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Defending the Role of a Principle of Proportionality in Just Punishment

By

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Honors Thesis

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Date Defended: April 19, 2024

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I. Introduction

What makes a punishment just or unjust is a familiar topic that the public and scholars alike recognize as an important question. Many factors are involved in conversations surrounding the just length of sentences, but this paper will specifically investigate two central questions: First, what makes a punishment just, and second, what role does a principle of proportionality play in thinking about just punishment.

When we reflect on what makes a punishment just, it seems that proportionality in punishment matters. We often think to ourselves or hear others say that a particular defendant received too much punishment or that another was not punished enough. Judgments of this kind reflect an underlying belief that there is an appropriate amount of punishment for a given crime.

To illustrate the salience of questions about just punishment and proportionality, consider a recent example in the national news: the case of Jennifer and James Crumbley, the parents of Ethan Crumbley. At age fifteen, Ethan shot and killed four of his classmates with a gun that his parents had purchased for him as a Christmas present. In separate trials, juries found Jennifer and James guilty of involuntary manslaughter. Both have been sentenced to terms of ten to fifteen years in prison for their role in their son's actions.¹ Comments on social media platforms reflect the kinds of intuitive reactions mentioned earlier. For example, some say, "The Crumbley's deserved this verdict,"² while others complain, "Sure punish parents but I don't think they should get a long sentence."³

¹ Quinn Klinefelter, "School Shooter's Parents, James and Jennifer Crumbley, are sentenced to 10-15 years," *NPR*, April 10, 2024.

² Suzette Adamson, "James Crumbley Verdict Reaction: School Shooter Dad on Trial," Facebook video, March 14, 2024, <https://www.facebook.com/watch/?v=783910846540869>.

³ Janet Martin Dickson, "James Crumbley Verdict Reaction: School Shooter Dad on Trial," Facebook video, March 14, 2024, <https://www.facebook.com/watch/?v=783910846540869>.

Clearly, people often make intuitive judgments regarding the justice of punishments, but how do we know beyond such reactions what length of punishment is genuinely just in a particular situation? And what role should the idea of proportionality play in our thinking about just punishments?⁴ Questions about proportionality's role are not confined to courtrooms but are also the subject of scholarly debate.⁵ Even those who agree that just sentences must be proportionate disagree significantly about how to determine what counts as a proportionate sentence.⁶

The importance of these questions became clear to me in my time working at a non-profit legal aid. For the past two summers, I have worked with individuals who were informing me of the suffering that they endured in South Carolina prisons, whether that be from a lack of medical treatment, a lack of mental health support, or violence. My job was to help people who had been sentenced to life in prison prepare for their parole hearings to try and give them the best chance of early release. One case that stuck out to me was the case of a man who had been convicted back when kidnapping was punishable with life in prison. He had removed someone from their vehicle and left them on the side of the road in order to steal the car. Although he was not armed and did not use significant violence, the act of moving someone against their will had been enough to result in a life sentence for kidnapping. His case left me with the shocked feeling that he had been punished far more than he deserved, which seemed like a true injustice, especially when combined with the suffering present in South Carolina prisons.

⁴ Michael Tonry, "Is Proportionality in Punishment Possible, and Achievable?" in *Of One-Eyed and Toothless Miscreants*, (New York, New York: Oxford University Press, 2020) 1-3.

⁵ Mitchell Berman, "Proportionality, Constraint, and Culpability," *Criminal Law and Philosophy* 15, (2021): 373, <https://doi.org/10.1007/s11572-021-09589-2>.

⁶ von Hirsch, "Proportionality in the Philosophy of Punishment," 95.

The stakes in the debate are high as it involves the knowing and intentional infliction of suffering on individuals by the state. The possibility that the suffering inflicted might be unjustified makes it essential to examine the grounds and requirements of just punishment. This paper aims to show that a punishment must be proportional in order to be just, and a crucial starting point for any discussion on punishment is reflection on the proper justification of punishment. Punishment necessarily involves the infliction of pain upon another person at the hands of the state, and how we morally justify punishment allows us to assess whether a principle of proportionality is required to fulfill that aim.

Within jurisprudence, the obvious starting point in this examination is the long-standing debate between proponents of two major justifications of punishment: utilitarianism and retributivism.⁷ These two theories provide vastly different accounts of what justifies punishment. For the utilitarian, the just punishment is the one that leads to the best overall consequences. However, for the retributivist, the just punishment is the one that gives wrongdoers what they deserve.⁸ As a result of their differences, they provide differing criteria for what makes a punishment just. So, we must first analyze each in turn and determine which one provides the proper justification of punishment. From there, we can determine whether the justification requires that punishments be proportional.

I will argue that both retributivism and utilitarianism provide valuable accounts of what justifies punishment. In particular, the requirement that just punishments be proportional necessitates incorporating a concept of retributive desert into a just theory of punishment. Despite the importance of retributive desert, I will argue that neither utilitarianism nor

⁷ K.G. Armstrong, "The Retributivist Hits Back," *Mind* 70, no. 280 (1961): 473-474.

⁸ Matthew Haist, "Deterrence in a Sea of Just Deserts: Are Utilitarian Goals Achievable in a World of Limiting Retributivism," *Journal of Law and Criminology* 99 (Spring 2009): 793-794.

retributivism can fully justify punishment on their own. Instead, the proper justification of punishment ought to be a mixed theory of punishment that incorporates utilitarian and retributive theories. In particular, I will argue that Andrew von Hirsch's mixed theory of just deserts best justifies punishment by relying on both utilitarian and retributive justifications to ensure that proportional punishments are inflicted. I will also defend the theory of just deserts against competing mixed theories that give retributive desert and its guidance lesser importance in determining the just distribution of punishment.

II. Utilitarianism

In this section I will briefly define utilitarianism as a theory of punishment and discuss the characteristics of this theory. I will then argue that utilitarianism does provide us with some valuable insights about what intuitively makes a punishment just, and thus must play a role in just punishment. Despite that, I will discuss how a purely utilitarian theory of punishment falls short of fully justifying punishment.

Utilitarianism asserts that an action's morality is determined by its consequences.⁹ A utilitarian theory of punishment holds that the just punishment is the punishment that results in the best overall consequences.¹⁰ For the utilitarian, the good consequences of punishment, such as deterrence of future criminal conduct or the incapacitation of offenders, are the fundamental considerations of justice that are logically prior to any other aim.

Utilitarianism is a popular ethical theory that, when applied to punishment, does reflect some valuable reactions that we have to punishment. The first is that we often associate punishment with being a painful and regrettable thing to inflict because it involves hard

⁹ T.L.S. Sprigge, "A Utilitarian Reply to Dr. McCloskey," *Inquiry* 8, no 1-4 (1965): 265.

¹⁰ Primoratz, *Justifying Legal Punishment*, 8.

treatment and the removal of liberties. Utilitarianism takes this into account and only allows for the additional suffering of punishment to be inflicted when there are benefits of doing so.¹¹

Utilitarianism also reflects the appealing sentiment that the reason we punish is for the positive benefit of deterring others from engaging in that behavior as well. We do tend to care about the positive benefits of a system of punishment, such as the deterrence of crime and the incapacitation of people who cannot follow the law.¹² Crimes are usually illegal because of the harmful effects they have on others, and utilitarianism allows us to rely on the effects of punishment in deterring those harms as the justification of punishment.¹³ Furthermore, since punishment necessarily inflicts hard treatment and suffering upon an offender, if that suffering had no good consequences and did not deter future criminal activity, then it would seem unjust for the state to inflict that further suffering.¹⁴

Consider how the following example demonstrates why the consequences of punishment may be relevant to determining the just punishment. Imagine a scenario where an elderly, sick woman has just been convicted of a crime that she committed when she was much younger. Since committing that crime, she has demonstrated her deep remorse and has not committed any further crimes. In addition, we also know that the cost of imprisoning her and dealing with her medical needs would be extremely high. Utilitarianism at least gives us the option to consider not punishing her or at least not punishing her as much as she might deserve. Each of the consequences that were mentioned above as a part of the punishment seem relevant, and utilitarianism allows us to take those into consideration.

¹¹ Tonry, "Is Proportionality in Punishment Possible, and Achievable?," 3.

¹² A.C. Ewing, "Punishment as Viewed by a Philosopher: A Study on Punishment," *Canadian Bar Review* 21 (1943): 103.

¹³ Ted Honderich, *Punishment: The Supposed Justifications*, (London: Hutchinson & Co, 1969), 40.

¹⁴ Andrew von Hirsch, *Doing Justice: The Choice of Punishments*, (New York: Hill and Wang, 1976), 53-54.

Since utilitarianism relies on considering the future consequences of a punishment, there is no inherent requirement that punishments be proportional to desert. Despite that, some philosophers assert that a utilitarian analysis of the costs and benefits of punishment may result in punishments that are proportionate. This does not mean that utilitarianism utilizes a principle of proportionality but rather that the resulting punishments are similar to what other theorists would consider to be proportional to desert.¹⁵

Consider a situation where a utilitarian determines that petty theft ought to be punished with a monetary fine. This punishment on face value does not seem disproportionate to the crime, so it seems that the utilitarian has justified a proportional punishment. The central issue is that the utilitarian did not reference what the offender deserved when determining what the sentence ought to be. Rather, they relied on considerations about what would best deter future conduct without requiring so much punishment that it outweighed those future good consequences. They arrived at a punishment that may be proportional, but the utilitarian does not recognize proportionality as an intrinsically important concept that must be recognized in and of itself.¹⁶

Although we have already demonstrated that utilitarianism has strengths as a justification of punishment, a central difficulty with a utilitarian theory of punishment is that it may justify the imposition of punishments that seem to go against our deepest intuitions. Many people take for granted that it is unjust to punish the innocent, and this assumption seems to be deeply embedded in our existing legal systems.¹⁷ This is demonstrated by the fact that one of the tenets of our legal system is that in criminal cases, the state must prove guilt beyond a reasonable

¹⁵ C.L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (Oxford: Clarendon Press, 1987), 141-143.

¹⁶ Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction*, 141-145.

¹⁷ H.J. McCloskey, "An Examination of Restricted Utilitarianism," *The Philosophical Punishment* 66, no 4. (1957): 469.

doubt. As a result, it is intuitive that justice requires that a person deserves punishment in order to be punished.

For the utilitarian, if the punishment of an innocent person benefits society so much that it outweighs the harm done to that individual, the utilitarian must say it is a justified, morally right act.¹⁸ Imagine a situation where an innocent man has been accused of murdering another, and the local government knows that he is innocent but also that many in the community are already convinced of his guilt. The government predicts that not prosecuting the innocent man would cause riots that would result in the death and harm of many people. As a result, the benefits from the punishment of one innocent person far outweigh the harms that would be caused if those riots were to happen. Thus, in some circumstances, the utilitarian theory of punishment requires the punishment of innocent persons to avoid the greater harm of not doing so.

The punishment of an innocent person seems at odds with our deepest intuitions about just punishment. Although just saying that an action seems intuitively unjust does not mean that all would agree with that intuition, it is still reasonable to say that most would agree that the punishment of an innocent person is unjust. When examining a concept such as the moral permissibility of punishment, there are no clear answers that can be deduced from the concept of punishment itself. So, moral intuitions can be helpful tools in reflecting on how we ought to view just punishment.¹⁹ Thus, it is problematic that utilitarianism would require punishments that so clearly violate our moral intuitions, even though that in itself does not conclusively show that referencing any utilitarian considerations is unjust.

¹⁸ Steven Sverdlik, "The Origins of the Objection," *History of Philosophy Quarterly* 29, no.1 (2012): 79.

¹⁹ Sprigge, "A Utilitarian Reply to Dr. McCloskey," 270.

Utilitarians have attempted to clarify how utilitarianism, when properly applied, can account for an example such as this. Regardless, the response from critics is to tweak the hypothetical in such a way that it ensures that there are only good consequences that can come from the punishment of the innocent person.²⁰ The utilitarian is then faced with justifying something against our intuitions or arguing that the hypothetical is problematic but would never occur in real life.²¹ It also seems that utilitarianism's assertion that punishments may be proportional could be manipulated as well, depending on the situation that the utilitarian is faced with. For example, if there are significant social benefits for a particular town to punish all traffic offenses with life in prison, then the utilitarian is forced to accept life in prison as the just punishment length, even if it is at odds with our intuitions.

These debates about hypotheticals demonstrate that when we only consider what the useful punishment is, we fail to capture something essential about the point of punishment.²² Utilitarianism, on its own, fails to account for why the punishment of an innocent person is wrong or why life in prison for a traffic offense is wrong. Our intuitions do not tell us that it is unjust because it has bad consequences; rather, there is something intrinsically wrong with punishing someone for a crime that they do not deserve or punishing someone far more than they deserve. Utilitarianism fails to protect against unjust punishment because it fails to capture what seems most relevant to decisions about punishment: reflection on the criminal act that led to the punishment itself.

III. Retributivism

²⁰ H.J. McCloskey, "A Non-Utilitarian Approach to Punishment," *Inquiry* 8, no 1-4 (1965): 255-256.

²¹ Saul Smilansky, "Utilitarianism and the 'Punishment' of the Innocent: The General Problem," *Analysis* 50, no. 4 (1990): 261.

²² Smilansky, "Utilitarianism and the 'Punishment' of the Innocent: The General Problem," 261.

If the proper justification of punishment cannot be purely utilitarian, then we must turn to the other common justification of punishment, retributivism, to see if it alone can offer a proper justification of punishment. Retributivism is an influential theory of punishment, and many interpretations and definitions vary across philosophers.²³ Despite this, there are certain aspects of the definition that run through every one of these different interpretations.

Retributive justifications of punishment rest upon the idea of desert, or what an offender deserves for their criminal conduct.²⁴ For a retributivist, offenders deserve punishment because they have committed a criminal act, and it is good in and of itself to give offenders what they deserve through punishment. Rather than punishment being a cost that needs to be outweighed, the retributivist views giving offenders what they deserve as a fitting response, just as it is appropriate to give an award to someone who deserves it for something they did. Furthermore, the retributivist does not base any aspect of the evaluation of punishment on consequences. Rather, they only reference the past actions of the offender to determine what punishment ought to be inflicted for that criminal conduct.²⁵

While utilitarianism sometimes holds that it is just to punish an innocent person, no retributive theory of punishment could ever justify that. The retributivist asserts that a person may only be punished if and only if they have committed a crime. Rather than separating the criminal act from decisions of punishment, it necessarily binds the two together. This fundamental characteristic of retributivism is one of its greatest strengths since it reflects the idea that what a person does when they commit a crime really matters.

²³ Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction*, 38.

²⁴ Douglas Husak, "Retributivism and Over-punishment," *Law and Philosophy* 41, no. 2-3 (2022): 173-174.

²⁵ Michael Moore, "Justifying Retributivism," in *Placing Blame* (Oxford: Oxford Academic, 2010), 153.

Another essential part of all retributivist theories is a requirement that punishments be proportional to desert.²⁶ To the retributivist, it is only good in and of itself that a person is punished as much as they deserve, no more and no less. In determining whether just punishment requires a principle of proportionality, it is helpful to analyze exactly why retributivism places so much emphasis on desert and how it determines what a person deserves.

First, what about a criminal act causes it to deserve punishment? Some crimes are illegal because the prohibited acts are immoral in themselves (even if they were not illegal). Examples include theft, rape, and murder. However, other crimes involve acts that would not necessarily be immoral if they were not legally prohibited. An example is laws that criminalize jaywalking. Furthermore, there are immoral acts that are not illegal. Actions such as cutting in line are considered immoral acts, but it would never be considered illegal to do so. So, how do legal philosophers discern between acts deserving of punishment and those that are not?²⁷ This question is difficult to answer, and there has been extensive philosophical debate devoted to addressing it.²⁸ As a result, for this paper, we shall assume that all crimes have some sort of moral wrong attached to them and deserve punishment to some degree.

Once we know that a crime has been committed and that an offender deserves some type of punishment, the retributivist must then articulate what factors about a crime affect how much punishment a person deserves. Those factors have been traditionally divided into two different categories: factors related to the level of culpability of the offender and factors related to the harm caused by the crime.²⁹ These two factors determine how much a person deserves, and from there, the retributivist determines what punishment is proportionate to that desert.

²⁶ Thom Brooks, *Punishment: A Critical Introduction* (New York: Routledge, 2021), 17-18.

²⁷ Brooks, *Punishment: A Critical Introduction*, 24-25.

²⁸ Brooks, *Punishment: A Critical Introduction*, 7-9.

²⁹ Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction*, 155.

As humans, we are free to act on our own will, and as a result, we are responsible for our freely made actions. However, when it comes to determining what someone deserves after committing a crime, legal culpability can vary depending on the characteristics of the criminal act. For example, we commonly recognize that one is less culpable for an accidentally harmful act versus an intentionally harmful one. In addition, when people are being forced through extortion and threats to commit crimes, we recognize that they have no culpability for their crimes. They may be causally responsible for the crime since they physically did it, but they are not legally culpable since they did not commit those actions freely.³⁰ So, how much punishment an offender deserves requires the retributivist to evaluate their moral responsibility for the crime.³¹

Another factor that can affect how much a person deserves is the harmfulness of the act, regardless of how culpable the individual is. Traditionally, the more harmful a crime is, then the more punishment the offender deserves for that crime. For example, consider the crimes of driving drunk versus driving drunk and hitting someone with your car. In each case, the responsibility of each of the offenders is the same because they each made the same decision. Despite that, the drunk driving resulting in death had far more harm associated with the crime. We recognize that the person who killed someone deserves more punishment because the harm caused by the conduct was far greater. Most retributivists argue that we are responsible for the outcome of our crimes, regardless of whether we intended that specific outcome. As a result, each drunk driver did not intend to cause harm, but since one did, they deserve more punishment³²

³⁰ Brooks, *Punishment: A Critical Introduction*, 20-21.

³¹ Brooks, *Punishment: A Critical Introduction*, 20-21, 25-26.

³² Michael Davis, "Why Attempts Deserve Less Punishment than Complete Crimes," *Law and Philosophy* 5, no. 1 (1986): 5-7. <http://www.jstor.org/stable/3504711>.

Despite these commonalities amongst retributivist theories about what causes someone to deserve punishment and what factors are involved in determining desert, some retributivist theories envision the requirements of a principle of proportionality differently. One interpretation, for example, is the maxim of *lex talionis*, which states that the harm of punishment must exactly match the harm done by the crime. The principle of *lex talionis* would dictate that someone who gouges the eye out of another must be punished by having their eye gouged out.³³ The Kantian interpretation of proportionality employs a slightly different standard of proportionality. It states that retributivism requires not that the offender has done to them what they did to others, but that equal harm is done to the offender that they did to others. Kant uses the example of a rich and a poor man who both verbally injure someone. To a rich man, a fine does not have the same punishing effect as it would for a poor man. Just punishment requires that each person's punishment be proportioned in a way that equally rights the wrong. A just punishment does not require that everyone's punishment be exactly the same, but rather that it fulfills the moral wrong committed by the offender.³⁴

Contrary to the principle of *lex talionis* and the Kantian interpretation of proportionality, the more common interpretation of proportionality argues that a principle of proportionality simply requires a punishment that is proportioned to the seriousness of the crime.³⁵ In my view, this interpretation is preferable because it recognizes that there are significant limits to the state's power. While we know that there are people in this world who inflict horrible cruelty onto others, it is morally unacceptable to sanction the government to inflict that same cruelty upon a person as punishment. For example, if a person sadistically tortured another person, it would still

³³ Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction*, 151.

³⁴ Michael Tonry, *Why Punish? How Much?: A Reader on Punishment* (Oxford; Oxford University Press, 2011), 32-33.

³⁵ Andrew von Hirsch, *Deserved Criminal Sentences* (Oxford: Hart Publishing, 2017): 8.

seem barbaric to sanction the government to torture the offender in the same way.³⁶ Requiring that punishment only be proportional to desert, we ensure that people are receiving punishments they deserve without sanctioning the government to inflict punishments that are morally reprehensible.

IV. The Relevance of Proportionality to Just Punishment

While we have already established that the retributivist recognizes that desert is something possessed in degrees, should we agree with the retributivist that justice requires that we only punish someone as much as their degree of desert dictates? I will argue that justice does require that punishments be proportional to desert. First, the traditional retributivist arguments for why punishments must be proportional demonstrate that undeserved suffering is wrong. Beyond those traditional arguments, however, I will further argue that the expressive nature of punishment helps articulate why we must punish proportionally.

Traditional retributive theories specify that punishment is just because it gives someone what they deserve; however, if you are inflicting disproportionate punishments, then you are inflicting punishments that are more or less than a person deserves. Any sort of excess punishment is an undeserved restriction of freedom and infliction of pain, and any leniency in punishment fails to give a person what they deserve.³⁷ Most traditional retributivists rely solely on the fact that undeserved imprisonment and pain are unjust, so they conclude that we may only punish as much as a person deserves.

Beyond this traditional understanding, there are further arguments that we can rely on to demonstrate the importance of proportionality. I will argue that the expressive nature of

³⁶ Ten, "Crime, Guilt, and Punishment: A Philosophical Introduction," 151-152.

³⁷ Immanuel Kant, *Metaphysics of Morals* (London: William Richardson, 1799), 104.; Tonry, *Why Punish? How Much?: A Reader on Punishment*, 32-33.

punishment is a characteristic of punishment that communicates society's blame and disapprobation of the offender. The expressive nature gives us another reason to only punish someone as much as they deserve.

The expressive nature of punishment is made clearer when you think about the difference between how we view two people who have both been convicted of murder. One of these people was found guilty and sentenced to life in prison, and the other was found not guilty by reason of insanity and forced to live in a mental institution for the rest of their life. Both of these people have been imprisoned, but we would never say that the person in the mental hospital is being condemned by society as blameworthy for their actions. On the other hand, that is exactly what is expressed when someone is sentenced to life in prison.

This example demonstrates that criminal punishment expresses something reprobative about the person and their conduct, whereas just institutionalizing someone does not. Finding someone guilty and sentencing them to a prison term carries with it an implication of blame and censure for the criminal act that they committed.³⁸ Not only does the punishment express something to society about the offender, but the length of the punishment does too. Suppose someone receives a much harsher punishment than another person. The longer punishment expresses to society that the first person's conduct was deserving of more blame. For example, if two people who were guilty of assault were sentenced to two years versus five years, there is a message sent to society that something about the second person's crime was more deserving of punishment. If their conduct was the same, then that person is being blamed more than they deserve. The condemnation associated with punishment adds yet another reason that we should not punish people more or less than they deserve.³⁹

³⁸ Henry Hart, "The Aims of Criminal Law" *Law and Contemporary Problems* 23, no. 3 (1958): 405-405.

³⁹ Feinberg, "The Expressive Function of Punishment," 418.

An important note of clarification is that I am arguing that the expressive nature of punishment is a characteristic intrinsic to state punishment. For some political philosophers, the expressive nature of punishment plays a central role in their justification of punishment. In other words, they argue that the reason we ought to punish is to ensure that the offender and society properly receive the message being communicated. As a result, they are forced to examine the consequences of the message being sent to society and the offender to determine whether the punishment was just.⁴⁰ In my argument, however, the blaming nature of punishment is a characteristic inherent to punishment that can be incorporated into a retributivist justification of punishment.⁴¹ The message of reprobation that is conveyed to the offender and to society changes the impact that a punishment has on an offender, but there is no requirement that we look to the consequences of the expressive nature to determine whether the punishment is just. It is merely a further reason that we ought to punish someone only as much as they deserve.⁴²

This demonstrates that punishment beyond what a person deserves inflicts undeserved pain, blame, and the removal of liberties. When we think back to what was so counterintuitive about the punishment of an innocent person, it was because an innocent person does not deserve these hardships associated with punishments. This is exactly what is inflicted when we impose disproportionate punishments: pain, blame, and the removal of liberties beyond what a person deserves.⁴³ Thus, the argument that we should not punish someone beyond what a person deserves is analogous to why we should not punish the innocent: they both received undeserved blame and suffering, which is wrong.

⁴⁰ Antony Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001).; Joel Feinberg, "The Expressive Function of Punishment," *The Monist* 49, no. 3 (1965).

⁴¹ von Hirsch, *Doing Justice: The Choice of Punishments.*; Von Hirsch, *Deserved Criminal Sentences.*

⁴² Mark Tebbit, *Philosophy of Law: An Introduction* (New York: Routledge, 2017); 254-255.

⁴³ Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979), 436.

As a result, any system of punishment that justifies undeserved punishment is unjust. This means that the proper justification of punishment must include a principle of proportionality. In order to determine what sentences are proportional, this also means that the proper justification must reference desert. This shows that we cannot rely on a solely utilitarian account because it does not include any reference to what an offender deserves. The fact that retributivism relies so heavily on desert and already has a principle of proportionality built into it becomes one of its greatest strengths. A retributivist justification of punishment would never impose punishment beyond what a person deserves.

Does this conclusion about the necessity of a principle of proportionality mean that the proper justification of punishment is a purely retributivist justification of punishment? If we accept pure retributivism as the proper justification of punishment, then we cannot reference any utilitarian considerations when making decisions about the just length of punishment in particular situations. Furthermore, we must be able to determine what the proportional punishment is in particular cases solely in reference to desert. It is my contention that a retributivist theory of punishment cannot fully justify punishment, and I will now examine each of those reasons in turn.

To start with, in the example from earlier with the elderly woman, the retributivist would be required to impose the exact punishment that she deserved, regardless of the other considerations that we recognized as relevant to determining what punishment was justified. It is clear that with a purely retributivist account, we lose the ability to consider factors that are relevant to just punishment. Furthermore, we would not be able to create sentencing policies that are meant to maximize benefits to society. For example, if a particular crime was prevalent in one community, then that community would not be able to increase the penalty beyond what a

person deserves in order to deter that crime. As a result, accepting a purely retributivist justification of punishment requires that we reject every aspect of a utilitarian justification of punishment that seemed relevant to just punishment.

Secondly, justifications of punishments that rely solely on retributivism have faced pushback from critics who claim that desert is simply not enough to justify the infliction of further suffering. Even when we recognize that someone deserves punishment, punishment involves the removal of liberty and the infliction of suffering upon the offender and potentially the family and friends of the offender as well. The retributivist argues that the intrinsic value of giving someone what they deserve morally justifies the state's infliction of punishment.⁴⁴ Despite this, there seems to be merit to the idea that punishment is a pain that must be outweighed. Desert can certainly be relevant to that evaluation, but perhaps other considerations are necessary to fully justify the imposition of punishment upon someone who deserves it.

Lastly, pure retributivism requires that punishment be proportional, but retributivism has come under criticism for being unable to articulate how desert alone can determine what the proportionate punishment is. While we may know that a murderer deserves more punishment than a thief, it seems impossible to determine what length of punishment the crime of burglary intrinsically deserves. Even when we look at the circumstances of a specific crime, there is no magic number that seems to be the intrinsically deserved length of punishment. Since the retributivist rejects all considerations other than the desert of the offender in determining just punishment, they are forced to rely solely on desert to determine the absolute proportional punishment for any given crime, which seems implausible.⁴⁵

⁴⁴ Honderich, *Punishment: The Supposed Justifications*, 8.

⁴⁵ Jesper Ryberg, "Retributivism and the Proportionality Dilemma," *Ratio* 34, no 2 (2021), 160-164.

These reasons, taken together, show that retributivism also seems to fall short of providing a comprehensive justification of punishment. We recognize that we ought to only punish as much as a person deserves, but it is not clear how desert alone can provide those answers. Furthermore, utilitarianism alone denied an intrinsic value to proportionality entirely. As a result, we have two justifications of punishments that each reflect valuable intuitions about what makes a punishment just, but that fall short of providing a comprehensive account of the proper justification of punishment.

V. Mixed Theories of Punishment

At this point, we seem to be faced with a serious problem in our pursuit of answers about justice in punishment and the role of proportionality. Both utilitarianism and retributivism capture valuable intuitions about what makes a punishment just but fall short of providing a full justification of punishment. What we really need is a justification of punishment that combines both utilitarianism and retributivism that ensures that punishments are only inflicted as much as a person deserves, but that also recognizes the value of the consequences of punishment. As a result, I began searching for a justification of punishment that provided a coherent account that utilized both theories.

Other philosophers recognized that neither utilitarianism nor retributivism was sufficient on its own to justify punishment and argued that the question of what justifies punishment needed a more complex answer that relied on a plurality of values. As a result, they created mixed theories that combine both utilitarian and retributive concerns into one coherent justification of punishment. One of the most influential and traditional approaches to a mixed theory of punishment was articulated by H.L.A Hart.⁴⁶

⁴⁶ Richard Lippke, "Mixed Theories of Punishment and Mixed Offenders: Some Unresolved Tensions," *The Southern Journal of Philosophy* 44, no. 2 (2006): 274-275.

Instead of only asking what justifies punishment generally, Hart proposed that we are really dealing with two questions: what justifies the general aim of punishment and what justifies the distribution of punishment.⁴⁷ In other words, the first question about the general aim asks what justifies the existence of a system of punishment, and the second question asks what justifies the imposition of specific punishments on individuals. He proposed that different principles of punishment were relevant at these two different points in an account of punishment.⁴⁸ This kind of mixed theory provides a possible justification of punishment that may address the weaknesses that we noted with both a pure retributive and utilitarian justification of punishment.⁴⁹

Hart's mixed theory provides a powerful justification of punishment. Hart argued that the first question—why we have a system of punishment—is justified solely through utilitarianism. According to Hart, we have a system of punishment for its good consequences, such as the deterrence and incapacitation of criminals. This allows us to consider the value of the consequences of punishment while also ensuring that no one is punished more than they deserve. Within his mixed theory, the system of punishment is intended to maximize the benefits to society, but punishments can only be given to those who commit crimes and thus deserve punishment. The distribution of punishment is justified solely by retributivism. In other words, the only people who may be punished in the pursuit of the general aim of a system of punishment are those who deserve it.⁵⁰ This ensures that the pursuit of the good consequences of the system of punishment is always constrained by the requirement that punishments are proportional to

⁴⁷ H.L.A Hart, "The Presidential Address: Prolegomenon to the Principles of Punishment," *Proceedings of the Aristotelian Society* 60, (1959): 3.

⁴⁸ Hart, "The Presidential Address: Prolegomenon to the Principles of Punishment," 3.

⁴⁹ Hart, "The Presidential Address: Prolegomenon to the Principles of Punishment," 2.

⁵⁰ Hart, "The Presidential Address: Prolegomenon to the Principles of Punishment," 4.

desert. The theory is also considered internally coherent because each theory is relevant at a separate part of the justification.⁵¹

Despite the influence of Hart's mixed theory framework, it is faced with the same issue that retributivism faced in determining what punishments are proportional to desert. Since the distribution of punishment is justified solely through retributivism, we can still rely only on retributive desert to determine the proportional punishment. Similarly to pure retributivism, just analyzing an offender's crime does not provide us with a number for the exact deserved punishment.

In Hart's mixed theory, he concludes that justice requires like cases to be treated alike and that offenses with different seriousness should not be treated with equal severity, but that is not as demanding of a requirement as a principle of proportionality. Hart does not require that punishments be proportional, because he argues that only rough estimates can be made about what a person deserves based on their crime. Furthermore, he argues that only broad judgments can be made about what would be roughly proportionate to that desert. Hart argues that beyond these broad requirements, desert cannot provide more specific guidance.⁵² As a result, Hart does not implement the requirement that punishments be proportional to desert.

Hart's conclusion about the guidance from desert was unsatisfactory, and I searched for a theory that could provide more guidance about what specific punishments are proportional. A lesser-known theorist, Andrew von Hirsch, provides an account of punishment that supplies much more guidance about what length of punishment is strictly proportional to desert. Von Hirsch utilizes the same mixed theory framework as Hart, but I will argue that Andrew von Hirsch's theory of 'just deserts' provides a more comprehensive mixed theory justification of

⁵¹ Brooks, *Punishment: A Critical Introduction*, 110.

⁵² Hart, "The Presidential Address: Prolegomenon to the Principles of Punishment," 23.

punishment. The strength of Andrew von Hirsch's theory lies in how it utilizes the same powerful mixed theory framework that Hart devised but provides more guidance towards what punishments are proportional to desert.

V. Andrew von Hirsch's Theory of Just Deserts

As a general outline of the theory of just deserts, von Hirsch breaks the question of what justifies punishment into the same two narrower questions that Hart did.⁵³ The first question is what justifies the general aim of punishment, and the second is what justifies the distribution of punishment. The theory of just deserts also utilizes retributivism and utilitarianism, but it relies on these theories in a different way than Hart did to answer those two questions. Rather than limiting the role of utilitarianism or retributivism to just one part, von Hirsch argues that both the general justifying aim and the distribution of punishment must be justified by relying on both utilitarianism and retributivism.

According to just deserts, the reason that we have a system of punishment is because of its good consequences and because people deserve punishment.⁵⁴ This means that neither utilitarian consequences nor retributive desert are alone sufficient to justify the existence of a system of punishment. The second question, what justifies the distribution of punishment, is where the strength of von Hirsch's theory lies because it allows reference to retributive desert and utilitarian considerations. The theory of just desert asserts that the only just punishment is one that is proportional, and in order to determine exactly what the just proportional punishment is, we must utilize both retributivism and utilitarianism.⁵⁵

A. The First Question: What Justifies the General Aim of Punishment?

⁵³ Von Hirsch, *Doing Justice: The Choice of Punishments*, 36.

⁵⁴ Von Hirsch, *Doing Justice: The Choice of Punishments*, 54-55.

⁵⁵ Von Hirsch, *Doing Justice: The Choice of Punishments*, 93-94.

The first question that must be addressed is what justifies the use of a system of punishment in the first place. Like Hart's mixed theory and many mixed theories, von Hirsch argues that utilitarianism is relevant to the general justification of punishment.⁵⁶ The critical difference between von Hirsch's justification of the general aim and Hart's is that von Hirsch argues that the general aim cannot be sufficiently justified by utilitarianism alone and requires retributivism.⁵⁷ His argument in favor of this claim results in a justification of the general aim that is only subtly distinct from Hart's justification of the general aim.⁵⁸ My argument for von Hirsch's mixed theory centers around his requirements for the just distribution of punishment. As a result, I will leave the discussion of the distinction between Hart and von Hirsch's justification of the general aim at that.

B. The Second Question: What Justifies the Distribution of Punishment?

The second question within the theory of just deserts is what justifies the distribution of punishment. In other words, what justifies the imposition of specific punishment lengths on specific people? The second question is where von Hirsch's theory diverges most significantly from Hart's. In Hart's mixed theory, distribution was solely justified through retributive desert, but von Hirsch argues that to create a system of punishment that only inflicts proportional punishments, we must also allow for utilitarian considerations. In the theory of just deserts, retributive desert becomes the predominant consideration, but utilitarianism still does play a role in determining the proportional punishment.⁵⁹

⁵⁶ John Rawls, "Two Concepts of Rules," *The Philosophical Review* 64, no. 1 (1955); Hart, "The Presidential Address: Prolegomenon to the Principles of Punishment".

⁵⁷ Von Hirsch, *Doing Justice: The Choice of Punishments*, 52.; Johannes Andenaes, *Punishment and Deterrence* (Ann Arbor: University of Michigan Press, 1974).

⁵⁸ Von Hirsch, *Doing Justice: The Choice of Punishments*, 51-52.

⁵⁹ Von Hirsch, *Doing Justice: The Choice of Punishments*, 93-94.

Von Hirsch argues that retributivism must be the predominant theory for determining the justification of punishment because utilitarianism cannot be relied on to create a just distribution of punishment. When determining how much an individual person ought to be punished, if utilitarianism is the predominant justification, it may result in punishments that go beyond what a person deserves for the sake of good consequences, which is unjust. In addition, there is even the chance that an innocent person would be imprisoned for the net good consequences of doing so. As discussed previously, punishment beyond what a person deserves is wrong because it inflicts undeserved blame and suffering.⁶⁰ However, that does not mean that utilitarian considerations are wholly irrelevant, just that they cannot be relied on solely or even primarily to reach decisions about the just amount of punishment.

When determining what justifies the distribution of punishment, von Hirsch argues that the only just distribution is where an offender receives a punishment that is proportional to desert.⁶¹ As a result, the question of distribution rests primarily on being able to determine how much a person deserves based on their crime. Von Hirsch recognizes how difficult it is to determine what a person deserves and crafted a theory that relies predominantly on desert but allows for utilitarian considerations to be relied upon to decide what punishment ought to be inflicted.⁶²

C. Determining the Seriousness of the Crime and the Severity of the Punishment

Determining the just distribution of punishment relies on measuring the seriousness of the crime committed and ensuring that the seriousness of the crime is proportional to the severity of

⁶⁰ Von Hirsch, *Doing Justice: The Choice of Punishments*, 65.

⁶¹ Von Hirsch, *Doing Justice: The Choice of Punishments*, 66.

⁶² Malcolm Thorburn and Allan Manson, "The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning," *New Criminal Law Review: An International and Interdisciplinary Journal* 10, no. 2 (2007): 283-284.

punishment. The theory of just deserts suggests that the seriousness of the crime ought to be measured based on two major components: harm and culpability. These two concepts are intuitively relevant, which is demonstrated by the fact that we already use those to judge the seriousness of a crime in our day-to-day lives. For example, we generally consider young adults less mature and less responsible, and as a result, a young adult who commits the same crime as a much older adult may be considered less responsible for their actions. This recognition of reduced responsibility reduces the seriousness of the crime, even if the harm is the same. Furthermore, we judge crimes that have more harm or more threatened harm as more serious than crimes that are less harmful.⁶³

Since the publication of the original version of the theory of just deserts, von Hirsch has faced criticism about what factors ought to be used to determine the seriousness of a crime since the seriousness of the crime dictates what a person deserves. Other philosophers have noted that deciding the harm and culpability of an offender will be incredibly complicated. For example, questions such as whether recidivists deserve more punishment for committing the same crimes as a first-time offender may make that calculation difficult. Von Hirsch has clarified that the most significant of those complicating factors, whether repeated criminal activity affects desert, can be factored into his existing analysis of harm and culpability. For instance, von Hirsch articulates that those who commit multiple crimes are even more culpable for their crimes than a first-time offender since they have already been informed that their behavior was wrong through previous punishment. This increased culpability increases the seriousness of the crime and, thus, what the offender deserves.⁶⁴ Overall, Hirsch contends that any complicating factors in

⁶³ Von Hirsch, *Doing Justice: The Choice of Punishments*, 78-79.

⁶⁴ Andrew Von Hirsch, *Past and Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (New Brunswick: Rutgers University Press, 1985), 85-91.; Von Hirsch, *Doing Justice: The Choice of Punishments*, 84-85.

determining the seriousness of a crime would not result in insurmountable difficulties in developing a workable ranking of crime seriousness.⁶⁵

Once you have analyzed the harm and culpability of the offender's crime, then you have to ensure that the seriousness of the crime is proportional to the severity of the punishment. The severity of the punishment is judged by how unpleasant the punishment characteristically is. This paper will focus on incarceration as the most severe punishment that can be inflicted since the justifiability of capital punishment is a topic that must be discussed at length elsewhere. Incarceration itself involves the removal of liberty and autonomy and thus must be reserved for serious crimes. In order to determine the proportional punishment, we determine what severity of punishment is proportional to the seriousness of the crime in particular cases.⁶⁶

D. How to Ensure that the Severity of the Penalty is Proportional to Desert

The central question that the theory of just deserts seeks to provide guidance for is how to properly equate the seriousness of the crime to the severity of punishment. The strength of von Hirsch's account lies in his utilization of two distinct types of proportionality: cardinal and ordinal proportionality. These two concepts are drawn from mathematical ideas about numeral ranking.⁶⁷ Before explaining how his theory uses these concepts to create a method that ensures punishments are commensurate to the seriousness of the crime, it is helpful to understand what these two types of proportionality are.

Ordinal proportionality assesses the relationships between crimes on a punishment scale rather than the penalty's relationship to the crime itself. It considers whether two crimes that have different levels of seriousness have appropriately different corresponding severity of

⁶⁵ Von Hirsch, *Doing Justice: The Choice of Punishments*, 82.

⁶⁶ Von Hirsch, *Doing Justice: The Choice of Punishments*, 107-112.

⁶⁷ "Ordinal Number," Mathematics, Britannica, <https://www.britannica.com/science/ordinal-number>.

punishments compared to one another. For example, ordinal proportionality is concerned with whether the difference in punishment severity between burglary and armed burglary is proportional to the difference in the seriousness of those two offenses. It is solely concerned with how crimes ought to be punished in relation to one another.⁶⁸

Cardinal proportionality, on the other hand, refers to the intrinsically deserved punishment of any given crime. It is solely concerned with whether the punishment length matches the intrinsically deserved punishment of the crime without any reference to the punishments of other crimes. This is a far more difficult standard of proportionality to achieve because it rests on determining the fitting punishment solely based on the seriousness of the crime. Unlike ordinal proportionality, this metric is unconcerned with how other crimes are penalized.⁶⁹ If we could determine the cardinally proportionate punishment for each crime, then the penalties would all be ordinally proportionate to one another because each penalty would match desert perfectly. However, cardinal proportionality is more subject to disagreement. To quell this disagreement, the theory of just deserts relies on ordinal proportionality as another tool to determine what punishment a person deserves.

In the theory of just deserts, von Hirsch relies on both cardinal and ordinal proportionality to build a system of punishment where each individual punishment is proportional to desert. First, he argues that we ought to arrange punishments so that they are ranked in order of their seriousness. From there, every penalty should be spaced from one another on that scale so that the associated penalty would be ordinally proportionate to other

⁶⁸ Andrew von Hirsch, and Andrew Ashworth, "Criteria for Proportionality: A Review." in *Proportionate Sentencing: Exploring the Principles*. Oxford: Oxford University Press, 2005, 138.

⁶⁹ Von Hirsch, Andrew and Andrew Ashworth, "Criteria for Proportionality: A Review," 141-142.; Göran Duus-Otterström, "Weighing Relative and Absolute Proportionality in Punishment," in *Of One-Eyed and Toothless Miscreants* (Oxford: Oxford University Press, 2020); 34-35.

penalties for their associated crimes. Von Hirsch argues that by only analyzing the desert of an offender based on the seriousness of the crime, we could devise a scale where each crime and its corresponding penalty is ordinally proportionate to one another.⁷⁰

Ensuring that a scale is ordinally proportionate is only one part of the overall method for creating a just sentencing scheme. A scale that is ordinally proportionate does not ensure that individual punishments on the scale will be cardinally proportionate to what the crime intrinsically deserves. Consider the following example and diagrams. In this situation, we have a scale of punishment where the least severe penalty is for jaywalking, and the other three crimes have been placed in relation to one another so that they are ordinally proportionate to one another on this scale.

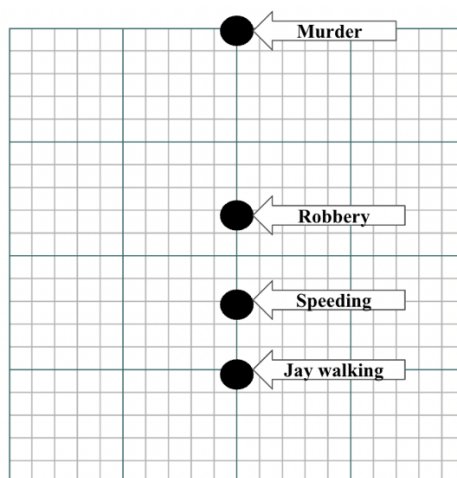


Diagram of an ordinally proportionate scale

Despite that, consider what would happen if the least severe crime of jaywalking is set to an absurdly high corresponding penalty, such as ten years in prison. Our intuitions about what

⁷⁰ Von Hirsch, *Doing Justice: The Choice of Punishments*, 132-135.

jaywalking intrinsically deserves tell us that ten years in prison is grossly disproportionate to the crime of jaywalking. Furthermore, jaywalking is the least severe crime and the anchoring point of the rest of the scale. As a result, even though the relationships between the crimes are proportionate, the penalties given for crimes going up the scale from the least serious crime would still seem disproportionate to the intuitions we do have about what they intrinsically deserve.⁷¹

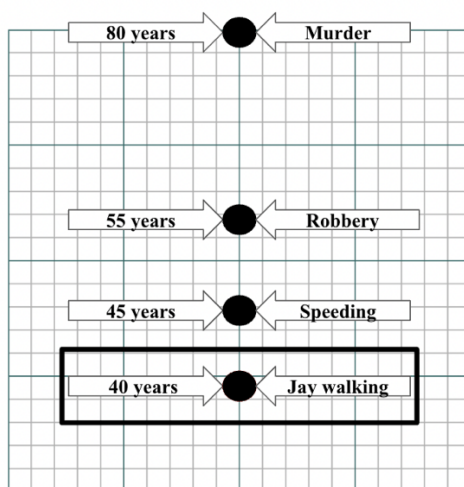


Diagram of an ordinaly proportionate scale with a cardinaly disproportionate anchor

As a result, we must ensure that the anchoring points of an ordinaly proportionate scale are not disproportionate to our intuitions about the maximum and minimum that the crime intrinsically deserve. To do this, we must rely on a judgment about those crimes' cardinal proportionality.⁷²

Von Hirsch concedes that desert can only provide fuzzy guidance for deciding the cardinally proportional punishments for the anchoring crime. This is because cardinal proportionality can only tell us what would be grossly disproportionate to a particular crime, but

⁷¹ Von Hirsch, *Doing Justice: The Choice of Punishments*, 91-92.

⁷² Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, 43.

not too much more.⁷³ We can say with certainty that desert requires that the scale ought not to be inflated so much that non-serious crimes receive severe penalties. However, we can't determine what the specific length ought to be solely in reference to what each crime intrinsically deserves.⁷⁴ For example, we cannot determine, even if we have already determined how other penalties for crimes relate to the crime of burglary, what the uniquely deserved punishment quantum of punishment for burglary is.⁷⁵ This is the point where von Hirsch argues that the theory of just deserts would require utilitarian considerations to resolve these remaining uncertainties.⁷⁶

To illustrate how utilitarianism resolves uncertainty about the anchoring of an ordinarily proportionate scale, consider the same hypothetical that we posed above. A government has determined the ordinal ranking of punishments within a scale of punishments ranging from the least severe crime to the most severe crime, but it cannot determine the anchoring points of the scale entirely with desert. The least severe crime is jaywalking, and by considering what is intrinsically deserved for that crime, we determine that it would be disproportionate to punish someone who was jaywalking with anything less than a fine, but it would also be disproportionate to punish jaywalking with anything more than a day in jail. At that point, though, the guidance from what is cardinally deserved by the crime of jaywalking runs out. Once the guidance for desert runs out, only then may you rely on utilitarian considerations such as deterrence to determine the just end point of the scale.⁷⁷

⁷³ Von Hirsch, *Doing Justice: The Choice of Punishments*, 93.

⁷⁴ Von Hirsch, *Doing Justice: The Choice of Punishments*, 91.

⁷⁵ Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, 43.

⁷⁶ Von Hirsch, *Doing Justice: The Choice of Punishments*, 93.

⁷⁷ Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, 92-94, 100-101.

Utilitarian considerations at this point determine what punishment on this scale of deserved punishments would have the best consequences. Since we know that neither a day in jail nor a monetary fine is grossly disproportionate to jaywalking, we then want to choose the punishment that best serves some other end. In the example above, perhaps a 500-dollar fine is close enough to effectively deter jaywalking, but it does not inflict as much suffering as the day in jail would. Setting that fine as the punishment for the least severe crime of jaywalking, we could then place our internally proportionate above that crime and penalty. From there, the ordinarily proportionate relationships between penalties would result in a scale that gives specific answers about what punishments are proportional to specific crimes. It was only through combining retributive desert and utilitarian considerations that we were able to come to a just system of proportional punishments.

Even though utilitarian considerations are given some role in determining the just distribution of punishment, desert always has logical priority and constrains the pursuit of utilitarian ends. In a situation where an offense is not as serious, such as petty theft, but could be better deterred with a severe penalty, the theory of just deserts prioritizes the consideration of desert. Hirsch claims that desert must have priority over any other consideration because proportionality is a requirement of justice rather than a strategy for controlling crime.⁷⁸ This ensures that utilitarian considerations can aid in making decisions about the most just punishment without ever inflicting an undeserved punishment for the sake of its good consequences.

Overall, Andrew von Hirsch's theory of just deserts presents a compelling account of the proper justification of the distribution question within a mixed theory. His answer rightly

⁷⁸ von Hirsch, *Doing Justice: The Choice of Punishments*, (74-75).

prioritizes that punishments be proportional to desert. His mixed theory as a whole uniquely combines utilitarian and retributive considerations into an extremely compelling system of punishments. His account fully addresses criticisms of both utilitarian and retributivist justifications and uses them to create a system of punishments that could realistically produce proportionate punishments.

VII. Criticism of Mixed Theories Generally

To fully defend the theory of just deserts, we must also defend it against criticisms directed against all mixed theories. The concept of a mixed theory has faced criticism that they are implausible because it combines utilitarianism and retributivism, which are theories that provide directly competing accounts of what makes punishment just. These criticisms focus on two general assertions. The first is that no pure utilitarian or retributivist would ever accept a mixed theory, so it would not be an effective compromise between utilitarianism and retributivism. The second is that these two opposing theories cannot be combined in any internally consistent way to result in one conclusion about what is just.⁷⁹

The first criticism centers around the fact that mixed theories, in practice, would not gain enough widespread support to be implemented. Rather than reconciling the retributivist and utilitarian, it would only be an unsatisfying compromise of each of their values. As a result, neither the retributivist nor the utilitarian would ever accept the mixed theory justification.⁸⁰ This criticism is not a convincing reason to reject the mixed theory framework. While it is true that the utilitarian and the retributivist each have fundamentally opposed opinions about what makes a punishment just, I do not think that advocating for a mixed theory of punishment that

⁷⁹ Whitley Kaufman, "The Mixed Theory of Punishment," in *Honor and Revenge: A Theory of Punishment* (New York: Springer, 2013); 91.; Matthew Altman, *A Theory of Legal Punishment: Deterrence, Retribution, and the Aims of the State* (Oxon: Routledge, Taylor, & Francis Group, 2021); 7.

⁸⁰ Kaufman, "The Mixed Theory of Punishment 91-92.

combines utilitarianism and retributivism requires that we create a theory of punishment that both retributivists and utilitarians would agree with. The point of advocating for a mixed theory of punishment is not to create a theory of punishment that either side would agree with but that effectively combines the two to create a stronger theory of punishment. The mixed theory does not create a system of punishment that an unwavering retributivist or utilitarian would accept over their own opinions; rather, it creates a system of punishment that is a stronger alternative.

The second criticism about the coherence of the conclusions of a mixed theory requires more analysis into how exactly the mixed theory combines utilitarian and retributive considerations. Although Hart's mixed theory framework clearly separates the relevance of retributivism and utilitarianism, some have argued that since neither the pursuit of the general aim nor the restriction of the question of distribution has logical priority to the other, then in order to come to conclusions about just punishment, one must decide which pursuit is more important. If a mixed theory requires this, then it would simply fall into being a purely retributivist or utilitarian theory rather than a mix of the two.

Without designating one theory as more important than the other, there seems to be no way to determine what punishments we ought to inflict or not in moments where the pursuit of one conflicts with the other.⁸¹ Earlier in this paper, I utilized the example of an elderly woman who deserves punishment for something she committed earlier in life. If neither the utilitarian considerations nor the retributivist answers are given more importance than the other, then how should we decide if she should be punished and how much?

In trying to answer this problem, if we decide to prioritize one theory over the other, then the mixed theory's strength of combining both theories seems to fall apart. Consider an example

⁸¹ Altman, *A Theory of Legal Punishment: Deterrence, Retribution, and the Aims of the State*, 7.

where a government utilizing a mixed theory decides that it is only just to punish individual offenders if and only if it maximizes utility, and then the mixed theory seems to fall into just being utilitarianism. The other side of this scenario is a government that decides that the aim of the distribution of punishment overrides the general aim, then the mixed theory requires that we punish people no matter the consequences, and it seems to be solely retributivist.

To combat the first scenario where a mixed theory falls into pure utilitarianism, I would argue that this criticism tends to discredit the strength of what the mixed theory, and in particular, von Hirsch's mixed theory, allows the government or sentencing commission to do. While the mixed theory framework may not explicitly say which aim takes logical priority over the other, it does not need to in order to provide coherent answers about what punishment to inflict. It leaves those decisions up to the individual government and sentencer. What the theory of just deserts does is ensure that the system of punishment does not justify punishments that go beyond what a person deserves. Even if the sentencing commission utilizing a mixed theory decided that punishments ought to only be imposed if and only if there is some benefit to that punishment, it does not become just like utilitarianism because it still incorporates an idea of desert and there is no risk that it will justify the punishment of an innocent person. This prevents the mixed theory from justifying punishments that go against our intuitions about punishment.

In the second scenario a sentencing commission utilizing a mixed theory has decided that we ought to prioritize desert and punish no matter the consequences. In the theory of just deserts, this seems to violate the requirement of the general aim of punishment. The justification of the general aim states that a system of punishment exists for its good consequences. If punishing each person, no matter the consequences, results in net bad consequences for society, then that would be rendered unjust by the mixed theory because it violates what justifies the general aim

of punishment. So, we should not be concerned about a mixed theory collapsing into a solely retributive theory of punishment in practice.

These arguments, taken together, show that a mixed theory is worth advocating for despite being objectionable to a staunch retributivist or utilitarian. Furthermore, it shows that a mixed theory of punishment provides coherent answers about what is just punishment while also leaving decisions about which values are most important to the individual governments and sentencers. The separation of the two questions in the theory of just deserts and their justification ensures that we do not have a system of punishment that, in practice, results in a pure retributivist or utilitarian account.

VIII. The Competing Theory of Limiting Retributivism

Since the publication of von Hirsch's theory of just deserts, there have been other competing mixed theories that offer different explanations of how a punishment system ought to work and the role that retributive desert plays in the just distribution of punishment. The most significant competing mixed theory is the theory of 'limiting retributivism' developed by the scholar Norval Morris.⁸² Morris's theory rejects the idea that we can determine with any certainty what a person deserves and creates a justification of punishment where any punishment that is 'not-undeserved' is just. I will argue that limiting retributivism does not provide a more just system of punishment. Rather, it unjustly inflicts undeserved punishments by not prioritizing the guidance that desert can provide towards determining the proportional punishment and not requiring strict proportionality.

Von Hirsch articulated a theory that followed from specific philosophical foundations and justifications. On the other hand, Norval Morris's theory is more concerned with assessing

⁸² Thorburn and Manson, "The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning," 278.

the real-world implications of desert and proportionality requirements than with assessing the finer points of von Hirsch's justification.⁸³ As a result, his critique of just deserts strays away from commenting on the basis of the justification and focuses on criticizing the extent to which desert can provide guidance about what punishments are just.

Morris's theory does not explicitly utilize the same mixed theory framework initially proposed by Hart, but the theory relies on both utilitarian and retributive considerations.⁸⁴ Morris's theory's central difference from the theory of just deserts centers around Morris's assertion that desert cannot provide as much guidance about the proportional punishment that the theory of just deserts requires. Furthermore, since desert cannot provide that guidance, Morris provides a different account of how we determine the just distribution of punishment. Within his criticism, he extensively debates whether desert is a limiting or defining principle, which are terms that are not utilized in von Hirsch's theory of just deserts. According to Morris, a limiting principle of punishment only tells us what the outer limits on punishment length ought to be, whereas a defining principle tells us precisely what length of punishment we ought to inflict.⁸⁵ Morris asserts that the concept of desert can only provide broad outer limits about what length of punishment would be grossly disproportionate but cannot provide any guidance beyond those limits regarding the specifically deserved punishment. This assertion causes Morris to conclude that desert is a limiting principle rather than a defining one.⁸⁶

Morris contrasts his discussion of desert with a discussion of utilitarian deterrence.

Morris asserts that if we had more information about crimes, such as exactly why people commit

⁸³ Thorburn and Manson, "The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning," 286.

⁸⁴ Norval Morris, "Punishment, Desert, and Rehabilitation," *Equal Justice Under the Law* (Washington: U.S. Department of Justice, 1977): 151, 159.

⁸⁵ Morris, "Punishment, Desert, and Rehabilitation," 141-142.

⁸⁶ Morris, "Punishment, Desert, and Rehabilitation," 158-159.

them and why people do not, then we could theoretically determine the appropriate punishment to deter a given crime by a given type of criminal. For example, if we knew exactly why shoplifters in this one city decided to shoplift or not, we would be able to determine the exact punishment that would most effectively deter shoplifting in that city. This possibility allows Morris to designate utilitarian deterrence as a defining principle. In contrast, according to Morris, no additional information about a crime would allow us to determine what the uniquely deserved cardinally proportionate punishment is to desert, so it is not a defining principle.⁸⁷

Morris argues that since desert is unable to provide definite answers about what punishments are just beyond those vague outer limits, the sentencer is not required to impose punishments that are strictly commensurate to desert. In more general terms, Morris doubts that we can make those judgments, so he denies von Hirsch's conclusion that justice says we ought to make those judgments. He advocates an entirely different method to determine the just punishment in particular cases. Specifically, he proposes that a sentencer would evaluate what a person deserves and set maximum and minimum limits on the severity of punishment for that crime based on what would be grossly disproportionate. Morris asserts that every possible sentence within those limits is 'not-undeserved.' This means that any sentence within those limits would be just.⁸⁸

Within that broad range, a sentencer would still need to decide what specific 'not-underserved' they should inflict at that point. From there, Morris articulates that a sentencer may rely on any number of further principles, such as utilitarian deterrence or equality, to supply reasons for a final, fine-tuned answer about what sentence to inflict.⁸⁹ How each principle ought

⁸⁷ Morris, "Punishment, Desert, and Rehabilitation," 140-141.

⁸⁸ Morris, "Punishment, Desert, and Rehabilitation," 159; Richard Frase, "Sentencing Principles in Theory and Practice" *Crime and Justice* 22 (1997): 369-376.

⁸⁹ Morris, "Punishment, Desert, and Rehabilitation," 159.

to be weighed against one another may be decided by the individual judge assessing the case. As long as a judge does not make arbitrary decisions and has reasons for inflicting the punishment they decide, Morris argues that this is just. This is a central difference to von Hirsch's theory, where one may only rely on utilitarian theories to decide what deserved punishment one ought to inflict for the anchoring crime on a scale of penalties.

Morris's theory has gained significant influence and popularity in penal theory. This is because Morris's theory does incorporate a consideration of desert, but beyond that, individual judges may decide how to fine-tune that answer based on other principles they find important to just punishment. This flexibility to decide on a punishment within a broad range allows individual judges to retain significant autonomy in determining what punishment ought to be inflicted.⁹⁰ At the same time, it does not allow for an innocent person to be punished, and it prevents grossly disproportionate punishment.

Von Hirsch has responded directly to Morris's limiting retributivism and has addressed the arguments about desert that Morris raised.⁹¹ The central difference between what von Hirsch argues about desert and what Morris argues is that Morris does not even think that desert can provide answers about what would be ordinarily proportionate.⁹² Von Hirsch clarified that desert can give us definite answers about what punishments are ordinarily proportionate. This means that von Hirsch argues that desert is a defining principle, rather than a limiting one, for determining ordinal proportionality. He does concede that desert cannot provide enough guidance about cardinal proportionality, and so desert is only a limiting principle when anchoring the scale with questions about cardinal desert. Von Hirsch maintains that his theory

⁹⁰ Frase, "Sentencing Principles in Theory and Practice," 426.

⁹¹ Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005): 138.

⁹² Von Hirsch, *Past and Future Crimes*, 39.

correctly requires that punishments be commensurate to desert and only rely on utilitarian considerations when anchoring the ordinally proportionate scale within the outer limits set by desert.⁹³

Morris's challenge that desert cannot provide direct answers about what is proportionate is not completely without warrant. Von Hirsch recognizes that desert cannot provide the exact quantum of punishment that is cardinally proportionate to a particular crime. Since desert is not enough to provide definite answers about how to anchor a scale of punishment, the theory of just deserts allows for utilitarian considerations to decide what the anchoring punishment ought to be within the broad limits of what desert allows for.⁹⁴ Regardless, I will argue that Morris's conclusions about desert have a few central difficulties. I will argue that we *can* use desert alone to make judgments about ordinal proportionality. Furthermore, Morris has not engaged enough with von Hirsch's theory of just deserts to show that von Hirsch's method does not give us enough guidance about desert to require that punishments are commensurate to desert. Lastly, the diminished role that Morris gives desert in his theory would allow for punishments that go against our intuitions about just punishment.

First, Morris asserts that, unlike the concept of deterrence, there is nothing that can be learned from the concept of desert except the broad limits of what would be grossly disproportionate. He draws a clear distinction between the concept of deterrence, where we do not know enough to always know what best deters criminal activity, and desert, where there is fundamentally no way to know more about desert other than those outer limits. It is important to get this distinction clear because this claim supports Morris's conclusion that we cannot require

⁹³ Von Hirsch, *Past and Future Crimes*, 39.

⁹⁴ Von Hirsch, *Doing Justice: The Choice of Punishments*, 93-94.

punishments to be strictly proportional. Instead, to Morris, all not-undeserved punishments are proportional.⁹⁵

Morris's claim that desert is only a limiting principle is problematic because we can use desert to determine whether the punishments are ordinally proportionate. In the case where we are comparing a robbery and an armed robbery, Morris claims we cannot determine which crime deserves more punishment than the other. It seems clear that we can look at the case of armed robbery and robbery and determine that when someone uses a weapon to rob another person, that increases the harm associated with the act and makes the crime more serious, and thus deserving of more punishment. This suggests that we can use desert to make judgments about what is ordinally proportionate.

Morris has not engaged specifically with rebuttals from von Hirsch about how exactly desert can provide further guidance since the original publication of his theory. Morris just maintains that conclusions about ordinal proportionality cannot be determined by desert. To support his argument, Morris may respond to von Hirsch by reiterating that simply knowing one crime is more serious than the other would not provide enough guidance to make specific decisions about exactly how far they ought to be apart from each other on a scale of punishments. He might also respond by saying that comparing similar types of crimes, such as the example of robbery and armed robbery used above, is the easiest possible situation and that insurmountable difficulties would arise when trying to compare vastly different types of crimes, such as fraud and kidnapping. There is a difference, however, between a concept that is difficult to come to conclusions about and a concept that is impossible to come to conclusions about. Von Hirsch recognizes that gauging the seriousness of crimes compared to one another will involve

⁹⁵ Morris, "Punishment, Desert, and Rehabilitation," 158.

complexities, but determining the culpability of the offender and the harm of the offense have roots in practical judgments that people make in their everyday lives. There may be some disagreements, but determining the ordinally proportionate relationship between crimes is not insurmountable.⁹⁶

There are further implications of Morris's claim that desert can tell us nothing about the ordinal proportionality of penalties which are deeply problematic. In limiting retributivism, as long as each offender receives a not-undeserved punishment, their punishments are not required to be the same. That would allow for the unequal sentencing of offenders who have committed the same offense.

To articulate how this becomes problematic for Morris's claim about desert, take the example of two people charged with fraud where one was sentenced to a year in prison and the other to a fine. Assume that each of these punishments falls within the range of what is considered just according to desert. While Morris would assert that they each received a not-undeserved punishment, we can still say that these punishments are ordinally disproportionate because they are different sentences for the same crime. This would make them ordinally disproportionate. If two equally serious crimes have different punishments, then at least one of them is receiving an undeserved punishment, which is wrong. Since we can clearly point to these punishments being ordinally disproportionate, then we have already demonstrated that desert can tell us more about what punishments are proportionate than Morris has asserted. This combats Morris's assertion that we cannot know anything about ordinal proportionality from desert because we know that crimes that are the same deserve the same punishments.

⁹⁶ Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, 42-43.

Another difficulty with Morris's assertion is that even if we accept his argument that desert does not provide abundantly clear guidance about what is proportional, that by itself is not necessarily convincing enough to reduce proportionality to the extent that Morris does within limiting retributivism. By asserting that any "not-undeserved" punishment is proportional and just, Morris asserts that like cases do not have to be treated alike. Morris explicitly states that the theory of limiting retributivism would allow for individuals who committed the same crime to receive different punishments solely for its net good consequences.⁹⁷

Morris clarifies his position by giving the example of a situation where six doctors are all guilty of fraud. He argues that punishing each of them with the same prison time is a drain on federal resources and would inflict unnecessary pain. Instead, Morris proposes that the same deterrent effect can be achieved by only punishing two of them with prison time and giving the other four fines.⁹⁸ As long as none of the punishments are not-undeserved, Morris allows considerations other than desert to justify unequal punishments. Even if we concede that it is difficult to come to conclusions about what is specifically deserved for a certain crime, that does not justify the conclusion that offenders with equal desert can be punished differently. This is wrong because at least some of them are receiving undeserved punishments, especially since, in this example, we know that each person is equally deserving of punishment. Morris reduces proportionality to such minimal importance that he justifies a conclusion that is clearly unjust: that equal cases may be treated unequally.

It is my contention that there is far more we can glean from desert about the ordinal proportionality of penalties than Morris recognizes. If we accept that desert can provide guidance about what is ordinally proportionate, then Morris's claims that deterrence is a defining principle

⁹⁷ Morris, "Punishment, Desert, and Rehabilitation," 153.

⁹⁸ Morris, "Punishment, Desert, and Rehabilitation," 153-154.

seem to allow us to classify desert as a defining principle as well. In Morris's definition of limiting and defining principles, he presents deterrence as an example of a defining principle. At the moment, we do not know enough for deterrence alone to provide those defining limits, but the fact that it could provide those answers with additional information allows it to be considered a defining principle.⁹⁹

That logic seems to undermine Morris's contrasting conclusion about desert. He argues that in contrast to deterrence, the concept of desert would never be able to give definite conclusions. What prevents us from making the same conclusion about deterrence? If we do not have this information about deterrence now, then what ensures that we would be able to obtain enough information to make definitive conclusions about what length of punishment best deters future criminal activity? The information that we have about what penalty best deters specific criminal conduct is comparable to the guidance that we can receive from desert. At its core, Morris's argument relies on us discounting desert's ability to guide us to decisions about ordinal proportionality. This is an unconvincing argument when you consider the fact that Morris allows for deterrence to be a defining principle despite the acknowledged difficulties with coming to definitive conclusions about punishment with deterrence. If utilitarian considerations such as deterrence can provide enough information to be considered defining principles, then desert ought to be considered one as well. Acknowledging desert as a defining principle would lead us to reject the diminished role that Morris gives desert in his theory.

Furthermore, Morris does not specifically address the method that von Hirsch articulates. What I mean by this is that Morris does not confront the way that von Hirsch articulates we can use cardinal and ordinal proportionality to come to more specific conclusions about what a

⁹⁹ Morris, "Punishment, Desert, and Rehabilitation," 141.

person deserves. The method proposed in just deserts would allow for sentencers to assess the seriousness of crimes and make comparative judgments about what is ordinarily proportionate based on that. From there, just deserts provides a method to anchor that ordinarily proportionate scale with desert and utilitarian considerations.¹⁰⁰ Morris presents a criticism of desert's guidance that does not accommodate for the way that von Hirsch argues we can use desert to come to decisions about ordinal and cardinal proportionality. Unless Morris specifically argues against the comprehensive method outlined in von Hirsch's account, we cannot accept the diminished role that Morris gives proportionality in just punishment.¹⁰¹

Ultimately, we ought to doubt Morris's sweeping claim that desert cannot tell us anything more than outer limits. The theory of just deserts recognizes the fact that we cannot determine the cardinally proportional punishment for any given crime just by analyzing desert. It is with that in mind that von Hirsch constructs a method for using desert to determine proportional punishments in the theory of just deserts. Analysis of desert is complex and difficult, but by determining the seriousness of crimes and using desert and utilitarian considerations to create a proportionate punishment scale, we can require that punishments be strictly proportional. Justice requires that we only punish as much as a person deserves, and the theory of just deserts best ensures that we use desert to meet that burden. As a result, we should not reduce desert's importance to determining just punishment in the way that limiting retributivism requires, and we ought to utilize von Hirsch's theory of just deserts.

IX. Criticism of Just Deserts in an Unjust World

Other critics have objected that the theory of just deserts fails to account for injustice in citizens' life circumstances. It is important to note that this criticism faces every theory of

¹⁰⁰ Von Hirsch, *Past and Future Crimes*, 43.

¹⁰¹ Frase, "Sentencing Principles in Theory and Practice," 382, 384-385.

punishment that incorporates desert as a necessary condition of punishment. According to this objection, while the theory of just deserts might be sound in theory, it is unable to account for the fact that citizens do not have equal opportunity for material advancement and abstention from crime.¹⁰² Since the real world falls short of the ideal, we cannot assume that each person can be held equally morally responsible for the crimes they commit. If that is the case, then critics argue that von Hirsch's method for determining what each person deserves falls apart. I will argue that we can recognize that society is unjust while also advocating for the best justification of punishment that we have, regardless. Furthermore, the theory of just deserts does provide a mechanism for considering a person's unequal circumstances in life.

This is a criticism that von Hirsch addressed in later publications about his theory of just deserts. He concedes that as long as a substantial percentage of the population is denied adequate opportunities for a livelihood, any justification of punishment must be morally flawed.¹⁰³ Whether or not we agree that a substantial percentage of the American population does not have adequate opportunities to pursue the livelihood of their choice is a separate debate.

Regardless of the existence of social injustice, in the real world, we are still faced with individuals breaking the law. In a mixed theory such as von Hirsch's, we also recognize the importance of having a system of punishment to prevent that harmful activity. Even if the reality is that a substantial percentage of the American population does not have equal opportunity, that does not absolve us of our duty to devise a just system of punishment. That system should hold individuals responsible for their criminal activity while also trying to mitigate the effects of social injustice. Furthermore, we have already concluded that a theory of punishment must incorporate the idea of desert to avoid justifying the punishment of an innocent person.

¹⁰² Michael Tonry, *Sentencing Matters* (Oxford: Oxford University Press, 1996); 16-17.

¹⁰³ Von Hirsch, *Doing Justice*, 147-149.

The theory of just deserts provides the best justification that we have to inflict just punishments while also providing a mechanism to consider an individual's circumstances in life. The theory of just deserts already requires that we assess the seriousness of the crime by analyzing harm and culpability. At that point, the theory of just deserts allows us to consider mitigating factors, such as social injustice, that may affect how much a person is culpable of their crimes.¹⁰⁴ As a result, the theory of just deserts does have a mechanism built into the theory that helps combat this objection, and we should not accept it as a reason to reject the theory of just deserts as the proper justification of punishment.

X. Real-World Applications of the Theory of Just Deserts

A. Three Strikes Laws

To demonstrate the strength of the theory of just deserts as well as the applicability of the conclusions made thus far in this paper, it is valuable to examine some real-world examples of difficult questions of just punishment. Through analyzing 'three strikes laws' and debates surrounding the criminalization of homelessness, we can better see the applicability of these philosophical theories and conclusions that I have advocated for throughout the paper. I will argue that each of these cases demonstrates how the theory of just deserts and the importance of desert are not just philosophically important but provide guidance in real-world debates about justice. I will also show how other theories of punishment fail to provide the answers that the theory of just deserts does. The first controversial issue where we can gain clear guidance from what we have concluded is the case of three strikes laws.

¹⁰⁴ Von Hirsch, *Doing Justice*, 147-148.

These laws made it so that after three felonies, or ‘three strikes,’ you would be sentenced to 25 years to life in prison, regardless of the underlying triggering felony.¹⁰⁵ These laws were meant to deter recidivism and imposed harsh sentences upon repeat offenders with three serious or violent felonies.¹⁰⁶ When you solely look at the felony triggering the sentence, it seems that the sentence is not proportional to the offense. Does that then make them unjust? For the legislatures as well as the Supreme Court, the answer was no.¹⁰⁷ These laws were meant to be harsh to try and deter repeat offenders. They also intentionally incarcerated individuals who could not follow the laws for long periods of time. These two reasons are often considered to be legitimate justifications of a punishment’s severity and do not require the individual sentence for the third felony to be proportional.¹⁰⁸

Without having the conclusions that we do about desert and the proper justification of punishment, it is not immediately clear how we should weigh the value of desert against utilitarian benefits. With the conclusions that we have made in this paper, however, we have more answers about whether or not these laws are just or not. First and foremost, it is not unjust in and of itself to increase the penalties of recidivist offenders. Within the theory of just deserts, von Hirsch argues that people who commit crimes repeatedly are more culpable for committing their offenses.¹⁰⁹ This is because, unlike first-time offenders, they have already been punished before and shown that their behavior was wrong. They had the chance to refrain from criminal

¹⁰⁵ Karch and Cravens, “Rapid Diffusion and Policy Reform: The Adoption and Modification of Three Strikes Laws,” 466-467.

¹⁰⁶ Andrew Karch and Matthew Cravens, “Rapid Diffusion and Policy Reform: The Adoption and Modification of Three Strikes Laws,” *States Politics & Policy Quarterly*, vol. 14, no. 4 (2014): 467, <https://doi.org/10.1177/1532440014561867>.

¹⁰⁷ Karch and Cravens, “Rapid Diffusion and Policy Reform: The Adoption and Modification of Three Strikes Laws,” 466-467; *Ewing v. California*, 538 U.S. 11, 12 (2003).

¹⁰⁸ Karch and Cravens, “Rapid Diffusion and Policy Reform: The Adoption and Modification of Three Strikes Laws,” 467.

¹⁰⁹ Von Hirsch, *Past or Future Crimes*, 77.

activity after the first punishment and did not. Recidivists having an increased level of culpability increases the seriousness of the crime. The more significant question is whether the mandatory harsh sentences on the third felony, which are often sentences of 25 years to life, imposed after the third crime are unjust.¹¹⁰

The theory of just deserts would never allow for the third felony to be punished with a crime that was disproportionate to their desert. Even considering the increased culpability of offenders, it is highly likely that many of the existing three-strikes laws would be rendered unjust under the theory of just deserts. This is because three strikes laws that exist within our country punish the third crime incredibly severely regardless of the underlying crime. Despite that, the theory of just deserts would allow for increased penalties as long as they increase proportionately with the seriousness of the crime. A state may decide how sharply they want to increase punishment for recidivist offenders but must never do so arbitrarily. Instead, utilizing both retributivist and utilitarian considerations within the distribution, it ought to make those decisions based on their view of the increase in culpability and the increase in social benefit for deterring recidivist behavior.¹¹¹

All in all, it seems that the theory of just deserts would prevent the imposition of grossly disproportionate penalties for third felonies. At the same time, however, the strength of the theory of just deserts is that it would allow for an increase in the seriousness of the crime based on the repeat offenses. This would enable governments to still impose policies that gave stricter penalties to repeat offenders while ensuring that the rate at which those penalties increased was just based on the offender's desert and the benefit of deterrence.

¹¹⁰ Karch and Cravens, "Rapid Diffusion and Policy Reform: The Adoption and Modification of Three Strikes Laws," 462.

¹¹¹ Von Hirsch, *Past or Future Crimes*, 85-88.

B. Criminalization of Homelessness

Another situation where we can use the theory of just deserts to reach beneficial conclusions about difficult sentencing issues is the debate over whether one can criminalize homelessness. In one recent case that went to oral argument in front of the Supreme Court, a city imposed ordinances that would make sleeping and camping in public an offense that could result in hundreds of dollars of civil fines. If those fines went unpaid, then the city could trespass individuals from state property, and if those individuals were found on state property, then they could face criminal prosecution.¹¹² The plaintiffs argued that these laws effectively criminalized homelessness, which was against the homeless individuals in the community's 8th Amendment right to be free from cruel and unusual punishment.¹¹³

The core of this debate focuses on whether it was just to criminalize conduct that is often involuntary for homeless individuals. The goal of the ordinances was to prevent the creation of homeless encampments in public spaces that caused public health and safety concerns.¹¹⁴ This is a case where, at face value, each side seems to have a point. On the one hand, homeless individuals are forced by their situation to reside in public places, and this law prevents them from doing so without providing any alternatives. On the other hand, the local government does have a legitimate concern for preventing the creation of homeless encampments in public spaces.

The first tool that the theory of just deserts provides is the ability to assess the culpability of homeless individuals who are trespassed after failing to pay the fines associated with the civil ordinances. For homeless individuals who do not have people to stay with or a shelter to stay in, these civil ordinances prevent homeless people from engaging in conduct that is necessary to

¹¹² *Johnson v. City of Grants Pass*, 20-35752, 3 (2024).

¹¹³ *Johnson v. City of Grants Pass*, 3-4.

¹¹⁴ *Johnson v. City of Grants Pass*, 23-24.

protect themselves from the elements. Can we really expect homeless people to refrain from camping when they have nowhere else to stay and are exposed to the elements? We must recognize that homeless people are often not voluntarily homeless, and so criminalizing conduct necessary for their survival seems to criminalize involuntary conduct. As a result, these individuals seem to have less culpability in committing these crimes, and the theory of just deserts articulates that their desert for violating these ordinances is lower.

Next, we can analyze the severity of the punishment that leads to trespass, which is the fines associated with the conduct. Von Hirsch argues that the theory of just deserts relies on an understanding of how severe the punishment typically is.¹¹⁵ Since these penalties are aimed at individuals who are indigent, the fines associated with the violations have a considerably larger impact on homeless individuals. Fines that may be proportional to the desert of most middle-class citizens would be more severe for the financial situation of a homeless person since it is much harder for them to pay off those fines.

The theory of just deserts provides the leeway for us to conclude that, in this instance, the severity of the fines is particularly worse for homeless individuals. If the severity of the punishment is higher, then the level of desert required to justify the imposition of those fines must also be higher. As we just discussed, it seems that the desert of homeless offenders is quite low due to the fact that homelessness is usually involuntary. These two conclusions, taken together, show that these laws impose disproportionate punishment, and thus unjust punishment, upon homeless individuals in the community.

The strength of the theory of just deserts is further demonstrated when you try and use competing theories of punishments to answer this real-world question about just punishment. A

¹¹⁵ Von Hirsch, *Doing Justice: The Choice of Punishments*, 107-112.

purely utilitarian theory of punishment would not consider any of these complexities when deciding the just punishment in these cases. Since there is no inherent consideration of desert, a utilitarian account would not have the nuance needed to ensure that homeless individuals are not fined more than they deserve.

The theory of limiting retributivism also fails because it does not require that we consider these complexities. In the theory of limiting retributivism, there is no built-in mechanism to assess the circumstances of the offender that ought to impact the seriousness of the offense and the severity of the penalty. It is clear from the nature of the situation that it is just to recognize that the culpability of homeless offenders in these situations is lower and that the severity of the penalties in this case is higher. Morris's theory does not incorporate a requirement that we use harm and culpability to determine exactly what a person deserves and would risk the imposition of unjust fines upon these individuals.

As such, under the theory of just deserts, these penalties are disproportionate and unjust. Without the theory of just deserts, we would risk justifying these punishments that are wrong to impose. We need the theory of just deserts to provide a full picture of what determines the proportionality of offenses and properly values the role of desert in just punishment.

XI. Conclusion

This paper focuses on assessing whether justice requires that punishments be proportional. We have an intuition that what a person deserves matters, and this paper investigates that intuition and attempts to determine whether punishment must be proportional to desert to be just. To determine the requirements of just punishment, we had to determine the proper justification of punishment. When talking about justice in punishment, the debate has

primarily focused on utilitarianism and retributivism as the two main justifications of punishment.

Utilitarianism and retributivism each seem to contribute values that reflect our intuitions about punishment, but each also falls short of creating a proper justification of punishment on their own. Beyond the recognition that retributive desert was important for just punishment, I argued that justice requires punishments to be proportional to retributive desert. I relied on the arguments that disproportionate punishment inflicts undeserved punishments in the same way that punishing an innocent person inflicts disproportionate punishment. Not only does that inflict undeserved pain and the undeserved removal of liberties, but I argued that the expressive nature of punishment meant that it also inflicts undeserved blame. These factors together clearly demonstrate that disproportionate punishment is unjust because inflicting undeserved pain, suffering, and blame goes against our intuitions about just punishment.

Since neither retributivism nor utilitarianism are sufficient to justify punishment fully on their own, some philosophers attempt to combine them both into a mixed theory. Hart's mixed theory provides a helpful framework for dividing a justification of punishment into two central questions: the question of what justifies the general aim and what justifies the distribution of punishment. Hart articulates that the general aim of punishment is justified by utilitarianism, and the distribution of punishments to particular people is justified by retributivism.

Despite Hart's framework providing a helpful starting point, I argued that Andrew von Hirsch's theory of just deserts better prioritizes proportionality and utilizes retributivism and utilitarianism in a way that allows sentencers to create a system of punishment that results in proportional punishment. In the theory of just deserts, the distribution of punishment is justified through retributivism and utilitarianism. The theory of just deserts outlines a helpful and

comprehensive method for creating an ordinally proportionate scale anchored by cardinally proportionate penalties. By allowing for decisions about the anchoring points of an ordinally proportionate scale to reference utilitarian ends, von Hirsch provides a compromise between retributive desert and other considerations that creates a realistic method for ensuring that punishments are proportional.

Just desert's most significant competing theory is the theory of limiting retributivism, which asserts that desert cannot provide enough guidance to require that punishments be proportional beyond requiring that punishments be not-undeserved. I articulated why we should deny the argument that desert cannot provide enough guidance to require punishments to be commensurate desert. Rather, the theory of just deserts provides a clear and plausible method for ensuring that a system of punishments ought to only inflict proportional punishments. Since it is crucial to justice that sentences do not go beyond what a person deserves and we can gain significant guidance from desert about what punishments are proportional to specific crimes, we ought to ensure that a system of punishments gives a principle of proportionality that central role, as the theory of just deserts does.

I also defended the theory of just deserts against other objections that dealt with the more fundamental aspects of the theory of just deserts. First, I defended the theory against the claim that any ideal theory cannot be advocated for in practice because it fails to account for the fact that we live in an unjust society. I demonstrated how the theory of just deserts could effectively deal with unjust circumstances within the existing framework of the theory. I also defended the theory of just deserts against the claim that mixed theories, in general, are implausible or incoherent. I showed how the theory of just deserts creates a method that is internally consistent and provides clear conclusions about what is just.

While it is clear that a principle of proportionality is important to justice, further reflection is required about the exact limits of desert's guidance in real-world practice. The theory of just deserts provides a comprehensive and convincing method for determining crime seriousness and equating that to severity, but an important next step is to relocate this more philosophical discussion of the value of desert and a principle of proportionality into a real-world scenario where a legislature is attempting to create a punishment scale using the theory of just deserts. I demonstrated through the two real-world case studies mentioned above the strength of applying the theory of just deserts to real sentencing controversies. Regardless, further work and application are still needed on this front.

Overall, this paper establishes that desert is an important consideration and justice requires that punishments be proportional to desert. Justifications of punishment ought to prioritize desert and respect the guidance that desert provides for determining the just punishment. We ought to care deeply about ensuring that we do not have a system of punishment that inflicts undeserved punishment, and the theory of just deserts provides a method for ensuring that we only inflict punishments that are proportional to desert.

Works Cited

- Adamson, Suzette. "James Crumbley Verdict Reaction: School Shooter Dad on Trial." Facebook video, March 14, 2024. <https://www.facebook.com/watch/?v=783910846540869>.
- Altman, Matthew. *A Theory of Legal Punishment: Deterrence, Retribution, and the Aims of the State*. Oxon: Routledge, Taylor, & Francis Group, 2021.
- Andenaes, Johannes. *Punishment and Deterrence*. Ann Arbor: University of Michigan Press, 1974.
- Armstrong, K.G. "The Retributivist Hits Back." *Mind* 70, no. 280 (1961): 471-490.
- Berman, Mitchell. "Proportionality, Constraint, and Culpability." *Criminal Law and Philosophy* 15, (2021): 373, <https://doi.org/10.1007/s11572-021-09589-2>.
- Britannica. "Ordinal Number." Mathematics. <https://www.britannica.com/science/ordinal-number>.
- Brooks, Thom. *Punishment: A Critical Introduction*. New York: Routledge, 2021.
- Davis, Michael. "Why Attempts Deserve Less Punishment than Complete Crimes." *Law and Philosophy* 5, no. 1 (1986): 1–32. <http://www.jstor.org/stable/3504711>.
- Dickson, Janet Martin. "James Crumbley Verdict Reaction: School Shooter Dad on Trial." Facebook video, March 14, 2024. <https://www.facebook.com/watch/?v=783910846540869>.
- Duff, Antony. *Punishment, Communication, and Community*. New York: Oxford University Press, 2001.
- Duus-Otterström, Göran. "Weighing Relative and Absolute Proportionality in Punishment." In *Of One-Eyed and Toothless Miscreants*. Oxford: Oxford University Press, 2020).
- Ewing, A.C. "Punishment as Viewed by the Philosopher." *Canadian Bar Review* 21 (1943): 102-122.
- Feinberg, Joel "The Expressive Function of Punishment." *The Monist* 49, no. 3 (1965):397-423.
- Frase, Richard. "Sentencing Principles in Theory and Practice." *Crime and Justice* 22 (1997): 363-433.
- Gross, Hyman. *A Theory of Criminal Justice*. New York: Oxford University Press, 1979.
- Haist, Matthew. "Deterrence in a Sea of Just Deserts: Are Utilitarian Goals Achievable in a World of Limiting Retributivism." *Journal of Law and Criminology* 99 (Spring 2009).

- Hart, Henry. "The Aims of Criminal Law" *Law and Contemporary Problems* 23, no. 3 (1958): 401-441.
- Hart, H.L.A. "The Presidential Address: Prolegomenon to the Principles of Punishment." *Proceedings of the Aristotelian Society* 60, (1959): 1-26.
- Honderich, Ted. *Punishment the Supposed Justifications*. London: Hutchinson & Co., 1969.
- Husak, Douglas. "Retributivism and Over-punishment." *Law and Philosophy* 41, no. 2-3 (2022): 169-191.
- Igor Primoratz. *Justifying Legal Punishment*. London: Humanities Press International, 1989.
- Kant, Immanuel. *Metaphysics of Morals*. London: William Richardson, 1799.
- Karch, Andrew and Cravens Matthew. "Rapid Diffusion and Policy Reform: The Adoption and Modification of Three Strikes Laws." *States Politics and Policy Quarterly*, vol 14, no. 4 (2014): 461-491, <https://doi.org/10.1177/1532440014561867>.
- Kaufman, Whitley. "The Mixed Theory of Punishment." In *Honor and Revenge: A Theory of Punishment*. New York: Springer, 2013.
- Klinefelter, Quinn. "School Shooter's Parents, James and Jennifer Crumbley, are sentenced to 10-15 years." *NPR*, April 10, 2024.
- Lippke, Richard. "Mixed Theories of Punishment and Mixed Offenders: Some Unresolved Tensions." *The Southern Journal of Philosophy* 44, no. 2(2006): 273-295.
- McCloskey, H.J. "An Examination of Restricted Utilitarianism." *The Philosophical Punishment* 66, no 4. (1957): 466-485.
- McCloskey, H.J. "A Non-Utilitarian Approach to Punishment." *Inquiry* 8, no 1-4 (1965): 249-263.
- Moore, Michael. "Justifying Retributivism." In *Placing Blame* (Oxford: Oxford Academic, 2010), 153-188.
- Morris, Norval. "Punishment, Desert, and Rehabilitation." *Equal Justice Under the Law*. Washington: U.S. Department of Justice, 1977.
- Rawls, John. "Two Concepts of Rules." *The Philosophical Review* 64, no. 1 (1955): 3-32.
- Ryberg, Jesper. "Retributivism and the Proportionality Dilemma." *Ratio* 34, no 2 (2021), 158-166.

- Smilanksy, Saul. "Utilitarianism and the 'Punishment' of the Innocent: The General Problem." *Analysis* 50, no. 4 (1990): 256-261.
- South Carolina Department of Probation, Parole, and Pardon Services. "Facts and Figures," About PPP. Accessed February 12, 2024. <https://www.dppps.sc.gov/About-PPP/Facts-Figures>.
- Sprigge, T.L.S. "A Utilitarian Reply to Dr. McCloskey." *Inquiry* 8, no. 1-4 (1965): 264-291.
- Sverdlik, Steven. "The Origins of the Objection." *History of Philosophy Quarterly* 29, no.1 (2012): 79-101.
- Tebbit, Mark. *Philosophy of Law: An Introduction*. New York: Routledge, 2017.
- Ten, C.L. *Crime, Guilt, and Punishment: A Philosophical Introduction* (Oxford: Clarendon Press, 1987).
- Thorburn, Malcolm and Manson, Allan. "The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning." *New Criminal Law Review: An International and Interdisciplinary Journal* 10, no. 2 (2007): 278-310.
- Tonry, Michael. "Is Proportionality in Punishment Possible, and Achievable?" in *Of One-Eyed and Toothless Miscreants: Making the Punishment fit the crime?* 1-29. New York, New York: Oxford University Press, 2020.
- Tonry, Michael. *Sentencing Matters*. Oxford: Oxford University Press, 1996.
- Tonry, Michael. *Why Punish? How Much? A Reader on Punishment*. Oxford: Oxford University Press, 2011.
- Von Hirsch, Andrew and Ashworth, Andrew . "Criteria for Proportionality: A Review." In *Proportionate Sentencing: Exploring the Principles*. Oxford: Oxford University Press, 2005.
- Von Hirsch, Andrew. *Deserved Criminal Sentences: An Overview*. Oxford: Hart Publishing, 2017.
- Von Hirsch, Andrew. *Doing Justice: The Choice of Punishment*. Boston: Northeastern University Press, 1976.
- Von Hirsch, Andrew. *Past and Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*. New Brunswick: Rutgers University Press, 1985.
- Von Hirsch, Andrew. "Proportionality in the Philosophy of Punishment." *Crime and Justice* 16 (1992): 55–98. <http://www.jstor.org/stable/1147561>.