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Mitchell N. Berman

*University of Pennsylvania Carey Law School*

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## **Proportionality, Constraint, and Culpability**

Mitchell N. Berman\*

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*Abstract:* Philosophers of criminal punishment widely agree that criminal punishment should be “proportional” to the “seriousness” of the offense. But this apparent consensus is only superficial, masking significant dissensus below the surface. Proposed proportionality principles differ on several distinct dimensions, including: (1) regarding which offense or offender properties determine offense “seriousness” and thus constitute a proportionality relatum; (2) regarding whether punishment is objectionably disproportionate only when excessively severe, or also when excessively lenient; and (3) regarding whether the principle can deliver absolute (“cardinal”) judgments, or only comparative (“ordinal”) ones. This essay proposes that these differences cannot be successfully adjudicated, and one candidate proportionality principle preferred over its rivals, in the abstract; a proportionality principle only makes sense as an integrated part of a more complete justificatory theory of criminal punishment. It then sketches a proportionality principle that best fits the responsibility-constrained pluralist theories of criminal punishment that currently predominate. The proportionality principle it favors provides that punishments should not be disproportionately severe, in noncomparative terms, relative to an agent’s culpability in relation to their wrongdoing.

### **Introduction**

Philosophers and theorists of the criminal law agree, almost without exception, that criminal punishment should be “proportional” to the offense, and that “disproportionate” punishment is unjust. But proportionality is a relational concept, and broad agreement among theorists at proportionality’s surface masks a substantial divergence of views regarding what, precisely, should be proportional to what. Most notably, scholars invoke at least nominally different features or qualities of offender (e.g., blameworthiness, fault, culpability) or offense (e.g., severity,

harmfulness, wrongdoing) to which, they contend, punishment should be proportional. In addition, some scholars have fastened on different features of punishment (censure or condemnation, hard treatment or deprivation) to which the injunction of proportionality attaches. Combining the diversity of positions on these two relata yields a multiplicity of proposed proportionality principles or constraints.

That's not all. Every proffered proportionality principle weighs against punishments that are excessively *severe* by reference to the relevant property of offense or offender. Only some, however, also proscribe or militate against punishments deemed excessively *lenient*. That is, some proportionality principles are infringed only by "supra-proportionate" punishments, whereas others are infringed by supra-proportionate and "infra-proportionate" punishments alike. Furthermore, some proportionality principles have the capacity to police individual punishment-offense pairs, whereas others concern only how one such pair compares to other pairs. This is the difference between what theorists call "cardinal" and (merely) "ordinal" proportionality.

In short, principles of proportionate punishment vary on at least three dimensions: on the relata that ought to be proportional; on whether punishments are objectionably disproportionate only when too severe or also when not severe enough; and on whether proportionality can deliver only ordinal rankings or also cardinal measures, even if very rough. This article chooses sides on these three disputed issues. It advocates a proportionality principle, grounded in principles of humanity, that bars punishments that (a) are excessively *severe* (b) in *absolute* terms, relative to (c) the offender's *culpability in regard to wrongdoing*. I do not contend that this is the single true or correct proportionality principle but only that it fits best with a family of theories of punishment's justifiability that enjoy widespread current support.

This business is conducted over three sections. Section 1 presents a quick overview of the literature, demonstrating that scholars have championed a varied array of principles of penal proportionality. Section 2 takes a step back, addressing the more general question of what, if anything, justifies the imposition of legal punishment. It endorses what I take to be the dominant current scholarly view—namely, that punishment can be morally justified by pursuit of, or conformity with, a plurality of goods and reasons, but only if constrained by principles of distribution (as H.L.A. Hart termed them)<sup>1</sup> that respect differences in one or another aspect of the

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\* Leon Meltzer Professor of Law, the University of Pennsylvania Carey Law School, and Professor of Philosophy, the University of Pennsylvania. Email:

offender's "responsibility" for the offense. I call this widely held position "responsibility-constrained pluralism."

Section 3 puts forth a sensible principle of proportionality for responsibility-constrained pluralists. First, this proportionality principle constrains punishment only from above, not also from below, because that is its point or function: to serve or embody the responsibility constraint. Second, the upper limits it supplies in one case need not involve comparisons to other punishments inflicted in other cases; it is absolute (though contextual), not comparative. Third, the relatum against which a punishment is measured for excessiveness centers on the offender's *culpability*. For want of space, this section cannot defend any one specification of a culpability-based proportionality relatum, but does aim to aid further work on that topic by demarcating the most important possibilities.

## 1. Principles of Proportionality: A Partial Typology

Although champions of proportionality occasionally remark on the wide scholarly support that "the principle of proportionality" enjoys,<sup>2</sup> use of the definite article can mislead. Norms with very different content travel under that label, and no single version appears to be accepted by more than a handful of contributors to a substantial literature. This section focuses on three distinct respects in which proposed proportionality principles differ. These are not the only dimensions on which supposed and defended principles of penal proportionality vary. They might not be the three most important or illuminating. They're important enough to repay attention.

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[mitchberman@law.upenn.edu](mailto:mitchberman@law.upenn.edu). This paper has been prepared for a symposium on "Proportionality in the Criminal Law," sponsored by the Georgetown Institute for the Study of Markets and Ethics, and slated to appear in *Criminal Law and Philosophy*. I am grateful to John Hasnas and Doug Husak for arranging the event and inviting my participation, and to my fellow symposiasts for helpful comments and criticisms on a prior draft.

<sup>1</sup> H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 3-13 (1968).

<sup>2</sup> E.g., Jesper Ryberg, *Proportionality and the Seriousness of Crimes*, in MICHAEL TONRY ED., OF ONE-EYED AND TOOTHLESS MISCREANTS: MAKING THE PUNISHMENT FIT THE CRIME 51, 51 (2020) ("The fact that the principle of proportionality has come to play a significant role in modern penal theory is not surprising."); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUSTICE 55, 56 (1992) (contending that "[s]anctioning rationales differ from one another largely in the emphasis they give the principle of proportionality" and, therefore, that "the choice among sanctioning rationales is, in important part, a choice about how much weight to give to proportionality").

First and most saliently, scholars advance varied views regarding the relation that are the principle's substance. Common formulations provide that punishment should be proportional to the "gravity" or "seriousness" of the offense.<sup>3</sup> But these versions are only as informative as are the notions of offense gravity or seriousness they incorporate.<sup>4</sup> Everybody understands that these formulations simply kick the can down the road until their constituents are specified. Whether proceeding via a conception of offense seriousness or gravity, or bypassing those notions entirely and cutting more quickly to the chase, theorists propose a diverse assortment of offense or offender characteristics to which punishment ought to be proportional. Many commentators focus entirely on properties that might sensibly be thought "internal" to the offender, such as the offender's "blameworthiness," "culpability," "guilt," or "desert."<sup>5</sup> Several focus outward, arguing that the seriousness that matters to proportionality is just the harm that the offense has caused,<sup>6</sup> or the disruption to "civil order" that it threatens.<sup>7</sup> Still others meld these two views, treating offense seriousness for proportionality purposes as some usually unspecified function of both blameworthiness (or culpability) and harm.<sup>8</sup>

That is one side of the equation, the side that concerns what punishment should be proportionate *to*. But the other side—the punishment side—can also be parsed or carved in different ways. Punishment is often defined as

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<sup>3</sup> See, e.g., *id.*, at 56; JOHN DEIGH, FROM PSYCHOLOGY TO MORALITY: ESSAYS IN ETHICAL NATURALISM 232 (2019); Matt Matravers, *The Place of Proportionality in Penal Theory: Or Rethinking Thinking about Punishment*, in TONRY ED., OF ONE-EYED AND TOOTHLESS MISCREANTS, *supra* note 2, at 76, 77.

<sup>4</sup> See, e.g., JOHN GARDNER, *Crime: In Proportion and in Perspective*, in OFFENCES AND DEFENCES 222 (2007) (noting that "everything turns on the applicable conception of 'the crime' and the specification of its axes of gravity"); Mirko Bagaric & James McConvill, *Giving Content to the Principle of Proportionality: Happiness and Pain as the Universal Currency for Matching Offence Seriousness and Punishment Severity*, 69 J. CRIM. L. 50, 51 (2005).

<sup>5</sup> See, e.g., GARDNER, *supra* note 4, at 225-26; ANDREW ASHWORTH & ANDREW VON HIRSCH, PROPORTIONATE SENTENCING 134 (2005).

<sup>6</sup> Bagaric & McConvill, *supra* note 4.

<sup>7</sup> DEIGH, *supra* note 3, at 232. I assess Deigh's proposal in *Principles of Proportionate Punishment: Comments on John Deigh*, From Psychology to Morality: Essays in Ethical Naturalism, 102 PHIL. & PHENOM. RES. \_\_ (forthcoming 2021).

<sup>8</sup> See, e.g., HART, *supra* note 1, at 234 (remarking sympathetically on "the deeply entrenched notion that the measure [of proportionality] should not be, or should not only be, the subjective wickedness of the offender but the amount of harm done"); von Hirsch, *supra* note 2, at 81 ("The seriousness of crime has two main elements: the degree of harmfulness of the conduct and the extent of the actor's culpability."); R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 135 (2001) (arguing that, for purposes of "the principle of proportionality," "criminal seriousness is usually taken to be a function of harm plus culpability"); Matravers, *supra* note 3, at 76 (same).

condemnation or censure effectuated or communicated by means of hard treatment or deprivation.<sup>9</sup> Drawing on this definition, Doug Husak argues that “[e]ach of these components gives rise to its own distinctive principle of proportionality”: a “principle of proportionality in censuring” provides that “the amount of reprobation deserved by an offender should be a function of the blameworthiness of his offence,” while a “principle of proportionality in hard treatment” directs that “the severity of hard treatment deserved by the offender should be a function of the seriousness of his offence.”<sup>10</sup>

Scholars differ on a second issue too. A proportionality principle proscribes, or weighs against,<sup>11</sup> disproportionate punishments. But punishment could be disproportionate, relative to the relevant offense or offender characteristics, either by being too severe or by being too lenient. To coin terms, call a proportionality principle that is offended only by excessively severe punishments a “ceiling principle,” one that is offended only by excessively lenient punishments a “floor principle,” and one that requires that punishments be neither too severe nor too lenient a “bracket principle.”<sup>12</sup> I am not aware of any scholar who glosses or defends proportionality as only a floor principle. But some do explicitly defend only ceiling principles,<sup>13</sup> while many others explicitly defend bracket

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<sup>9</sup> See, e.g., ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES* ch. V (1985); DUFF, *supra* note 8, at xiv-xv.

<sup>10</sup> Douglas Husak, *Strict Liability, Justice, and Proportionality*, in A.P. SIMESTER ED., *APPRAISING STRICT LIABILITY* 81, 95-97 (2005).

<sup>11</sup> Which is it: “proscribes” or “weighs against”? Is this supposed “principle” really a *principle* (a contributory rather than decisive norm), or is it a *rule* (a decisive norm)? My view is the former, but I mean to be agnostic on this question for now.

<sup>12</sup> The ceiling/bracket distinction tracks the difference between what Jesper Ryberg calls “negative” and “positive” “proportionalist views.” Ryberg, *supra* note 2, at 73. Antony Duff, however, uses the qualifiers “negative” and “positive” to mark a different proportionality distinction. See *infra* note 14.

<sup>13</sup> See, e.g., Michael Tonry, *Is Proportionality in Punishment Possible, and Achievable*, in TONRY, ED., *OF ONE-EYED AND TOOTHLESS MISCREANTS*, *supra* note 2, at 1, 4 (“[P]roportionality theory . . . support[s] two injunctions with which most people, citizens, scholars, and professionals alike, would say they agree. First, no one should be punished more severely than he or she deserves. Second, all else being equal, people who commit more serious crimes should be punished more severely than people who commit less serious ones, and vice versa.”); Leo Katz & Alvaro Sandroni, *Strict Liability and the Paradoxes of Proportionality*, 12 *CRIM. L. & PHIL.* 365, 366 (2018) (construing the principle of “proportionate punishment” as a “prohibition of excessive punishment”); *Hoare v. The Queen* (Australia 1989) (“A basic principle of sentencing law is that a sentence of imprisonment . . . should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime . . .”).

principles.<sup>14</sup> Several are modestly ambiguous, focusing almost entirely on proportionality's role in protecting against excessively severe punishments, while defining the principle they favor in terms that would appear to proscribe excessively lenient punishments too.<sup>15</sup>

Third, commentators disagree about whether proportionality is only a comparative principle, one that addresses "how severely crimes should be punished relative to each other,"<sup>16</sup> or can also provide absolute guidance, by providing that some given punishment for some given offense can be disproportionately severe (or lenient) without regard for the punishments imposed on other offenders for other offenses. The standard vocabulary, thanks to Andreas von Hirsch, terms these versions of proportionality "ordinal" and "cardinal," respectively, though I'll follow Göran Duus-Otterström in preferring "absolute" and "comparative."<sup>17</sup> Terminology aside, the orthodox view holds that "[t]he proportionality principle is inherently comparative,"<sup>18</sup> a position that provokes proportionality's critics to complain that it "render[s] the appeal to proportionality chimerical as a basis for limiting punishment."<sup>19</sup> Accordingly, other defenders of proportionality maintain that proportionality can furnish absolute

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<sup>14</sup> See, e.g., von Hirsch, *supra* note 2, at 79-83; GARDNER, *supra* note 4, at 222; GIDEON YAFFE, *THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY* 61 (2018) (contending that proportionality militates against punishments either "disproportionately small" or "disproportionately large"); DUFF, *supra* note 8, at 137-41 (arguing for a "negative" principle of proportionality that provides only that punishments *should not* be disproportionate, as against a "positive" principle that directs that punishments *should be* proportionate, but emphasizing that disproportionate punishments are objectionable whether disproportionately harsh or disproportionately lenient).

<sup>15</sup> See, e.g., Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1836, 1838, 1843-44 (2012) Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 OXFORD J. LEG. STUD. 57, 61, 62, 68 (2008).

<sup>16</sup> ASHWORTH & VON HIRSCH, *supra* note 5, at 138.

<sup>17</sup> Göran Duus-Otterström, *Weighing Relative and Absolute Proportionality in Punishment*, in TONRY ED., *OF ONE-EYED AND TOOTHLESS MISCREANTS*, *supra* note 2, 30, 34.

<sup>18</sup> Tonry, *supra* note 13, at 4 n.2; see also, e.g., HART, *supra* note 1, at 25 ("The guiding principle is that of a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a commonsense scale of gravity. This scale itself no doubt consists of very broad judgements both of relative moral iniquity and harmfulness of different types of offence."); *id.* at 234 (arguing that the principle of proportionality "is concerned with the relationships within a system of punishment between penalties for different crimes, and not with the relationship between particular crimes and particular offences"); GARDNER, *supra* note 4, at 222 ("the proportionality principle does not in itself specify or even calibrate the scale of punishments which the State may implement, but simply indicates how different people's punishments . . . should stand *vis-à-vis* another . . .").

<sup>19</sup> Nicola Lacey & Hanna Pickard, *The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems*, 78 MODERN L. REV. 216, 227 (2015).

standards, even if such standards “are ultimately supplied by sociocultural conventions” and subject to substantial ineliminable vagueness.<sup>20</sup>

For all these reasons, perhaps among others, broad agreement on the proposition that punishment should be proportional to the offense is largely uninformative. As Gideon Yaffe recently observed, proportionality remains “one of the most elusive of the central concepts in the theory of punishment.”<sup>21</sup>

## 2. Justifying Punishment: Responsibility-Constrained Pluralism

Why do so many principles of proportionality compete for our endorsement? It’s partly due to the fact that they’re not freestanding norms depending entirely on their own independent merits. Instead, a principle of proportionality is ideally an integrated component of a broader theory of criminal law that includes an account of what justifies the institution of legal punishment, or its infliction in individual cases, in the first place. Proportionality principles are less like groceries to choose from a market and more like ingredients to select for a dish. Because theorists justify punishment on varied grounds, it stands to reason that preferred proportionality principles will vary too. A quasi-Kantian theory on which justice demands that we give wrongdoers what they deserve, a Benthamite theory structured entirely to maximize aggregate pleasure net of pain, and a Hartian mixed theory will naturally conceptualize proportionality requirements differently (if at all). So the path toward a principle of proportionality reasonably starts with some basic commitments of criminal law theory.

Obviously, this is not the place to develop and defend a theory of the justifiability of legal punishment. I’ll have to content myself with simply putting on the table one that I have argued for elsewhere.<sup>22</sup> I call it “responsibility-constrained pluralism.” It is not merely the view I favor, but also, and more importantly, a view that plausibly predominates among

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<sup>20</sup> E.g., Duus-Otterström, *supra* note 17, at 42-44.

<sup>21</sup> YAFFE, *supra* note 14, at 61. See also, e.g., Michael Tonry, *Preface*, in TONRY ED., *OF ONE-EYED AND TOOTHLESS MISCREANTS*, *supra* note 2, at vii, vii (bemoaning “[t]hat so central a concept [as proportionality] remains so poorly understood”).

<sup>22</sup> See Mitchell N. Berman, *Punishment and Justification*, 118 *ETHICS* 258 (2008); Mitchell N. Berman, *Modest Retributivism*, in KIM FERZAN & STEPHEN MORSE EDS., *LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL MOORE* (2016); Mitchell N. Berman, *The Justification of Punishment*, in ANDREI MARMOR ED., *THE ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW* 141 (2012).

current philosophers of criminal law. Views pressed by all of the following scholars, among others, fall within this broad family: Doug Husak, John Gardner, Larry Alexander and Kim Ferzan, Leo Zaibert, C.L. Ten, Michael Cahill, and Thom Brooks.<sup>23</sup> As a class, such theories possess three important features: they are pluralist, retributivist-friendly, and constrained.

First, pluralistic theories insist that punishment can secure a variety of goods, or can be supported by a variety of reasons, and that the plurality of relevant goods and reasons bear on the all-things-considered permissibility of the punishment inflicted. Most of these theories take a consequentialist—or “instrumentalist”<sup>24</sup>—cast: they provide that the infliction of punishment can only be justified by the net good consequences that it will produce, or can reasonably be expected to produce. Unlike classical utilitarian justifications of punishment, however, versions of pluralistic instrumentalism are all, well, pluralistic. Rather than reducing all value to hedonic states, they maintain that there are several or many different goods at which punishment could reasonably aim, not all of which are reducible to a single currency: aggregate social welfare, a reduction in moral wrongdoing, the promotion of individual autonomy, the stability and security of a civil order, and more.

Second, some or many pluralists about punishment are retributivists. Pluralism about punishment might seem challenging for retributivists if we define retributivism as a “backward-looking,” or anti-consequentialist, justification for punishment. But that is not necessary.<sup>25</sup> Retributivism is commonly defined as a view that justifies punishment at least in part by reference to a wrongdoer’s desert. If a wrongdoer deserves to suffer, or deserves some negative or hostile response, in virtue of their (culpable)

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<sup>23</sup> See, e.g., Douglas Husak, *Why Punish the Deserving?*, 26 *NOUS* 447 (1992); GARDNER, *supra* note 4, at 214-15, 281-82; LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* ch. 1 (2009); LEO ZAIBERT, *RETHINKING PUNISHMENT* (2018); C.L. TEN, *CRIME, GUILT, AND PUNISHMENT* 6 (1987); Michael T. Cahill, *Punishment Pluralism*, in MARK D. WHITE ED., *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 25 (2011); THOM BROOKS, *PUNISHMENT* (2012).

<sup>24</sup> See VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 13 (2011) (advocating that forward-looking justifications for punishment be labeled “instrumentalist” rather than “consequentialist” precisely to make less likely the misunderstanding that such accounts must embrace consequentialism as a comprehensive moral theory).

<sup>25</sup> I examine consequentialist (“instrumental,” “teleological”) versus non-consequentialist versions of retributivism in Mitchell N. Berman, *Two Kinds of Retributivism*, in R.A. DUFF AND STUART P. GREEN EDs., *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 433 (2011). For elaboration on the recent prevalence of pluralistic retributivism see my *Review of Rethinking Punishment*, *NOTRE DAME PHIL. REV.*, Nov. 4, 2018, available at <https://ndpr.nd.edu/news/rethinking-punishment/>.

wrongdoing, then one of the goods at which punishment may justifiably aim, the realization of which can contribute to punishment's overall justifiability, is the state in which the wrongdoer's negative desert is satisfied. If this is only one good among several that punishment can secure, and especially if this one good does not assume clear priority over other goods, then the account is pluralist. But if realizing negative deserts is a goal that the state may permissibly pursue, one that has sufficient weight to make a difference, at least sometimes, to whom, how, and how much, the state ought to punish, then the account also rightly qualifies as retributivist.<sup>26</sup>

This point warrants emphasis because contributions to the proportionality literature frequently characterize retributivism in narrow terms that bias the debate over proportionality principles. Take Michael Tonry's recent claim, in a valuable volume of essays on the topic, that "all retributivists agree that the seriousness of the crime should be the sole or a primary determinant of the punishment's severity."<sup>27</sup> But retributivists do not all agree on what Tonry says they do (at least so long as enough content be given the terms "seriousness" and "a primary determinant" to avoid vacuity). For one, Husak is a retributivist, yet I read him to be rejecting Tonry's view when contending that "[i]f we have good reason to inflict different amounts of punishment on two offenders who have committed equally serious crimes, we should not be worried that our decision does not preserve proportionality."<sup>28</sup> I consider myself a retributivist, yet I too would not assign crime seriousness quite the privileged role that Tonry claims for it. Tonry's version of retributivism naturally entails that proportionality will be a bracket principle: punishment severity should be proportional to offense seriousness—neither too much nor too little. The pluralistic retributivism defended by Husak, myself, and others need not.

(While we're here, it's important to distinguish a "principle of proportionality" from "proportionality theory," understood as a sentencing reform proposal championed by von Hirsch, Ashworth, and Tonry among others. Stripped to fundamentals, that program advises legislatures to set sentences at levels that comport with judgments about relative offense seriousness, and thus adopts an ordinal bracket principle of proportionality by definition. In contrast, I take philosophical investigations into candidate principles of proportionality to be first-order inquiries of political morality

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<sup>26</sup> See Berman, *Modest Retributivism*, *supra* note 22, at 46-47.

<sup>27</sup> Tonry, *supra* note 13, at 6.

<sup>28</sup> Douglas Husak, *Why Legal Philosophers (Including Retributivists) Should Be Less Resistant to Risk-Based Sentencing*, in *PREDICTIVE SENTENCING: NORMATIVE AND EMPIRICAL PERSPECTIVES* 44-45 (2019), *quoted in* Tonry, *supra* note 13, at 4.

into the in-principle justifiability of state punishment. Such investigations lie some distance upstream from the promotion and defense of a supposedly implementable program of criminal law reform.<sup>29</sup>)

Third, the overwhelming majority of pluralists about punishment's justifying goals or ends, whether retributivist or anti-retributivist, advocate a moral constraint on pursuit of those ends. This position traces back to Hart's insistence that pursuit of a consequentialist "general justifying aim" should be constrained by principles of "distribution."<sup>30</sup> The first principle of distribution—distribution in liability—provides that punishment could justly be imposed only on "an offender for an offense." The second principle—distribution in amount—Hart never fleshes out with great precision. He is often read, however, as contending that it "forbid[s] us . . . to punish the guilty more harshly than they deserve."<sup>31</sup> Regardless of whether this was Hart's own position, exactly, it is plainly one that many contemporary punishment theorists embrace, though sometimes referencing an offender's guilt, blameworthiness, or culpability as a substitute for, or supplement to, the language of desert.

In an influential article, John Mackie dubbed the theory "negative retributivism."<sup>32</sup> But that's a misleading name for the view if, as I have already suggested, we reserve the "retributivist" label for accounts in which realizing an offender's negative desert counts as an affirmative reason (of some strength) for the state to inflict punishment.<sup>33</sup> Antony Duff's proposed term for this position—"side-constrained consequentialism,"<sup>34</sup> —is an improvement, though I'd offer two (friendly) amendments. First, because proponents of the view overwhelmingly recognize a plurality of legitimate punishment objectives, I'd substitute "pluralism" for "consequentialism." Second, because the side constraint is furnished by respect for some feature of the offender's responsibility, I'd make that fact explicit. Thus are we led to "responsibility-constrained pluralism." If not the single predominant

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<sup>29</sup> In general, it strikes me that some anti-retributivists are insufficiently attentive to differences between more "pure" and more "applied" retributivist projects, too often assuming that critiques of the latter burn the former too. For want of space, though, I'll have to leave this complaint as an undefended assertion.

<sup>30</sup> Hart called these constraints retributivist though few commentators today would endorse that characterization.

<sup>31</sup> DUFF, *supra* note 8, at 11.

<sup>32</sup> J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3 (1982).

<sup>33</sup> It is widely assumed that "negative retributivism" (that desert is a necessary condition on just punishment) is entailed by any form of "positive retributivism" (that desert provides a reason to punish). I challenge that inference in Berman, *The Justification of Punishment*, *supra* note 22, at 154.

<sup>34</sup> DUFF, *supra* note 8, at 11-14.

contemporary justificatory theory of legal punishment, it's a strong candidate for that title.

### 3. Responsibility-Constrained Pluralism and Proportionality

For those who adopt any version of a responsibility-constrained pluralism, the most likely role for a principle of punishment proportionality will be obvious: it gives content to the responsibility constraint. Sure enough, this is precisely how Mackie viewed things. Negative retributivism, he said, provides not solely that only the guilty may be punished, but also “that even one who is guilty must not be punished to a degree that is *out of proportion* to his guilt.”<sup>35</sup> Similarly, David Wood describes the side constraints on “Hart’s theory of punishment” as providing, first (distribution in liability), “that we never punish the innocent,” and second (distribution in amount), that “we never impose *disproportionately harsh* punishment on the guilty.”<sup>36</sup> This, in short, is the most plausible and attractive proportionality principle for responsibility-constrained pluralists. I’ll designate this principle PoP/RCP. This section fleshes it out, exploring what implications PoP/RCP has for the three respects identified in Section 1 in which principles of proportionality vary.

First, though, a word about principles of proportionality and retributivism. It is a striking assumption of much of the recent proportionality literature that proportionality is a concern for retributivists alone.<sup>37</sup> This section rejects that assumption. PoP/RCP is a principle for responsibility-constrained pluralists, whether retributivist or anti-retributivist.<sup>38</sup> Moreover, to reiterate a point made only a few paragraphs earlier, even some of the pluralists I’m calling retributivist might not register as retributivist under some of the more restrictive conceptions of that concept.

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<sup>35</sup> Mackie, *supra* note 32, at 4 (emphasis added).

<sup>36</sup> David Wood, *Punishment: Consequentialism*, 5 PHIL. COMPASS 455, 465 (2010) (emphasis added). See also, e.g., Richard L. Lippke, *Some Surprising Implications of Negative Retributivism*, 31 J. APP. PHIL. 49, 49 (2014).

<sup>37</sup> The supposition that principles of proportionality are of unique or particular concern to retributivists runs through most of the chapters in TONRY ED., *OF ONE-EYED AND TOOTHLESS MISCREANTS*, *supra* note 2.

<sup>38</sup> Accord Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 266 (2005).

### 3.1. Ceiling, not bracket

First, PoP/RCP is only a ceiling principle, not a bracket principle, because that's the role it plays in the theory: it serves the responsibility constraint, and that constraint aims to protect individuals from excessively harsh treatment by the state, not to guard against unduly lenient treatment.

That proportionality is a ceiling principle will be obvious, or nearly so, to responsibility-constrained pluralists who are anti-retributivist. If you don't believe that wrongdoers ever deserve anything bad or disagreeable, or that, even if they do, furnishing those bads is not a permissible aim of a legitimate state, then you won't see any need for or value in a normative principle that condemns punishments that are too lenient relative to the offender's responsibility. (By way of contrast, you will see value in a principle that condemns punishments too lenient relative to, for example, the community's interest in physical security.)

But responsibility-constrained retributive pluralists might be expected to view things differently.<sup>39</sup> As retributivists, they believe that punishment should not be too lenient relative to the offender's desert, and as constraintists, they believe that punishment should not be too excessive, also relative to desert. It might seem to follow that there is no single principle of proportionality that all or most responsibility-constrained pluralists could be expected to share. Rather, responsibility-constrained retributive pluralists endorse a bracket principle of proportionality while their anti-retributivist cousins reject the floor principle, thereby leaving themselves with only a ceiling principle.

That would be the right lesson, I think, if pluralist retributivists believed that the injunctions that states (a) should ensure that wrongdoers receive the punishment they deserve, and (b) should not inflict punishment excessive relative to a wrongdoer's desert, are of comparable force or stringency. But very few do believe that; if they did, they probably wouldn't be pluralists. And if responsibility-constrained retributive pluralists do not assign the same force or stringency to the floor and ceiling aspects of a putative single bracket principle, then it is doubtful that their two positions are best conceived as dual aspects of a single principle. If retributivist and anti-retributivist pluralists (as a group) assign the same normative force to a principle that militates against punishments excessively severe relative to offender responsibility, and if retributivist pluralists assign lesser force to any principle or consideration that militates against punishments that are unduly lenient relative to offender

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<sup>39</sup> I am grateful to Doug Husak for provoking me to say more in response to this line of thought.

responsibility, then it seems more perspicuous to describe responsibility-constrained pluralists, whether retributivist or anti-retributivist, as aligned in espousing a ceiling principle of proportionality—a principle of political morality according to which state-inflicted punishment should not be excessively disproportionate relative to some feature of offender responsibility. This is true even while it is also true that retributivists in that large class also believe, while their anti-retributivist peers deny, that wrongdoers deserve to suffer (or to be punished, or to experience their wrongdoing as personally costly, etc.) on account of their wrongdoing, and that furnishing such negative desert counts among the ends that a just state should pursue.

More generally, pluralists of both retributive and anti-retributive stripes, don't need a separate proportionality principle to bear against unduly *lenient* punishments—not because pluralists are indifferent to the possible costs of great leniency, but because it is the very fact of pluralism with respect to the goods at which punishment should aim that already guards against undue leniency.

### 3.2. Absolute, not (merely) comparative

Second, PoP/RCP aims to have absolute, noncomparative bite, not solely comparative (“ordinal”) force. To see why, it is helpful to advert now to another respect, additional to those canvassed in section 1, in which proposed proportionality principles differ—with regard, not to their contents, but to their grounds or justifications.

A principle of proportional punishment does not rest on its own moral bottom. It is not a moral primitive. Rather, if a principle of proportionality does merit our allegiance, it will be grounded in or entailed by principles or values that have independent moral status. This is why proportionality defenders often say that proportionality is required by “principles of justice.”<sup>40</sup> That might be so, but because there are so many conceptions of justice, invocation of the bare concept, standing alone, is about as informative as is the claim that punishment severity should be proportional to offense “seriousness.” And when proportionality theorists do give content to the capacious concept of justice—or when they bypass the language of “justice” entirely—they collectively invoke all manner of values and principles as grounds for proportionality.

Despite the variety of terms that theorists invoke, and to overgeneralize only a little, it seems to me that the principal animating values are of two

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<sup>40</sup> *E.g.*, von Hirsch, *supra* note 2, at 68; GARDNER, *supra* note 4, at 235 (proportionality concerns “justice between offender and offender”); DEIGH, *supra* note 3, at 232, 242.

types: fairness or equality on the one hand,<sup>41</sup> and humanity on the other.<sup>42</sup> It seems further that there is a non-accidental relationship between the value that supposedly grounds proportionality and the character of the proportionality principle that it grounds: principles grounded in fairness and equality tend to be only comparative, whereas principles grounded in humanity aspire to be absolute. To the extent this is so, whether PoP/RCP is an absolute or merely comparative proportionality principle depends on the moral values or principles that demand that the state's pursuit of plural ends via the infliction of punishment be constrained in the first place.

When the issue is thus posed, it strikes me as adequately clear—though also hard to establish in a short space—that a responsibility-based constraint on punishment is grounded (chiefly) in considerations of humanity, not in considerations of equality. The animating thought is that personhood or human dignity or the like ground moral limits on the permissibility of using persons for good ends even when some such use is licensed by the individual's own wrongdoing. Wrongdoers do not forfeit protection against all impositions that, but for their wrongdoing, would be rights-violating. And the reason they don't is because we are constrained by duties of humanity in how we may treat a person, constraints that have force entirely apart from how we have treated others.

Of course, it is one thing to say that PoP/RCP has noncomparative aspirations, another to conclude that those aspirations can be realized. The reason to think that purportedly absolute proportionality principles cannot deliver on what they promise is plain enough: it seems highly implausible that the specific point, or vague line, at which some quantum of punishment of an offender for an offense becomes disproportionately great is wholly acontextual. Even putting aside epistemic difficulties in knowing where that point or line resides, it just seems hard to swallow that the same  $x$  units of punishment are disproportionate for offense  $N$ —and that  $x$ - $y$  units wouldn't be—across all places and times. It may seem a short step to the conclusion that a coherent proportionality principle can only be relative to other punishments meted out within that jurisdiction to other offenders.

But this conclusion moves a little too quickly. PoP/RCP maintains that punishment should not be excessive relative to (some aspect of) the

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<sup>41</sup> See, e.g., von Hirsch, *supra* note 2, at 85 (“the proportionality principle rests on a particular value—that of equity”); Lee, *supra* note 15, at 1838 (“To achieve fairness, the State must punish in a manner that is consistent with principles of proportionality: it must treat its citizens equally.”).

<sup>42</sup> See, e.g., DEIGH, *supra* note 3, ch. 12 (principles of humanity); Tapio Lappi-Seppälä, *Humane Neoclassicism: Proportionality and Other Values in Nordic Sentencing*, in TONRY, *supra* note 2, at 209 (same).

wrongdoer's moral responsibility. As a gradable adjective, "excessive" is a context-sensitive predicate.<sup>43</sup> Thus, what is excessive will be sensitive to "the prevailing political culture,"<sup>44</sup> and "reflect diverse historical, cultural, and political influences."<sup>45</sup> Part of the relevant context is the general punishment regime, at least to the extent it is accepted as legitimate or appropriate, and perhaps even if otherwise. In this way, it is true that other sentences form part of the context needed to determine whether a given punishment is excessive. Yet the fact that context-sensitivity is built into even supposedly noncomparative assessments of punishment disproportionality does not reduce such assessments to comparative ones. For a comparative proportionality principle, other punishments are more than just part of the relevant *context* of application; they are ineliminable components of the principle's *content*: whether a given punishment is excessive or disproportionate is *defined* by reference to other punishments. That is not true of non-comparative proportionality principles notwithstanding what I acknowledge to be their context-sensitivity.<sup>46</sup>

Does it follow that all is hunky-dory if the state inflicts radically disparate punishments on two offenders for identical offenses so long as neither punishment is excessive relative to offender responsibility? Not at all. Such disparities do not infringe the proportionality principle (as I construe it). But proportionality is not the only principle that bears on the justice or permissibility of particular inflictions of punishments,<sup>47</sup> and an

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<sup>43</sup> See, e.g., Christopher Kennedy, *Vagueness and Grammar: The Semantics of Relative and Absolute Gradable Adjectives*, 30 LINGUISTICS & PHIL. 1 (2007).

<sup>44</sup> Tapio Lappi-Seppälä, *supra* note 42, at 228.

<sup>45</sup> Tonry, *supra* note 13, at 21.

<sup>46</sup> My claim here is related to Duus-Otterström's distinction between "context-sensitivity" and "convention-sensitivity," Göran Duus-Otterström, *Retributivism and Public Opinion: On the Context Sensitivity of Desert*, 12 CRIM. L. & PHIL. 125, 132 (2018), but claims more. For one thing, his distinction is offered as a way to make sense of different accounts of what a wrongdoer *deserves* while mine concerns what punishments are *excessive*. These are different inquiries so long as desert is not the full measure of excessiveness—a matter to be explored in subsection 3.3. Moreover, Duus-Otterström allows only that social context affects the quality and amount of harm that a given act of wrongdoing imposes or risks. He is certainly right about that. I'm contending further that context, including legal practices, bear on what would be an excessive punitive response even holding the harms of a given criminal act constant.

<sup>47</sup> See, e.g., von Hirsch, *supra* note 2, at 78 (emphasizing that "[p]roportionality . . . is not the only value involved—there may be countervailing reasons of various sorts for departing from proportionality"); *but see id.* at 75-76 (deeming it a "fundamental objection" to the "range theories" associated with Norval Morris that they "would allow two offenders, whose conduct is equally reprehensible but who are considered (say) to present differing degrees of risk, to receive different punishments").

equality principle directing that likes should be treated alike is also part of the full moral accounting.<sup>48</sup>

### 3.3. From “responsibility” to “culpability in regard to wrongdoing”

I have argued thus far that the principle of proportionality that goes with constrained pluralism—PoP/RCP—is a noncomparative ceiling version of proportionality: it prohibits, or weighs forcefully against, punishments that are excessive relative to some aspect of an offender’s responsibility. I’ve needed the “some aspect of” qualifier because proportionality theorists do not usually say that punishment should be proportional to a wrongdoer’s “responsibility,” full stop (and it wouldn’t be very informative if they did). Instead, they draw from a large number of responsibility terms, saying that punishment should be proportional to, or not excessive relative to, the offender’s “desert,” “blameworthiness,” “culpability,” “fault,” or “guilt.”<sup>49</sup> So the last task is to identify the particular responsibility relatum to which, per PoP/RCP, punishment should not be excessively disproportionate.

To emphasize what is probably obvious, we’re interested in concepts, operators, or properties, not word meanings. I have no doubt that some significant portion of the nominal diversity regarding the proportionality base is *only* nominal: Taylor says that punishment shouldn’t be disproportionate to offender “blameworthiness,” Jhankar says it shouldn’t be disproportionate to offender “culpability,” but they have the same idea in mind. On the other hand, it’s not *all* nominal: surely diverse concepts are floating in the poorly regimented sea of our linguistic practices. In my view, the multiplicity of terms in the literature corresponds moderately well to a multiplicity of underlying concepts, and that four distinct moral responsibility concepts figure prominently in the story: DESERT, BLAMEWORTHINESS, FAULT, and CULPABILITY. So our task comprises two

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<sup>48</sup> Some defenders of equality-grounded bracket principles of proportionality agree that principles of humanity supply some upper noncomparative limits on punishment severity, but believe that this is not the function of proportionality principles, rightly understood, which are essentially comparative. See, e.g., GARDNER, *supra* note 4, at 222 n.15; von Hirsch, *supra* note 2, at 77-78. On my picture, this gets things backwards: the principle of proportionality is grounded in principles of humanity and is essentially absolute, but punishment is also constrained by principles of equality which are comparative.

<sup>49</sup> See, e.g., Jacob Bronsther, *Vague Comparisons and Proportional Sentencing*, 25 LEGAL THEORY 26, 36 (2019) (“moral desert”); Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 127 (2009) (“blameworthiness”); John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 659 (2012) (“culpability”); Michael J. Zimmerman, *The Immorality of Punishment: A Reply to Levy*, 9 CRIM. L. & PHIL. 113, 116 (2013) (“guilt”).

parts: to disambiguate the potentially relevant moral concepts, fine-tuning where possible; and, if more than one responsibility concept remains eligible for the role, to explain why the proportionality relation is the one that it is. I won't complete that two-part task in this final section but hope to make some progress.

Let's start with desert and blameworthiness, a pair of concepts that differ in one essential respect but are alike in another.<sup>50</sup> Take desert first. Although much about desert remains mysterious, this is common ground: desert serves a "pro" or "favoring" function. That A deserves some treatment or state of affairs is not a normatively inert fact. It has normative force or significance, a significance often put in terms either of value or of reasons and duties. To a first pass, that A deserves some treatment increases the impersonal value of the state of affairs in which that treatment obtains for A, or creates reasons of some stringency for some suitably situated others to bring that state of affairs about.<sup>51</sup> This is a desert-general truth: it applies across the waterfront of valid desert claims regardless of their contents.

Of course, we're not interested in all desert claims, such as whether Pat deserves a medal or Jody deserves a second chance. We're interested in "negative desert" or "retributive desert": the desert that supposedly links some bad consequence for an agent (punishment, suffering, hard treatment, what-have-you) to some wrongful behavior by the agent (wrongdoing, blameworthy wrongdoing, culpable willings, or the like). Retributivists are like moviegoers: they believe that the placeholders "bad consequence" and "wrongful behavior" can be given content such that it is true, sometimes or often, that A deserves a bad consequence in virtue of their wrongful conduct, where their deserving such bad consequences makes it good that they get them, or makes it the case that somebody should give it to them.

Blameworthiness is different. That an agent is blameworthy does not by itself *favor* blaming them. Rather, to be blameworthy is to forgo or forfeit an immunity from being subject to a range of blaming practices involving directed criticism, censure, castigation, distancing, retaliation, infliction of costs or hardship, punishment, and the like, that you would otherwise enjoy.<sup>52</sup> This difference in normative function can be highlighted by

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<sup>50</sup> This discussion draws from my manuscript, "Blameworthiness, Desert, and Luck" (unpublished ms., dated 6/25/20).

<sup>51</sup> In putting things this way, I aim to be agnostic regarding which normative concept, good and reason, is passing the buck to the other.

<sup>52</sup> I'm with Michael Zimmerman, see Michael Zimmerman, *Varieties of Moral Responsibility*, in RANDOLPH CLARKE, MICHAEL MCKENNA & ANGELA M. SMITH, EDs., *THE*

reflecting on the proposition, ubiquitous in punishment theory, that “to be blameworthy is to deserve blame.” On the picture I offer, that is strictly false: to be blameworthy is to be *liable to* blaming practices, not to *deserve* them. This is why even anti-retributivists object, say, to strict liability offenses. Their complaint is not that strict liability licenses punishment without negative desert—after all, many anti-retributivists believe that negative desert is no part of our moral universe, that nobody *deserves* to be punished<sup>53</sup>—but that it impermissibly results in punishment of persons who haven’t made themselves liable to punishment or censure.

That’s the difference: desert serves a favoring function, and blameworthiness serves a liability function. Here’s the similarity: both blameworthiness and desert are relational concepts with a triadic structure. This is famously true of desert, as Joel Feinberg observed a half century ago: an agent deserves a “desert object” (DO) on account of some quality or action of the agent, the “desert base” (DB).<sup>54</sup> It is true as well of blameworthiness: an agent is liable to “blaming practices” (BP) in virtue of some quality or action of the agent, A’s “blaming base” (BB).

Now we reach fault and culpability. “Fault,” of course, is the standard term for what I’ve just called the “blaming base.” An agent is at fault when failing to satisfy a standard fairly imposed upon them. And their being at fault renders them fairly liable to blame. In contrast, fault is not the base for retributive desert. Many retributivists believe that the desert base for negative desert is better framed as “culpability,” or “culpable wrongdoing,” where culpability consists of morally insufficient regard or concern—and thus a morally objectionable quality of will—in action. Culpability is a type of fault: it is the fault of failing to meet the moral demand, imposed on us all, to conduct ourselves with adequate regard for the rights and interests of others. So there is no faultless culpability. But because culpability is only one type of fault, there is nonculpable fault. The sentry who falls asleep is

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NATURE OF MORAL RESPONSIBILITY: NEW ESSAYS 45 (2015), in strongly resisting the suggestion that there exists a *single* behavior or mental state properly denominated “blame,” and that our task is to excavate its “essence.” Justin D. Coates & Neal A. Tognazzini, *The Contours of Blame*, in JUSTIN D. COATES & NEAL A. TOGNAZZINI, *BLAME: ITS NATURE AND NORMS* 3, 8 (2013).

<sup>53</sup> Anti-retributivists have diverse views about desert. Some (e.g., Victor Tadros) reject desert claims categorically. They deny that A deserves DO in virtue of DB for all values of A, DO, and DB. Others (e.g., Nathan Hanna) grant the truth of some desert claims but deny that a person can ever deserve a treatment or a state rightly describable as “bad”; they accept “positive” desert but reject “negative” desert. Still others (e.g., David Dolinko) can accept the wrongdoers instantiate negative desert while denying that the state is ever justified in acting to realize their negative desert.

<sup>54</sup> JOEL FEINBERG, *Justice and Personal Desert*, in *DOING AND DESERVING* (1970).

at fault, hence liable to reasonable blaming practices, even if not culpable, hence not deserving any disagreeable consequences or ill-treatment.<sup>55</sup>

To summarize:

DESERT: What it is for an agent, A, to deserve some treatment or state because of some conduct or quality of A's is for it to be impersonally non-instrumentally good that A get that treatment or state, or for some agent(s) to have (special or stringent) reason to bring that treatment or state about, in virtue of A's conduct or quality.

NEGATIVE DESERT: An agent, A, deserves bad consequences, or a setback to their interests, in virtue of their culpable wrongdoing.

CULPABILITY: What it is for an agent, A, to be morally culpable for conduct is for that conduct to issue from A's insufficient regard for the interests of others, and thereby to instantiate a morally objectionable quality of will.

BLAMEWORTHINESS: What it is for A to be blameworthy for some conduct, event, or state is for A to be at fault with regard to that conduct, event, or state, and thereby to be rendered liable to reasonable blaming practices (by some agent(s)) to which A would otherwise be morally immune.

FAULT: What it is for A to be at fault with regard to some conduct, event or state is for A to engage in that conduct, or to allow that event to occur or state to obtain, in consequence of A's failure to satisfy a fairly imposed standard.

If this stab at conceptual analysis and disambiguation is broadly on target, how does it advance our understanding of the responsibility notion that serves as the base relatum for PoP/RCP? Here are three suggestions.

First, their triadic character renders contentions that punishment should be proportional (or not excessively disproportionate) either to "desert" or to "blameworthiness" ambiguous. Such claims could refer, on the one hand, to the treatments that are favored (for desert) or to which the agent is liable (for blameworthiness), or, on the other, to the conduct (culpable wrongdoing, fault) that serves as grounds or bases for such treatments.

Second, it is not very plausible that punishment severity should be constrained in proportion either to the-suffering-that-the-wrongdoer-

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<sup>55</sup> Or so I argue in *Negligence and Culpability: Reflections on Alexander and Ferzan*, \_\_ CRIM. L. PHIL. \_\_ (forthcoming 2021).

deserves (the DO) or to the blame-to-which-the-wrongdoer-is-liable (the BP), and essentially for the same reason.

Again, take desert first. If a wrongdoer's desert object is to serve as a constraint on legal punishment, the content of that constraint would most naturally enjoin the infliction of punishment *more severe than* the bad consequences that the agent deserves, not the infliction of punishment *excessive relative to* those deserved bad consequences. Because what is deserved and what is inflicted (as punishment) are measured in the same currency, it is intuitively likelier that the severity of bad consequences that are deserved would serve as a *cap* on the severity of bad consequences that may justly be inflicted rather than as a *base* against which still more severe punishments are assessed for disproportionality. This is not an argument that an offender's desert object does *not* supply the constraint on punishment severity that responsibility-constrained pluralists seek. It's a surmise that, if the desert object—i.e., the bad consequences that the wrongdoer deserves—*does* play that role, it does so *in lieu of* a proportionality principle, not as a relatum within it. The principle "*no more than* what the wrongdoer deserves" is different from the principle "*not disproportionate relative to* what the wrongdoer deserves," and is not a principle of *proportionality*.

Much the same is true about blameworthiness. I have said that to be blameworthy is to be rendered liable to blaming practices. Which practices, and how much of them? Unfortunately, too many forms of blame and too diverse an array of considerations appear on reflection to be relevant to permissible blaming to permit any highly informative or detailed answer to these questions. Though it will strike some as a dodge, I fear that we can say little more than that a blameworthy agent is made liable to "reasonable blaming practices," where reasonableness is a function of the factors that make the actor's conduct faulty in the first place and much else besides: whether they had done it before; the agent's background and upbringing and the breadth of their opportunities to avoid wrongdoing; the treatment accorded other, similarly situated actors; the "standing" of those who would impose blame; the likelihood that a strong response would have a positive effect on future behavior by this agent or by similarly situated others, and so forth.<sup>56</sup> But whatever kinds of blame a faulty agent becomes liable to, the practices to which they are liable do not constitute a promising

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<sup>56</sup> For myself, I think it clear that the consequences traceable (in the right ways) to a blameworthy act also bear on the reasonableness of a given blaming response. But I acknowledge that that's modestly controversial. It is much less controversial than whether consequences of a wrongful act bear on the actor's negative desert, although the questions are often conflated.

proportionality base. It's a natural thought that a wrongdoer shouldn't be subjected to harsher punishment than they are liable to; it's an awkward thought that the punishment shouldn't be disproportionately severe relative to what they're liable to. This suggestion, just like the idea that punishment should not be disproportionate to the bad consequences that a wrongdoer deserves, involves, as it were, "one thought too many."

Third, it *is* very plausible that punishment should not be excessively severe relative to the agent's culpability in wrongdoing. Whether it is not only plausible but correct is a question that I cannot pursue in this already overlong contribution, in part because a persuasive answer can't be worked out from the relevant concepts, but involves substantive claims about justice or political morality and therefore requires substantive arguments. Instead, I'll close with two observations about a culpability-centered proportionality base.

The major question that divides scholars who defend some version of a culpability-centered proportionality principle is whether the proportionality base that constrains punishment severity involves only internal factors that constitute an agent's culpability or also includes harms that their wrongdoing realizes or causes. It is important to note that there are (at least) three options in this space, not just two. Call the position that culpability alone constrains punishment severity "culpability in wrongdoing." On this view, punishment of the attempted murderer and of the successful murderer should be equally severe, *ceteris paribus*. But two different positions contrast with this culpability-only account. The more distant alternative might be dubbed "culpability and harm." It maintains that punishment should be constrained by some amalgam of culpability and "the amount of harm done." An intermediate view—I'll call it "culpable wrongdoing"—includes within the proportionality base any harms that are *constitutive* of the wrong done (unlike the first view), but not harms that are *caused by* the wrong done (unlike the second). All of these positions appear to have scholarly defenders—Alexander and Ferzan of "culpability in wrongdoing";<sup>57</sup> Hart, von Hirsch, and Duff of "culpability and harm";<sup>58</sup> Gardner of "culpable wrongdoing."<sup>59</sup>

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<sup>57</sup> See ALEXANDER & FERZAN, *supra* note 23, at ch.5.

<sup>58</sup> See *supra* note 8.

<sup>59</sup> GARDNER, *supra* note 4, at 227-34 (arguing that wrongdoing is partly internal to blameworthiness, because "blameworthiness is always blameworthiness in respect of some action"). The same could be true of culpability, even though Gardner himself appears to treat culpability and blameworthiness interchangeably, *id.* at 225-27, which I am arguing against.

Whichever approach one takes to the relevance of harm (harm counts insofar as it is constitutive of the wrong; harm counts whenever constitutive of, or caused by, the wrong; harm doesn't count), it is a separate question whether the culpability that matters is limited to states of mind occurrent with the willed bodily movements that make up the actus reus of the offense or of the wrong. I believe that it does not. To the contrary, the culpability that constrains punishment severity, in my judgment, is the agent's culpability "in relation to their wrongdoing." This is a temporally extended notion, and thus embraces pre-action behaviors and associated mental states (e.g., planning, premeditation) as well as post-action ones (e.g., apology and remorse).<sup>60</sup>

## Conclusion

Criminal law theorists overwhelmingly agree that, to be morally just, criminal punishment must comport with a principle of proportionality. Yet they are not close to agreement regarding any of the principle's elements—which relata must be kept in proportion, whether the principle condemns only supra-proportionate punishments or infra-proportionate punishments too, whether proportionality has absolute (cardinal) or only comparative (ordinal) implications, what values or considerations explain its force, and more. Hence this symposium.

This article has maintained that the start of wisdom is to get clearer on the more general theory of punishment in which the supposed principle of proportionality is embedded. After all, a principle of proportionality that best fits a positive retributivist justification of punishment will differ in function and content from one that fits a classical utilitarian justification (if one does). The most compelling and widely accepted justification of punishment, I have claimed, is some version of a responsibility-constrained pluralism. A principle of proportionality for such a theory, I have further argued, will prohibit only excessively severe punishments, not also unduly lenient ones, and will endeavor to measure and police excessiveness in terms that are at least partly "cardinal" or absolute, not wholly dependent on comparisons to other punishments imposed in the jurisdiction on other offenders. The feature of the offender, or the aspect of their responsibility, to which punishment should not be disproportionately severe presents a tougher question. I have suggested (without supportive argument) that it

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<sup>60</sup> For tentative explorations, see my *Negligence and Culpability*, *supra* note \_\_, at section 4; Gabriel S. Mendlow, *Punishment Proportionate to What?*, \_\_ CRIM. L. & PHIL. \_\_ (this issue).

is the offender's culpability in relation to their wrongdoing. The chief upshot of this version of a principle of proportionality is that the state may not inflict objectively harsh punishment on wrongdoers who exhibit low levels of culpability even when it has genuine reasons—reasons that the pluralistic justificatory theory recognizes and affirms—to punish severely.