk-based sentencing's effects on competitions for positional goods is likely to be small. Low-risk offenders are already better-off than high-risk offenders along many metrics including education, employment history, and neighborhood and family of origin, and thus may not be in competition for

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[107] *See, e.g.*, Starr, *supra* note 18, at 816, 840, 870; Collins, *supra* note 105, at 91–108.

[108] Starr, *supra* note 18, at 840.

[109] *Id.*

[110] *Id.*

[111] *See, e.g.*, sources cited *supra* note 58.

[112] *See*, e.g., FRED HIRSCH, SOCIAL LIMITS TO GROWTH 27–56 (1976); Harry Brighouse & Adam Swift, *Equality, Priority, and Positional Goods*, 116 ETHICS 471, 472 (2006) (defining positional goods as "goods with the property that one's relative place in the distribution of the good affects one's absolute position with respect to its value. The very fact that one is worse off than others with respect to a positional good means that one is worse off, in some respect, than one would be if that good were distributed equally.").

[113] Relative income and consumption levels are strongly correlated with subjective utility. *See, e.g.*, Sara J. Solnick & David Hemenway, *Are Positional Concerns Stronger in Some Domains than in Others?*, 95 AM. ECON. REV. 147, 149–50 (2005).

the same positional goods upon re-entering the community, regardless of how they are sentenced.[114] Insofar as low- and high-risk offenders come from different walks of life to begin with, risk-based sentencing does little to change their relative positions.

As such, the case for risk-based sentencing hinges on whether it can be used primarily or solely to reduce our overall reliance on incarceration. If risk-based sentencing ends up simply redistributing the burdens of current levels of imprisonment so that they fall even more heavily on the backs of the disadvantaged—harming poor, predominantly Black communities—then it becomes very difficult and perhaps impossible to justify.[115] For the purpose of argument, this article will assume that it is possible to constrain sentencing officials to only use risk-assessment tools for the former. But, as shown in Part IV, concerns about concentrated incarceration's negative effects weigh against risk-based sentencing even given that assumption.

D.   CRIME BACKLASH

Some critics—most notably Sonja Starr and Bernard Harcourt—argue that risk-based sentencing could potentially increase overall crime rates despite the incapacitation-related benefits that proponents cite.[116] There are three arguments for this objection.

1.   *Undermining Perceived Legitimacy*

First, as Starr argues, risk-based sentencing could undermine the perceived legitimacy of criminal justice systems.[117] This would in turn cause more crime because when people perceive the law or law enforcement as illegitimate they are less likely to obey.[118] Risk-based sentencing, as Starr puts it, "involves the state explicitly telling judges that poor people should get longer sentences because they are poor—and, conversely, that socioeconomic privilege should translate into leniency."[119] She argues that

> Dressing up that generalization in scientific language may have succeeded in forestalling public criticism, but mostly because few Americans understand these [risk assessment] instruments or are even aware of them. If the instruments were better understood (and as [risk-based sentencing] expands, perhaps they will be), they would send a clear message to disadvantaged groups: the system really is rigged. Further, if

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[114] *See* sources cited *supra* note 58.

[115] Starr, *supra* note 18, at 836–39; HARCOURT, *supra* note 56, at 160–68.

[116] Starr, *supra* note 18, at 839; HARCOURT, *supra* note 56, at 145–71.

[117] Starr, *supra* note 18, at 839.

[118] *Cf., e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 40–71 (2006); PAUL ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 141–89 (2013).

[119] Starr, *supra* note 18, at 839.

that message undermines the criminal justice system's legitimacy in disadvantaged communities, it could undermine [risk-based sentencing's] crime prevention aims.[120]

It is unlikely that those who are teetering on the brink of committing serious crimes would be swayed much in either direction by their perceptions of the legitimacy of the instruments used in risk-based sentencing, however, as most people are unaware of changes in the criminal law and sentencing policy in general.[121] Instead, people tend to use their own moral intuitions to guess at what the legal rules in question might be.[122] One survey found that 35% of offenders "didn't think about" what the likely punishment would be for the crime they committed, while 18% responded "I had no idea, or thought I knew but was wrong."[123]

Furthermore, even if prospective offenders knew of the increased use of risk assessment at sentencing, that would not necessarily undermine their perception of the system's legitimacy. After all, people will only perceive a risk-based sentencing system as illegitimate if they think there is something wrong with risk-based sentencing. Perhaps there is not, as proponents argue and some prospective offenders may agree.

2.   *Deterrence and Relative Elasticity*

According to the rational choice theory that underlies economic models of crime and punishment, people are more likely to be deterred from crime by harsher prospective penalties and less likely to be deterred by more lenient sentencing regimes.[124] Harcourt argues that overall crime rates that result from any given allocation of penal severity—holding the overall rate of incarceration constant—depends in part on the "relative elasticity" of different groups of offenders to punishment.[125] In Harcourt's view, if people who are more likely to commit crime have lower elasticity to punishment

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[120] *Id.* (citing William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1825–30 (1998)).

[121] Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 954 (2003).

[122] *Id.*; John M. Darley, Catherine A. Sanderson & Peter S. LaMantia, *Community Standards for Defining Attempt: Inconsistencies with the Model Penal Code*, 39 AM. BEHAV. SCI. 405, 405 (1996) (documenting survey results in which respondents "believed that the state law assigned liabilities that matched their own intuitions about appropriate liability judgments.").

[123] David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 AM. L. & ECON. REV. 295, 303 (2002).

[124] *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–79 (1968); Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSPS. 43, 46–48 (1996).

[125] HARCOURT, *supra* note 56, at 145–71.

than people who are less likely to commit crime, giving the higher-risk group harsher penalties than the lower-risk group could actually encourage more crime than punishing both groups with equal severity.[126] High-risk prospective offenders are likely to offend regardless because they have a lower elasticity to punishment.[127] Low-risk prospective offenders may make a more dramatic adjustment to their behavior if they are suddenly faced with much more lenient penalties, thus increasing their rates of offending significantly.[128] On balance, Harcourt argues, expanding risk-based sentencing could at least hypothetically lead to a net increase in crime.[129]

But research on deterrence shows unequivocally that people assign exponentially greater weight to the likelihood of getting caught than they do to the severity of potential penalties when deciding whether to commit crime.[130] Therefore, Harcourt's relative elasticity argument has exponentially greater force in the context of risk-based policing than it does in the context of risk-based sentencing.[131] And the force of that argument could be dwarfed by the incapacitation-related benefits of risk-based sentencing, if proponents are right in claiming those benefits.

E.   MAKING THE PUBLIC MORE PUNITIVE

Starr argues that even if risk-based sentencing were used with the explicit intention of reducing overall incarceration rates (and legislation effectively limited its use for that purpose), it could ultimately lead to more incarceration.[132] Part of what makes the public so punitive, and in turn led to the exponential growth of our prison populations, they argue, was that the privileged were largely spared from imprisonment.[133] Because risk-based sentencing only furthers that dynamic, it follows that the public might become even more punitive if sentencing regimes continue to use risk assessment tools more and more.[134]

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[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* For the purposes of this argument, Harcourt leaves out the potential incapacitation effects of risk-based sentencing.

[130] Nagin, *supra* note 54, at 85.

[131] Harcourt analyzes policing and sentencing together. HARCOURT, *supra* note 56, at 168–69.

[132] Starr, *supra* note 18, at 837–39.

[133] Starr, *supra* note 18, at 837–39; James Forman Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1001 (2010).

[134] Starr, *supra* note 18, at 837–39.

But this concern is probably overstated. First, "the privileged" are already largely spared the burdens of incarceration.[135] For example, as Bruce Western and Becky Pettit document, while almost 60% of Black male high school dropouts born between 1965 and 1969 were incarcerated by age 30–34, only 0.7% of White men with at least some higher education born within that cohort were incarcerated by the same age.[136]

Furthermore, crime policy is not solely (or even primarily) driven by privileged people who are completely disconnected from the realities of crime and punishment.[137] Most American crime policy is determined at the state and local government level and is, in many ways, much more democratically determined than other areas of public policy.[138] As Michael Fortner and James Forman Jr. document, the punitive turn in crime policy was driven in large part by fearful residents of poor, predominantly Black neighborhoods wracked by crime surges in the 1970s and 80s, not solely or primarily by wealthy White suburbanites for whom crime was a distant reality.[139]

F. DISTORTING THEORIES OF PUNISHMENT

Harcourt, along with Jessica Eaglin, argue that one should reject risk-based sentencing because it makes both the public and criminal justice officials think about the justification of punishment in a "distorted" way.[140] This critique is different from the idea that one should reject risk-based sentencing because it is unjust or inefficient. Specifically, Harcourt argues that "the prediction of future dangerousness has begun to colonize our theories of punishment."[141] On his view, the rise of actuarial risk-based sentencing (and policing) has "fundamentally redirected our basic notion of how best and most fairly to administer the criminal law," contributing to a shift away from rehabilitation and toward incapacitation in sentencing theory and criminal justice policy.[142]

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[135] Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOCIO. REV. 151, 162 (2004).

[136] *Id.*

[137] *See, e.g.*, JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 119–84 (2017); MICHAEL J. FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT 133–72 (2015).

[138] *See, e.g.*, RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 1 (2019).

[139] FORMAN JR., *supra* note 137, at 119–84; FORTNER, *supra* note 137, at 133–72.

[140] Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 517–33 (2019).

[141] HARCOURT, *supra* note 56, at 188.

[142] *Id.*

The idea that risk-based sentencing has "distorted" public or scholarly ideas about the justification of punishment implies that there is something wrong with how scholars or the public think about the justification of punishment as a result. It would seem misleading to say that the rise of risk-based sentencing regimes "distorted" our views about the justification of punishment, rather than merely "shaped" those views, if it caused us to form *true* beliefs about the matter, after all.[143]

Eaglin and Harcourt's position can be summarized as follows:

> (a) The development of actuarial risk-assessment tools has nudged scholars or the public to think about the justification of punishment primarily in terms of its incapacitation effects, rather than, for example, any retributive or rehabilitative aims we might have had before; and
>
> (b) This way of thinking about the justification of punishment is wrong.

If (a) and (b) are true, then the rise of actuarial tools in the sentencing context caused scholars or the public to form a false belief about the justification of punishment, or a "distorted theory."

Eaglin and Harcourt need not defend any particular theory about the justification of punishment in order to sustain this objection to risk-based sentencing. But merely showing that the rise of actuarial risk tools in the sentencing context nudged scholars or the public toward an incapacitation-focused justification of punishment is not enough to support the argument either. In order to sustain this objection, Eaglin and Harcourt also need to eliminate the incapacitation-focused model as a plausible theory of punishment. For if incapacitation actually is a good justification of punishment, then it would be strange to think that scholars or the public believing as much is "distorted."

According to both Eaglin and Harcourt, the rise of actuarial methods in the sentencing context changed how people thought about the justification of punishment largely by providing criteria for sentence severity that were seemingly more objective and determinate than other frameworks could deliver.[144] As Harcourt puts it, "These actuarial instruments allow for a level of determinacy that cannot be matched by retribution, deterrence theory, or the harm principle."[145]

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[143] *But see* Selim Berker, *Epistemic Teleology and the Separateness of Propositions*, 122 PHIL. REV. 337, 360–80 (2013) (defending a non-consequentialist view of epistemic justification). I take it that Berker's view is not the kind of position that critics of risk-based sentencing have in mind here, however.

[144] Eaglin, *supra* note 140, at 517–33; HARCOURT, *supra* note 56, at 188.

[145] HARCOURT, *supra* note 56, at 188.

That is consonant with Morris' limiting retributivist theory, and the underlying approach taken in the MPC's sentencing provisions.[146] According to the MPC Sentencing Provisions, retributive considerations of desert should only be used to set broad upper and lower limits to the severity of permissible punishment; such considerations do not establish a precise quantum of punishment for any given offense.[147] Instead, the sentencing decisions' incapacitation effects should determine the precise level of severity that is warranted within the broadly permissible range.[148]

Eaglin argues that the shift toward an incapacitation-focused justification of punishment, precipitated by the rise of actuarial risk tools in the sentencing context, had bad consequences aside from simply leading to false beliefs about the justification of punishment—in particular, contributing to the rise of mass incarceration.[149] According to Eaglin, the incapacitation-focused sentencing theory helped legitimate the expansion of criminal justice systems across the country, exacerbating public fears of crime—even crime that is not truly harmful or dangerous.[150] If that were true, it would explain how the incapacitation-focused sentencing theory is a kind of "distorted" belief in one sense. From a consequentialist perspective, that is, the incapacitation-focused sentencing theory would be the wrong way to think about the justification of punishment if it were likely to lead to bad consequences.[151]

However, this view is not well supported by the empirical evidence. Ordinary citizens' fears of crime indeed drove mass incarceration.[152] But that fear was not the product of a change in how people were thinking about the justification of punishment.[153] It was, rather, the product of a massive crime wave across the country concentrated in poor, predominantly Black urban communities where the industrial economy was in decline.[154]

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[146] MORRIS, *supra* note 33, at 58–85; MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (AM. L. INST., Approved Final Draft 2017).

[147] MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (AM. L. INST., Approved Final Draft 2017).

[148] *Id.*

[149] Eaglin, *supra* note 140, at 523–29.

[150] *Id.*

[151] Berker, *supra* note 143, at 360–80.

[152] FORMAN JR., *supra* note 137, at 119–84; Fortner, *supra* note 137, at 133–72.

[153] FORMAN JR., *supra* note 137, at 119–84; Fortner, *supra* note 137, at 133–72.

[154] FORMAN JR., *supra* note 137, at 119–84; Fortner, *supra* note 137, at 133–72; WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 126, 148–49 (1987) ("Basic structural changes in our modern industrial economy have compounded the problems of poor blacks because education and training have become more

It is not yet clear, as such, why one should worry about the way that risk-based sentencing has caused the public to think about the justification of punishment. The incapacitation model of punishment is widely endorsed and seemingly compelling on the theoretical merits, but cannot plausibly explain the explosion of prison populations since the 1970s.

III. DISTRIBUTING DE-CARCERATION TO THE DISADVANTAGED

The arguments canvassed above fail to undermine the prevailing limiting retributivist rationale for risk-based sentencing.[155] But the remainder of this Article will show that risk-based sentencing is indefensible even (and perhaps especially) according to the theoretical framework its proponents put forward as its justification. The most plausible interpretation of limiting retributivism mandates the opposite of what risk-based sentencing proponents recommend: offenders who present the highest risk of future crime should actually get the most lenient sentences.

A. UNCERTAINTY ABOUT DESERT

The key premise that underlies the limiting retributivist framework in the MPC's new sentencing provisions is:

Uncertainty about Desert: it is impossible to know the precise level or severity of punishment an offender deserves in any given case.[156]

As the Code puts it, "[H]uman moral intuitions about proportionate penalties in individual cases are almost always rough and approximate."[157] Consider this premise's full elaboration in the text, which is a core impetus for the underlying theory as a whole:

> Even when a decisionmaker is acquainted with the circumstances of a particular crime and has a rich understanding of the offender, it is seldom possible, outside of extreme cases, for the decisionmaker to say that the deserved penalty is precisely x. In Morris's

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important for entry into the more desirable and higher-paying jobs and because increased reliance on labor-saving devices has contributed to a surplus of untrained black workers." and that "blacks tend to be concentrated in areas where the number and characteristics of jobs have been most significantly altered by shifts in the location of production activity and from manufacturing to services. Since an overwhelming majority of inner-city blacks lack the qualifications for the high-skilled segment of the service sector such as information processing, finance, and real estate, they tend to be concentrated in the low-skilled segment which features unstable employment, restricted opportunities, and low wages.").

[155] One has to go back 35 years to find a detailed critical engagement with this rationale. *See* ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 139–47 (1985).

[156] MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b (AM. L. INST., Approved Final Draft 2017).

[157] *Id.*

phrase, the "moral calipers" possessed by human beings are not sufficiently fine-tuned to reach exact judgments of condign punishments. Instead, most people's moral sensibilities, concerning most crimes, will orient them toward a range of permissible sanctions that are "not undeserved." Outside the perimeters of the range, some punishments will appear clearly excessive on grounds of justice, and some will appear clearly too lenient—but there will nearly always be a substantial gray area between the two extremes.[158]

The quantum of punishment a given offender deserves, on the limiting retributivist view, is vague.[159] There are, on this view, *clearly undeserved* levels of sentencing severity for any given offense, along with borderline cases of *possibly deserved* severity, but never any clear cases of *definitely deserved* sentencing severity.[160] Since, as the MPC puts it, "[t]here are no tools in law or philosophy that can render proportionality doctrine an exact science," there is no single sentencing decision that we could ever *know* to yield exactly the amount of punishment that an offender deserves.[161] For example, think of a typical barfight, where one man beats up another man in a drunken dispute but there is no severe or lasting injury. Sentencing this hypothetical offender to 20 years in prison for assault and battery may seem clearly undeserved. But a two-day, two-week, or two-month sentence could seem to be at least possibly deserved. Yet, even if we knew all of the granular details of the case, it would seem impossible to make a precise judgement about exactly how severely the offender deserves to be punished. How could a sentencing judge ever know whether the correct answer is, say, two weeks, four days, and five hours in the county correctional facility or whether it is in fact, one week, one day, and one hour?

This view is sharply distinguishable from the "non-cognitivist" idea that there is *no fact* of the matter about how severely any given offender deserves

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[158] *Id.*

[159] That is, according to the limiting retributivist view, there are borderline cases of deserved punishment. Vagueness in this sense is distinct from ambiguity. Ambiguous terms have two or more distinct meanings. For example, "child" could mean "offspring" or "immature offspring." "Child" in the sense of "offspring" is ambiguous, but not vague. Ambiguity can be resolved by clarifying a speaker's (or writer's) intention. For example, imagine that I have a fifty-year-old son. In that case, *my* child (my "offspring") is clearly not *a* child (in the sense of being "immature offspring.") Child in the sense of "immature offspring" is vague, however. Is your eighteen-year-old daughter still a "child" in this sense? That is inherently unclear.

[160] MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b (AM. L. INST., Approved Final Draft 2017).

[161] *Id.*

to be punished.[162] There are determinate facts about how much punishment any given offender deserves for any given offense, on the limiting retributivist view.[163] For example, it might indeed be the case that the offender in the barfight does deserve exactly two weeks, four days, and five hours in the county correctional facility. And, according to the limiting retributivist theory, human beings are capable of knowing the facts about whether a punishment is *clearly undeserved*.[164] But, on that view, human beings are incapable of knowing the precise level of severity that actually *is* deserved in any given case.[165] So, if limiting retributivism is correct, then the best that sentencing officials can do is to punish offenders within the range of severity where they are *unsure* whether the punishment fits the crime.[166]

Limiting retributivism is also sharply distinguishable from a "disjunctive" view about deserved punishment.[167] On a disjunctive view, there is an identifiable range of deserved sentencing severity for any given offense-token,[168] and any sentence within that range would be equally deserved.[169] That view recommends ranges of sentencing severity for purely substantive moral reasons, whereas limiting retributivists adopt sentencing

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[162] For a defense of non-cognitivism about deserved punishment, see Russ Shafer-Landau, *The Failure of Retributivism*, 82 PHIL. STUD. 289, 307–11 (1996). Non-cognitivism about deserved punishment should also be distinguished from *skepticism* about deserved punishment—the idea that in fact nobody deserves to be punished. For a defense of the latter, see, for example, Thomas M. Scanlon, *Giving Desert Its Due*, 16 PHIL. EXPLORATIONS 101, 101 (2013) (arguing that nobody deserves to be punished, but that people can deserve moral blame); TADROS, *supra* note 25, at 60–87. The Model Penal Code expresses no skepticism of the idea that people in fact deserve to be punished, stating, for example that "[a]long with Kant, the Code would mete out serious punishment to the culpable murderer, even if no utilitarian benefit were realistically in sight." MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b (AM. L. INST., APPROVED Final Draft 2017).

[163] MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b. (AM. L. INST., APPROVED Final Draft 2017); MORRIS, *supra* note 33, at 59.

[164] MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. (AM. L. INST., APPROVED Final Draft 2017); MORRIS, *supra* note 33, at 59.

[165] MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. (AM. L. INST., APPROVED Final Draft 2017); MORRIS, *supra* note 33, at 59.

[166] MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. (AM. L. INST., APPROVED Final Draft 2017); MORRIS, *supra* note 33, at 59.

[167] H. Scott Hestevold, *Disjunctive Desert*, 20 AM. PHIL. Q. 357, 360 (1983) (defining "disjunctive desert" as "a set of states of affairs every member of which *alone* serves as someone's sufficient desert for having done a particular action . . . ").

[168] An offense-token is a specific instance of an offense-type. For example, if Barty beats up Albus tomorrow, that is a specific instance of the more general offense-type of assault and battery.

[169] Hestevold, *supra* note 167, at 360.

ranges as a pragmatic response to **Uncertainty about Desert**—the fact that we can never be sure of exactly what the relevant moral reasons entail.[170]

As this Part demonstrate, rather than providing cover for risk-based sentencing, **Uncertainty about Desert** makes risk-based sentencing impossible to justify.

B.   SKEPTICISM ABOUT THE SENTENCING GUIDELINES

Neither the MPC's sentencing provisions, nor Norval Morris' writings (upon which those provisions are largely based) provide any substantive criteria to determine what the upper and lower bounds of sentencing severity ought to be for any given offense (either offense-types or offense-tokens).[171] The MPC provides purely procedural guidance, offering only a minimal "conceptual and institutional structure to the moral reasoning process for the derivation of proportionality limits," rather than venturing into the complex substantive questions that such a moral reasoning process would inevitably raise.[172] The Code says that as long as the right institutional actors—first, a "well-constituted" sentencing commission, then the trial and appellate courts—make these decisions, the sentencing ranges and decisions they come out with are, *ipso facto*, legitimate.[173] Morris assumed that existing guidelines-based sentencing regimes—particularly the heavily studied and widely admired guidelines system in Minnesota—formulated the correct ranges of severity for permissible punishment.[174] But Morris provided no substantive normative criteria for explaining why Minnesota's ranges are correct.[175]

Furthermore, the mere procedural legitimacy of a sentencing guidelines system or of an individual sentencing decision does not ensure substantive justice. A sentencing commission formed in the requisite procedural manner could conceivably come up with a guidelines system that would be morally abhorrent. For example, a guidelines system that mandated death by a thousand cuts for every crime in the book. Limiting retributivism would not permit this because it is a substantive theory of the principles that ought to

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[170]   MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b (AM. L. INST., Final Draft, Approved May 24, 2017); MORRIS, *supra* note 33, at 59.

[171]   MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b (AM. L. INST., Final Draft, Approved May 24, 2017); MORRIS, *supra* note 33, at 59.

[172]   MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b (AM. L. INST., Final Draft, Approved May 24, 2017).

[173]   *Id.*

[174]   Morris & Miller, *supra* note 14, at 36–39; FRASE, *supra* note 9, at 123–38.

[175]   Morris & Miller, *supra* note 14 at 36–39.

guide penal policy, not just a procedural theory of who gets to decide what those principles are.

If **Uncertainty about Desert** is true, people cannot know the facts about whether a given offense-type or offense-token deserves any given quantum of punishment, except in the clearest cases of *undeserved* sentencing severity. So, criminal justice officials should be skeptical that sentencing within existing guidelines ranges will automatically ensure that the punishments they impose are "not undeserved."

Given the supposed bipartisan consensus in favor of reducing prison populations, it is especially strange to assume that existing guidelines—many of which were conceived during the peak years of prison growth and widespread fear across the citizenry prompted by a nationwide upsurge in crime[176]—just happened to have got it right about the range of sentencing severity people who break the law morally deserve.

Criminal justice systems in the United States tend toward the punitive extreme compared to other developed countries[177] including some, like Finland, whose sentencing regimes are explicitly desert-oriented.[178] The conditions of American prisons are much worse, and Americans lock people up in these facilities for longer.[179] There is now a vast empirical literature on the tremendous amount of damage that imprisonment in the U.S. does to people's physical and mental health, along with the myriad ways it destroys relationships and derails the life course.[180] How can one be confident, given all of this, that American sentencing guidelines are properly calibrated with respect to desert, and Finland's are not? Limiting retributivism does not give us any reason to think this is the case.

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[176] *See, e.g.*, ANDREW VON HIRSCH, KAY A. KNAPP & MICHAEL TONRY, THE SENTENCING COMMISSION AND ITS GUIDELINES 16–47 (1987); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 763–64 (2005); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1194–206 (2005).

[177] *See, e.g.*, PFAFF, *supra* note 2, at 1–5.

[178] *See, e.g.*, Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349, 357–58 (2011).

[179] *Id.*; John R. Snortum & Kåre Bødal, *Conditions of Confinement Within Security Prisons: Scandinavia and California*, 31 CRIME & DELINQ. 573, 573 (1985) (surveying prison conditions in Scandinavia and California and finding that "[o]n most measures, the conditions of confinement were most severe in California prisons, much less severe in Finnish prisons, and least severe in Norwegian and Swedish prisons.").

[180] *See, e.g.*, Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOCIO. REV. 526, 536–38 (2002) (detailing the extent to which access to the steady jobs that usually produce wage growth for young men is limited for the formerly incarcerated).

As such, the key normative and epistemological premise that motivates limiting retributivism—**Uncertainty about Desert**—also entails the following principle:

Skepticism about Sentencing Guidelines: Existing guidelines cannot ensure that sentencing severity is "not undeserved."[181]

C.   THE ASYMMETRY OF UNDER- AND OVER-PUNISHMENT

This Section provides a provisional defense of the following principle:

Asymmetry: Judges should strongly favor punishing people *less* than they deserve over punishing them *more* than they deserve.

Asymmetry is widely accepted.[182] Morris himself emphasized the importance of desert-based upper limits on sentencing severity more than the lower limits.[183] Richard Frase—who defends a modified version of Morris' Limiting Retributivist view—argues that **Asymmetry** is consistent with Morris' parsimony principle, constitutional proportionality standards, chronic resource limits, prosecutorial discretion in charging and plea bargaining, and the guidelines in Minnesota and other states that have implemented a Limiting Retributivist model for their sentencing regimes.[184]

Frase tells us, moreover, that "the upper limits of desert raise fundamentally different moral questions than lower limits."[185] In Frase's view, these upper limits "are about fairness to the defendant and the limits of governmental power," while desert-based lower limits "raise different and less compelling normative issues"—such as fairness to victims or law-abiding people.[186] Frase also argues that a Rawlsian view about social justice entails **Asymmetry** because contractors in the "original position" would seek desert-based upper limits on penal severity to ensure that their worst-case outcome (presumably, being imprisoned) is as good as possible.[187]

Frase's moral argument for **Asymmetry** is controversial, however. It is difficult to show why fairness to the defendant is a more important interest than fairness to victims or law-abiding people, why hypothetical Rawlsian

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[181] The double negative "not underserved" or "not unjust" comes from Morris' formulation, meant to emphasize the impossibility of making precise judgments of deserved sentencing severity. *See, e.g.*, Morris & Miller, *supra* note 14, at 38.

[182] *See, e.g.*, FRASE, *supra* note 9, at 26; HART, *supra* note 40, at 237; MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b (AM. L. INST., Final Draft 2017); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 190–92 (1995).

[183] *See* MORRIS, *supra* note 14, at 74–75.

[184] FRASE, *supra* note 9, at 28.

[185] *Id.* at 26.

[186] *Id.*

[187] FRASE, *supra* note 9, at 87.

contractors would be more worried about being incarcerated than being victimized, or why American criminal legal systems should make decisions based on a Rawlsian theory of justice. Thus, this Section provides a more ecumenical (albeit provisional) normative basis for adopting that principle.

The argument for **Asymmetry** proceeds in two waves. First, this Section outlines a *prima facie* substantive case for the principle based on independent normative considerations. Second, this Section makes an analogical argument that shows that **Asymmetry** is entailed by one of the most deeply entrenched principles in the doctrine of criminal procedure—the Blackstone principle.

1.   *Substantive Plausibility Proof*

Consider the following case:

Joke Shop: Fred and George are identical twin brothers who own a joke shop in London. Business takes a turn for the worse when the twins are forced to close the joke shop for several months during a viral epidemic. With mounting debt, Fred and George decide to rob Jonko's, a rival joke shop, in order to keep their business alive—stealing the owner's life savings. They are eventually arrested.

Assume that Fred and George *deserve* two years in prison for this offense. Sentencing judges would have no reliable way to discern this precise point, but the recommended sentencing range for their offense is between one and three years.

For arbitrary reasons, Fred and George are tried in front of different judges. Judge Bones has a full English breakfast the morning of Fred's sentencing hearing which leaves her feeling satisfied and generous. She gives Fred the minimum one-year sentence in Azkaban Prison. Judge Umbridge, by contrast, eats some of her children's Trix cereal for breakfast (forgetting that "Trix are for kids") which leaves her hungry and agitated by the time George's sentencing hearing begins. She gives George the maximum three-year sentence in Azkaban.

Fred gets a year *less* than he deserves, while George gets a year *more* than *he* deserves. Both twins' sentences deviate from what they deserve by exactly one year. Therefore, one might infer that the decisions are equally bad from a moral perspective. (Let us stipulate that, as identical twins, Fred and George will both be treated and experience prison the same way.)[188]

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[188]   Findings in hedonic psychology suggest that people tend to adapt to life in prison. *See, e.g.*, John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1046–49 (2009). This might suggest some further difference between

This conclusion might be plausible if *desert* were the only value relevant to comparing the moral magnitude of these two kinds of errors. But even retributivists, for whom desert is the central justifying aim of punishment, acknowledge that this is not the only value we ought to care about.[189] As Göran Duus-Otterström argues, the guilty's deserved suffering might be a good thing in one respect, if retributivism is to be believed, but suffering is still generally bad.[190] Punishment is a way of making people suffer. Thus, Duus-Otterström infers, an overly lenient sentence results in less suffering overall than an overly severe sentence for the same crime.[191]

For example, in the case above, both Fred and George's sentences represent a one year deviation from what each of the two deserve. But Fred only has to suffer in prison for one year, while George has to suffer for three years. So, George's sentence is worse than Fred's, from a moral perspective, because it deviates from desert by the same amount, but causes more suffering overall.

Duus-Otterström's argument is invalid, however. He fails to consider that punishment affects offenders' families and communities, potential future victims, and the society at large—not just the alleged offender.[192] It is impossible to compare the effects of over and under punishment on aggregate social welfare *a priori*. One needs to consider empirical research to weigh the effects of different sentencing policies and decisions.

However, something close to what Duus-Otterström suggests is plausible in the American context considering current empirical research. Punishment has bad consequences for offenders, their families, their communities, and for society as a whole.[193] Punishment also helps to *prevent* certain kinds of suffering or harm—particularly the suffering associated with

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the extent to which Fred is under-punished compared to the extent to which George is over-punished. Much of that adaptation occurs over the first few months of incarceration, however. *Id.* at 1048. So, for the sake of simplicity, let us further stipulate that George's third year in Azkaban will not be any worse than Fred's second year in Azkaban *would have been* if Judge Bones had given Fred the sentence he "deserved."

[189] *See, e.g.*, Husak, *supra* note 9, at 41–47.

[190] Göran Duus-Otterström, *Why Retributivists Should Endorse Leniency in Punishment*, 32 LAW & PHIL. 459, 473–75 (2013).

[191] *Id.*

[192] *Id.*

[193] *See, e.g.*, TODD CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 49–69 (2007) (arguing that concentrated incarceration in disadvantaged neighborhoods exacerbates financial instability, breaks up families, weakens social and civic ties, disempowers the political infrastructure, and erodes informal mechanisms of social control, thus reducing public safety).

crime victimization.[194] But there are diminishing marginal benefits to incarcerating any given offender over time.[195]

General deterrence is almost entirely driven by the perceived certainty of punishment, while severity plays a much smaller role.[196] The prospect of facing a long prison sentence if one is caught, that is, does not deter prospective criminals from breaking the law.[197] Prospective criminals are deterred by the perception that they are likely to be caught and punished, which is determined in large part by policing, not sentencing policy.[198] Due to the backlash of concentrated incarceration, replacement effects, and crime within our jails and prisons, the extent to which prisons genuinely "incapacitate" people from crime is unclear at best.[199] But research on "criminal careers" conclusively shows that people tend to progressively "age out" of crime.[200] So, there will likely be a sharply diminishing marginal benefit to incarcerating any given offender. The bad consequences of punishment are thus more likely to outstrip the good ones (and to do so by a wider margin) when we punish people more severely than they "deserve," compared to when we punish people less severely than they "deserve."

To fully demonstrate the above argument's soundness, one would need to comprehensively weigh the consequences of over and under punishment. And in order to know when over-punishing and under-punishing occurs from the perspective of desert, one would first have to establish criteria for determining exactly what degree of penal severity any given offender deserves. The first of these tasks would be a massive scholarly undertaking; the second might simply be impossible. Thus, the first-wave argument outlined here cannot be regarded as conclusive. But it should at least show that there are some prima facie reasons to think that the **Asymmetry** principle is plausible on substantive moral grounds.

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[194] I do not take a stance on *how much* crime is prevented by incarceration at any given level here. Most of the estimates in the scholarly literature put the elasticity of crime with respect to incarceration somewhere between .15 and .30. *See, e.g.*, John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 13 (1998).

[195] *See, e.g.*, David Roodman, OPEN PHILANTHROPY PROJECT, THE IMPACTS OF INCARCERATION ON CRIME 127–35 (2017), https://arxiv.org/pdf/2007.10268.pdf [https://perma.cc/7XRK-UXAU].

[196] *Id.* at 27–47; Nagin, *supra* note 55, at 86–90.

[197] Nagin, *supra* note 55, at 86–90.

[198] *Id.*

[199] *See, e.g.*, Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 71 (2019).

[200] *See, e.g.*, Travis Hirschi and Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOCIO. 552, 554–62 (1983); Roodman, *supra* note 195, at 11–12.

2. *Analogical Argument*

Let us now turn from the prima facie substantive case for the Asymmetry principle to the more conclusive analogical argument. This argument will show that Asymmetry is logically entailed by one of the most deeply rooted ideas in Anglo-American legal doctrine: **The Blackstone Principle**.

Under **The Blackstone Principle:** punishing the innocent is much worse than failing to punish the guilty.

William Blackstone famously held that "it is better that ten guilty persons escape, than that one innocent suffer."[201] Perhaps nobody today believes that today's criminal legal systems ought to produce exactly the ratio that Blackstone suggested—ten "false acquittals" for every one false conviction. But criminal procedure reflects the underlying principle that punishing the innocent is much worse than failing to punish the guilty. This idea is "perhaps the most revered adage in the criminal law, exalted by judges and scholars alike as 'a cardinal principle of Anglo-American jurisprudence.'"[202] And it underlies some of the most deeply entrenched doctrine in criminal procedure.

The Blackstone Principle is most obviously manifested in the standard of proof required for criminal conviction: "beyond a reasonable doubt."[203] Courts have not typically quantified this standard of proof,[204] and some scholars argue that there is good reason for this.[205] But others find value in doing so,[206] and most attempts at quantifying the "beyond a reasonable doubt" standard model it as something approaching a 90% credence—in line with the ratio Blackstone himself suggested.[207]

The Blackstone Principle is likewise reflected in the rule that every member of a jury must vote to convict in order for a criminal defendant to be found guilty.[208] And numerous other procedural rules are asymmetrically

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[201] 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

[202] Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1067–68 (2018) (quoting United States v. Greer, 538 F.2d 437, 441 (D.C. Cir. 1976)).

[203] *In re* Winship, 397 U.S. 358, 364 (1970).

[204] *See* United States v. Copeland, 369 F. Supp. 2d 275, 333 (E.D.N.Y. 2005).

[205] *See, e.g.*, Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1372–75 (1971); Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1196–97 (1979).

[206] *See, e.g.*, C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1295–99 (1982).

[207] *See, e.g.*, Hal R. Arkes & Barbara A. Mellers, *Do Juries Meet Our Expectations?*, 26 LAW & HUM. BEHAV. 625, 630–31 (2002); McCauliff, *supra* note 206, at 1325, 1332.

[208] That rule is effective in both the federal and state courts. FED. R. CRIM. P. 31(a); Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020).

structured to favor false acquittals over false convictions—such as the defendant's right to appeal a criminal conviction and the state's lack of any corresponding right to appeal an acquittal under any circumstances.[209]

The Blackstone Principle, along with the standard of proof and other procedural rules it purportedly justifies, are meant to guide decision making at the conviction stage of criminal procedure.[210] But, as this Section argues, if **The Blackstone Principle** is a justified basis for decision-making at the conviction phase, then a similar principle ought to govern decision making at the *sentencing* phase.[211] Patrick Tomlin illustrates this continuity through a defense of the following thesis:

"Equivalence Thesis 2 (ET2**)**: Punishing [a guilty person] more than they should be punished is ultimately the same kind of error as punishing someone for something that they did not, in fact, do. Neither error is inherently worse than the other."[212]

The idea that over punishing a guilty person is just as bad as over punishing an innocent person might seem counterintuitive at first, but there are a number of powerful reasons that support the idea. And if this idea is true, then **The Blackstone Principle** entails **Asymmetry**.[213] The remainder of this Section shows that this is indeed the case.

First, good procedures do not always or necessarily produce good decisions, and legitimate authorities do not always do what is morally right.[214] It follows that legislatures, sentencing commissions, and sentencing judges can all make normative errors about how severely various crime-types and crime-tokens ought to be punished. Recall that limiting retributivism is motivated by the thought that these kinds of errors are inevitable given the limits of human cognition.[215]

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[209] Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam).

[210] *See* Epps, *supra* note 202, at 1068.

[211] This argument draws heavily from Patrick Tomlin, *Could the Presumption of Innocence Protect the Guilty?*, 8 CRIM. L. & PHIL. 431, 436–37 (2014).

[212] *Id.* at 436. Tomlin also argues that something like the Blackstone Principle (he calls it the "Presumption of Innocence Principle," which is a combination of a presumption of innocence and a "beyond a reasonable doubt" standard of proof) should apply to legislative decisions about criminalization. *See* Patrick Tomlin, *Extending the Golden Thread? Criminalisation and the Presumption of Innocence*, 21 J. POL. PHIL. 44, 52 (2013). His first Equivalence Thesis is that "it can be as bad or worse to punish someone for something that they should not, in fact, be punished for (and did do), as it is to punish someone for something that they did not, in fact, do (but that is, in principle, punishment-worthy)." *Id.*

[213] The argument here is a reconstruction of Tomlin's case for ET2, geared toward intuitiveness and brevity rather than faithfulness to Tomlin's reasoning. *Cf.* Tomlin, *supra* note 211, at 436–37.

[214] *See supra* Part III.B.

[215] *See supra* Part III.A.

These kinds of normative errors are, in this context, not importantly different from empirical errors about whether a given defendant committed a certain crime, and, for example, what his or her mental state or motivation was at the time. Both sorts of errors can lead to the same unjust result: people being punished more than they ought to be.[216]

Wrongful conviction and excessively harsh sentencing are both subsets of the more general phenomenon of over punishment. They are both wrong for the same reason, namely, that in both cases someone is punished more than they ought to be. As Tomlin puts it, "In the case of wrongful conviction . . . someone who should receive no punishment receives *some* punishment, whilst in the case of punishing someone too much, someone who should receive some punishment receives too much."[217]

There is no reason to think that wrongful conviction is *necessarily* worse than excessively harsh sentencing. A wrongful conviction for a petty offense could be accompanied by an extremely lenient sentence which would amount to a relatively minor injustice, compared to an excessively harsh sentencing for an offense that the defendant in fact committed. Tomlin provides an apt example of this possibility:

Consider Adam, who is wrongly convicted of littering and fined £200. Now consider Charlie, who is correctly convicted of littering but is sent to prison for five years. The injustice that Charlie suffers is ultimately of the same type that Adam suffers—punishment she should not receive—yet the injustice she suffers is greater: the punishment is so grossly disproportionate that she is wronged far more than Adam is—he only has to pay a small fine and receive mild censure when he should receive none.[218]

If this argument is sound, then **Asymmetry** follows from **The Blackstone Principle**.[219]

Asymmetry, on its face, seems consistent with—or perhaps even a good normative justification for—risk-based sentencing.[220]

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216 *See* Tomlin, *supra* note 211, at 437.

217 *Id.*

218 *Id.*

219 Of course, The Blackstone Principle might not be justified; some consequentialist legal scholars and philosophers argue that its costs outweigh its benefits. *See, e.g.*, Epps, *supra* note 202, at 1121–24. I cannot venture into those debates here. But given the combination of prima facie moral reasons to believe it, and the logical connection it has with one of our most deeply entrenched principles, **Asymmetry** should seem at least plausible.

220 As Frase puts it, "Some may argue that risk-based sentence adjustments are unacceptable even if they are used entirely for mitigation. But reduced punishment for low-risk offenders is consistent with [his "expanded" Limiting Retributivist model's] asymmetric approach and the parsimony principle. Treating all such offenders . . . as if they were as risky

But, as this Article demonstrates below, the principles drawn out here actually undermine the case for risk-based sentencing, and in fact suggest that criminal justice officials should focus sentencing cutbacks on those who pose the greatest risk of reoffending.

D. DISADVANTAGE AND CRIMINAL RESPONSIBILITY

A number of criminal law theorists, including myself, defend one version or another of the following principle:[221]

Disadvantage as a Mitigating Factor: social and economic disadvantage should mitigate one's liability to legal punishment for most crime.

The demographic characteristics that predict future crime are correlated with, and often constitutive of, social and economic disadvantage.[222] So if disadvantage indeed ought to mitigate one's liability to legal punishment, then risk-based sentencing systematically saves the heaviest sanctions for those who are least liable to punishment and gives the lightest sentences to those who are most liable to punishment. As such, risk-based sentencing does not determine the severity of punishment in a merely arbitrary way, based on factors that are irrelevant to how much we are justified in blaming them. Rather, it would appear to systematically render decisions that are morally backward in an important respect.

Of course, the idea that social and economic disadvantage ought to mitigate one's liability to legal punishment for most crime is controversial.[223] Many legal theorists think that it is impossible to determine whether socio-economic disadvantage should mitigate criminal responsibility without first reaching answers on bigger, seemingly intractable questions in philosophy and the social sciences: e.g., the nature of social justice and the extent to

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as the average offender would waste scarce resources and impose needless hardship. Nor, if one accepts the premises of limiting retributivism . . . is the denial of mitigation to higher-risk offenders equivalent to unfairly 'punishing' them for statuses they may have little or no power to control." FRASE, *supra* note 9, at 36.

[221] *See* Lewis, *supra* note 17 at 13–18. For a useful overview of some of the previous literature, see Benjamin Ewing, *Recent Work on Punishment and Criminogenic Disadvantage*, 37 LAW & PHIL. 29 (2018). Four of the most influential discussions of poverty or disadvantage as a potential mitigating factor can be found in *United States v. Alexander*, 471 F.2d 923, 960–61 (D.C. Cir. 1972) (Bazelon, C.J., dissenting); David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985); Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFS. 217 (1973).

[222] *See* sources cited *supra* note 58.

[223] *See, e.g.*, Ewing, *supra* note 221, at 36–55.

which it is realized in any given context, the relationship between free will and moral responsibility, and the social and psychosomatic determinants of crime.[224]

But in other recent work, I provide a defense of **Disadvantage as a Mitigating Factor** that avoids taking a position on these ostensibly intractable questions.[225] Call the view the "Incentive Theory" of criminal responsibility. The "Incentive Theory" avoids some of the main problems associated with other neighboring theories, relies on fewer controversial normative and empirical premises, applies to a wider range of crime-types, and provides a more ecumenical foundation for judicial sentencing decisions.[226]

According to the "Incentive Theory," the severity of justified punishment for any given offense depends in part on the amount of ill will that offense manifests.[227] The amount of ill will that any given crime manifests depends in large part on the strength of the offender's objective incentives to commit that crime.[228] In the "Incentive Theory," the strength of one's incentives to commit any given crime depend on the extent to which committing the offense in question would foreseeably add to the offender's bundle of what Rawls called the "primary goods"[229]—things that anybody would want, regardless of whatever else they wanted—or in terms of Sen's "Capabilities Approach" which tracks one's opportunities to live a life they have reason to value.[230]

Socially and economically disadvantaged people stand to gain much more than the wealthy, powerful, and entitled classes, in terms of either of these metrics, from committing most criminal offenses. This is most obvious in cases where the crime is economically motivated, has a clear financial payoff, and is committed intentionally with full awareness of the

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[224] *See, e.g.*, Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. Cal. L. Rev. 1247, 1258–60 (1976); Victor Tadros, *Poverty and Criminal Responsibility*, 43 J. Value Inquiry 391, 391 (2009); R. A. Duff, *Blame, Moral Standing and the Legitimacy of the Criminal Trial* 23 Ratio 123, 137–39 (2010); Gary Watson, *A Moral Predicament in the Criminal Law*, 58 Inquiry 168, 175 (2015).

[225] Lewis, *supra* note 17, at 3.

[226] *Id.*

[227] This does not entail that the underlying justification for sentencing decisions is necessarily deontological. *See, e.g.*, Paul Robinson, Distributive Principles of Criminal Law: Who Should Be Punished How Much? 175–212 (2008); Charles Fried, *Moral Causation*, 77 Harv. L. Rev. 1258, 1268 (1964).

[228] Lewis, *supra* note 17, at 13–18.

[229] *See, e.g.*, John Rawls, Justice as Fairness: A Restatement 58–61 (Erin Kelly ed., 2001).

[230] *See, e.g.*, Amartya Sen, The Idea of Justice 225–90 (2009).

consequences for all parties involved. But it is also true even of violent crimes committed recklessly or negligently and for no financial gain[231]—though probably not with sexual violence.[232] For in neighborhoods where poverty is concentrated and violence is common, mutual respect often becomes a zero-sum game, leaving residents with incentives to adopt a threatening demeanor and to behave in ways that are often unfriendly, uncivil, and disrespectful—sometimes breaking the law in doing so.[233] Violent crime and the reputation that often comes with it can sometimes be the best (or the only) way to secure one's social standing, especially in response to other acts or threats of violence.[234]

Offenders who are the least socially and economically advantaged pose the greatest statistical risk of future crime.[235] But, these offenders also, unsurprisingly, have the strongest incentives to commit crime. With respect to the vast majority of serious crime, then, risk-based sentencing regimes would seem to mandate the most severe punishments for the least blameworthy, and the lightest sanctions for the most blameworthy—systematically rendering sentencing decisions that look completely backwards from a moral perspective.

E.   FAIRLY DISTRIBUTING REFORM EFFORTS

The core premise that motivates the Limiting Retributivist theory is **Uncertainty about Desert**: it is impossible to know the precise level or severity of punishment an offender deserves in any given case. As this Article demonstrates, the implications of this premise are much more radical than the theory's proponents commonly recognize. In particular, it entails **Skepticism about Sentencing Guidelines**: there is no reason to think that sentencing within existing guidelines ranges will ensure that offenders get what they deserve. Thus, sentencing decisions must be made against a backdrop of more radical uncertainty about cardinal desert than proponents of risk-based sentencing assume. As stated previously, there are a number of reasons to accept **Asymmetry:** judges should strongly favor punishing people *less* than they deserve over punishing them *more* than they deserve. **Asymmetry** is supported by independent moral considerations and is the

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[231]   *See* Lewis, *supra* note 17, at 165–70.

[232]   *Id.*; Lewis, *supra* note 21, at 1257–58.

[233]   This is especially, but not exclusively, true for men (in particular, young men), because neighborhood violence can threaten their sense of masculinity. Elijah Anderson documents this phenomenon in detail in CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY 91–107 (1999).

[234]   *Id*.

[235]   *See* sources cited *supra* note 58.

logical consequence of some of our most entrenched legal principles and doctrine.

These three principles present a puzzle for sentencing judges. Judges cannot abandon fairness and proportionality altogether in light of these principles without forsaking the limiting retributivist justification for risk-based sentencing entirely. That would reduce the sentencing decision to an act-consequentialist calculation with no limits. But—if it is impossible to know the precise quantum of punishment an offender deserves in any given case, and existing sentencing guidelines are not a reliable guide to the morally permissible range of sentencing severity—then what principles should judges use to make sentencing decisions?

One thing judges and sentencing commissions can do, in light of these unavoidable epistemic limitations, is to try to minimize undeserved over-punishment.

Judges and sentencing commissions need not know exactly how severely any single offender deserves to be punished in absolute terms to do this. Instead, judges and sentencing commissions can focus sentence reductions on those who are least deserving of (or liable to) punishment in a comparative sense. If, as I have argued in depth elsewhere, social and economic disadvantage should mitigate one's liability to legal punishment for most crime, then that means that judges and sentencing commissions should focus sentence reductions on the disadvantaged.[236] Social and economic disadvantage correlate strongly with one's risk of committing crime in the future.[237] Offenders who present the highest individual risk of recidivism are thus the least likely to deserve the severity with which they are punished under current sentencing regimes.

Risk-based sentencing, by contrast, promises to extend the greatest leniency to those who are the least likely to face disproportionately severe sentences. This cannot be justified, even granting the truth of MPC-style Limiting Retributivism. As this Article argues, the normative framework that proponents take to justify risk-based sentencing actually entails the opposite of what proponents defend. Instead of trying to cut sentences for those who are least likely to reoffend, officials should focus sentence reductions on the least well-off—who tend to be the most likely to reoffend.

IV. BUT WOULDN'T THAT CAUSE MORE CRIME?

The obvious objection to the argument outlined in Part III is that, even if it would be *fair* to give lighter sentences to the disadvantaged (who tend to

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[236] *See* Lewis, *supra* note 17 at 13–18.
[237] *See* sources cited *supra* note 58*.*

pose the most risk of recidivism) and stiffer sentences to the well-off (who tend to pose the least risk of recidivism), doing so would not be *efficient*. One might think that at any given incarceration rate, crime rates would be higher under the kind of sentencing regime this Article proposes than under a risk-based regime. This would, of course, be especially troublesome given crime's harmful effects on America's least well-off neighborhoods and communities.[238] But, as this Part will show, this objection is not sufficiently supported by existing social science research, and is likely much less powerful than it would seem on its face.

Recall that, according to its proponents, risk-based sentencing is an efficient way to minimize crime at the lowest possible cost given the combination of (1) crime averted through the relatively longer incapacitation of riskier offenders, and (2) the fiscal and social benefits that come from the relatively shorter incarceration and less stringent monitoring of less risky offenders.[239]

This outlook depends on an intuitive—but ultimately defective—way of measuring the benefits of incarceration in terms of what criminologists call "incapacitation effects." Criminologists measure the "incapacitation effects" by projecting an incarcerated offender's counterfactual likelihood of committing crime during the prospective period of incarceration, were he or she to remain free in the community.[240] In the literature, this projection is represented by the Greek lambda (λ).[241] The public safety-related benefits of incarceration are then estimated by adding up the incapacitation effects of incarcerating various individual offenders. For example, imagine that 100 people are incarcerated for ten years each, and each of them is predicted to commit one felony per year if they *were not* locked up. It would follow, on the incapacitation model, that incarcerating these people will spare the public from 1,000 felonies.

Though it is intuitively appealing and simplistically elegant, this way of measuring the benefits of incarceration leads to two major problems. The first is a general difficulty for *any* crime policy regime that relies on criminological measures of incapacitation effects: namely, that these measures completely—and unjustifiably—ignore crime that occurs inside prisons and jails.[242] The second is more specific to risk-based sentencing, given the close connection between one's risk of future crime, and one's

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238 *See, e.g.*, ABT, *supra* note 4, at 1–15; ELLIOT CURRIE, A PECULIAR INDIFFERENCE: THE NEGLECTED TOLL OF VIOLENCE ON BLACK AMERICA 1–77 (2020).

239 *See supra* Part I.B.

240 *See, e.g.*, Piquero & Blumstein, *supra* note 54, at 271.

241 *Id*. at 269.

242 *See infra* Part IV.A.

socio-economic status or background. "Replacement effects" can mitigate or cancel out the crime-control benefits of incapacitating specific individuals.[243] And concentrated incarceration can erode informal social control at the neighborhood level, leading to more crime.[244] These phenomena are likely to be most pervasive in the communities from which the least well-off—and, thus, the riskiest—among the incarcerated come.[245] Calculating a crime policy's community-level effects by aggregating the individual incapacitation effects of incarceration overstates the benefits of incarcerating the badly-off, and understates the benefits of incarcerating the well-off. As such, it is not at all clear that risk-based sentencing is any more "efficient" than it would be to do what this Article suggests: namely, for judges and sentencing commissions to reduce sentencing severity for the socially and economically disadvantaged who pose the greatest risk of future reoffending.

A. CRIME INSIDE PRISON

Criminological research on "incapacitation effects"—which supposedly justify risk-based sentencing—treats crime within prisons as non-existent.[246] Crime that occurs in prison is underreported and under-prosecuted.[247] And given the conditions of many American prisons, decisions about who is incarcerated and for how long may dictate *who* gets hurt and whose rights are violated, but not *whether* people get hurt, or how much.[248]

In popular culture and discourse, this is both known and accepted.[249] Convicted criminals, in the popular view, forfeit their rights not only to, for example, the freedom of movement and association that incarceration inevitably takes away, but also to bodily integrity, freedom from harm, and police protection.[250] But even if one accepts the view that people forfeit *some* of their rights when they commit an imprisonable offense, it is implausible

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[243] *See infra* Part IV.B.

[244] *See infra* Part IV.C.

[245] *Id.*

[246] *See, e.g.*, Piquero & Blumstein, *supra* note 54, at 269.

[247] *See, e.g.*, Nancy Wolff, Cynthia L. Blitz, Jing Shi, Jane Siegel & Ronet Bachman, *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 589 (2007) ("Official estimates of physical violence inside prison . . . grossly underrepresent the level and type of victimization inside prison").

[248] *See, e.g.*, Gifford, *supra* note 199, at 103–07.

[249] *Id.* at 113 (citing Elizabeth Stoker Bruenig, *Why Americans Don't Care About Prison Rape*, NATION (Mar. 2, 2015), https://www.thenation.com/article/archive/why-americans-dont-care-about-prison-rape [https://perma.cc/7KDW-L229].

[250] For general discussion and defense of rights forfeiture as a justification for punishment, see Christopher Heath Wellman, *The Rights Forfeiture Theory of Punishment*, 122 ETHICS 371, 371 (2012). Wellman does not endorse the popular view under consideration here.

that they forfeit *all* of their human rights, or that their interests can be completely discounted in cost-benefit analysis or social welfare functions as soon as they are sent to prison.[251]

It is common knowledge that offenders found guilty of even relatively minor crimes might be brutalized, beaten, and raped in prison.[252] But policymakers and analysts fail to include these harms in cost-benefit analyses.[253] And at the same time, judges and sentencing commissions do not include the things that might happen to people inside of our jails and prisons in how they consider the severity of punishment.[254]

Crime within prisons shows that using "incapacitation" as a rationale for penal policy decisions is a dubious proposition. Information about the extent of prison crime is less reliable than data on crime rates in the free population.[255] Decisions about who should be imprisoned and for how long cannot be made with the blind assumption that incarcerated people will be unable to commit crime or cause harm during their imprisonment. That assumption is both empirically and normatively implausible.[256] Crime of all kinds occurs within prison walls, and that crime cannot be written off or discounted in cost-benefit analysis or social welfare functions.[257]

B. BACKLASH AND REPLACEMENT EFFECTS

Incapacitating a specific offender from committing further crime does not yield a net social benefit when other people in the community end up committing the same crime as the incarcerated person would have otherwise committed herself. Unfortunately, the literature on "replacement effects" suggests that this may often be the case—especially for crimes that are either conducted or organized by groups or offenses that are "market driven."[258] Organized crime can continue when one gang member or other criminal

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[251] Gifford, *supra* note 199, at 112–20.

[252] *See id*. at 113 (citing Bruenig, *supra* note 249).

[253] *See, e.g.*, Gifford, *supra* note 199, at 103–106; John J. Donohue III, *Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin*, *in* Do Prisons Make Us Safer?: The Benefits and Costs of the Prison Boom 269, 269–341 (Steven Raphael & Michael A. Stoll eds., 2009).

[254] In *Farmer v. Brennan*, 511 U.S. 825, 847 (1994), the Supreme Court held that the conditions of a prison count as "punishment" only if (1) a prison official knows that there is a substantial risk of serious harm to inmates, and (2) he or she disregards that knowledge by failing to take reasonable precautions to protect inmates from the risk at hand.

[255] *See* Gifford, *supra* note 199, at 106.

[256] *Id.* at 106–07.

[257] *Id.*

[258] *See, e.g.*, Thomas J. Miles & Jens Ludwig, *The Silence of the Lambdas: Deterring Incapacitation Research*, 23 J. Quant. Criminology 287, 291 (2007).

enterprise is incarcerated but the others are not. And incarcerating one person for a market-driven offense—such as trafficking an addictive drug like heroin—can open new and lucrative criminal opportunities for someone else.[259] The stronger these replacement effects are, the less any change in the incarceration rate is likely to impact public safety or wellbeing at the community level.[260]

The greater the probability that any given offender has of returning to crime in the future, the stronger these replacement effects are likely to be. Black, Latino, and poor defendants in criminal cases are more likely to have prior convictions than their White and wealthy peers and are more likely to reoffend.[261] They are also more likely to commit the kinds of crimes for which replacement effects are strongest. Young men and boys living in poverty are much more likely to join gangs than the better-off.[262] Black men and Latinos are over represented in the incarcerated population generally, relative to their share of the population overall.[263] And Black, Latino, and poor men are even more disproportionately over represented among those convicted for the offenses with the strongest replacement effects—gang-related violent crime and trafficking addictive drugs (especially heroin, crack, and powder cocaine).[264]

Concentrated incarceration in poor, predominantly Black urban neighborhoods can also *cause* crime by making it harder for those communities to maintain informal mechanisms of social order and control.[265] Close to twenty percent of adult men are imprisoned in some of our country's least well-off neighborhoods.[266] Almost everyone in those communities has a male family member who either is or has been incarcerated.[267] This exerts a great deal of strain on those families' personal and economic resources,

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[259] *Id.*

[260] *Id.*

[261] BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 5–7 (2013); *see* sources cited *supra* note 58; Harcourt, *supra* note 60, at 237.

[262] Irving A. Spergel, *Youth Gangs: Continuity and Change*, 12 CRIME & JUST. 171, 171 (1990) ("The gang is an important social institution for low-income male youths and young adults . . . because it often serves social, cultural, and economic functions no longer adequately performed by the family, the school, and the labor market").

[263] BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 16–17 (2006).

[264] BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 3 tbl.3 (2015).

[265] CLEAR, *supra* note 193, at 149–74.

[266] James P. Lynch & William J. Sabol, *Assessing the Effects of Mass Incarceration on Informal Social Control in Communities*, 3 CRIMINOLOGY. & PUB POL'Y 267, 270 (2004).

[267] CLEAR, *supra* note 193, at 9, 93–120.

which in turn keeps them in poverty.[268] In these circumstances, parents are hard-pressed to teach their children social skills to keep them out of trouble with the law.[269]

As a result, informal social control—which is more important than formal social control for public safety—is undermined in these neighborhoods.[270] So, increasing rates of imprisonment in communities where incarceration is already concentrated can cause more crime than it prevents.[271] Conversely, decreasing incarceration rates in these communities may reduce rates of crime, or at least not elevate them to the extent that individual assessments of released offenders' risk of future crime would predict.[272]

Whether these negative, community-level externalities outweigh any incapacitation-related benefits of socio-demographic risk assessment is a large and thorny criminological question. But it is one that must be addressed to gain a more realistic picture of the consequences of sentencing and crime policy decisions.

C. REFOCUSING ON PUBLIC SAFETY

Risk-based sentencing is designed to be an efficient allocation method for promoting public safety at the lowest fiscal and social cost. But public safety cannot be understood in terms of incapacitation effects, as they are currently measured in criminology given empirical research (and gaps in research) about crime in prison, replacement effects, and the relationship between concentrated incarceration and informal social control.

There is no benefit to "incapacitating" a large portion of the community if others will rise to commit the same crimes that today's prisoners would have committed had they not been incarcerated. As argued above, these replacement effects and negative externalities are likely strongest for offenders who are the most likely to reoffend. How much crime the public must live with is what fundamentally matters. It does not matter (or at least not nearly so much) *who* commits those crimes. And there are reasons to be skeptical of the extent to which incarcerated people are genuinely incapacitated, rather than simply redirected, in their criminal endeavors.

It is impossible to tell whether, or to what extent, risk-based sentencing serves the goal of public safety simply by aggregating our predictions about

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[268] *Id.*

[269] *Id.*

[270] *Id.* at 149–74.

[271] *Id.*

[272] *Id.*

individual offenders' relative likelihood of committing crime outside of prison. Thus, there is strong reason to doubt that sentencing regimes based on calculations of each individual offender's risk of reoffending can truly serve as efficient mechanisms for promoting public safety at the lowest fiscal and social cost.

CONCLUSION

In order to reduce the scope of mass incarceration in the United States, some people who would otherwise be imprisoned must either be released or remain free. The central question of criminal justice reform, as such, is: who should those people be? The intuitive answer is: those who pose the lowest risk of reoffending. Reformers see risk-based sentencing as a politically feasible and fiscally conservative way to scale back mass incarceration while preserving public safety without going outside the limits of what justice and fairness require. But, as this Article demonstrated in Part III, risk-based sentencing is unfair even by the lights of its own purported justification. Furthermore, as shown in Part IV, risk-based sentencing is likely not as efficient as it might seem, and it might even be counterproductive to public safety or aggregate social wellbeing. Thus, criminal justice reformers and officials now have sufficient reason to reject it.

Perhaps the most obvious response to these arguments would be to say that using risk-based sentencing to reduce prison populations is better than just leaving mass incarceration the way it is. Indeed, it might be. But that would unjustifiably limit the set of law and policy options under consideration.

Optimistically, if the backlash effects of concentrated incarceration are strong enough, and if fiscal savings from decarceration could be reallocated toward social programs that help prevent future crime, it is possible that the United States might be able to reduce the scope of mass incarceration at a similar (or even reduced) cost to public safety using a risk-blind approach to sentencing. That would be an improvement compared to risk-based sentencing with respect to fairness and possibly both public safety and fiscal saving.

But even that optimistic possibility does not completely address the issue of political feasibility. The public is easily influenced by "Willie Horton"-type stories about heinous crimes committed by repeat or high-risk offenders.[273] These kinds of evocative narratives lead to the passage of Megan's Law, Three Strikes, and other punitive pieces of legislation that

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[273] *See, e.g.*, TONRY, *supra* note 3, at 77–114.

helped create mass incarceration in the first place.[274] Since risk-based sentencing regimes focus on each offender's *individual* likelihood of recidivism,[275] they are well placed to avoid public disapproval as a result of these kinds of narratives. Even if crime rates were to go up under a risk-based sentencing regime, for example, the public would not be able to complain that the system allowed someone *known to be dangerous* to commit another heinous crime. So risk-based sentencing gets points for political feasibility, even under optimistic assumptions.

Feasibility, though, is not a dispositive reason to support a substantive policy position. Elected officials can neither always make the most popular decisions, nor can (or should) they base their decision-making solely with the aim of getting re-elected or retaining popular support. Furthermore, reform efforts that aim to reduce the scope of mass incarceration might do well to focus on insulating crime policy from populist influence, and move decision-making in this area to a more technocratic space.[276] That kind of structural shift would mute some of the concern about political feasibility that might continue to drive reformers and policymakers toward risk-based sentencing despite its moral or economic shortcomings.

Less optimistically, and in my view more realistically, there is unlikely to be any way for elected officials to simultaneously (1) reduce incarceration rates while (2) minimizing sacrifices to public safety, (3) saving money, (4) retaining popular support, and (5) doing what is morally fair. These values will inevitably clash, and decision-makers have to assign relative weights or priorities to them in order to know what to do.

I cannot give a full account of how policymakers ought to weigh or prioritize these potentially clashing values in this article. But it is worth returning to and reconsidering the meaning of "mass incarceration," here. David Garland originally coined the term "mass imprisonment" (though, "mass incarceration" is now the more common appellation) to refer partly to the rate at which the U.S. has incarcerated its population over the last four to five decades compared to other developed democracies around the world and compared to other periods in our own history. But Garland also intended "mass imprisonment" to refer to "the social concentration of imprisonment's effects" in poor Black communities.[277]

Reducing the scope of mass incarceration in a meaningful way is a distributive endeavor, not a mere matter of reducing the overall prison

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[274] *Id.*

[275] *See, e.g.*, Piquero & Blumstein, *supra* note 54, at 26–68.

[276] BARKOW, *supra* note 138, at 1–2.

[277] David Garland, *Introduction: The Meaning of Mass Imprisonment*, 3 PUNISHMENT & SOC'Y 5, 6 (2001).

population. The more decarceration efforts prioritize the least well-off—and thus, those who pose the greatest individual risk of reoffending—the more those efforts contribute toward the goal of genuinely unwinding mass incarceration.