

Faulkner's fiction, I have attempted to show that works of political and literary import can illuminate attitudes that are barely articulated in, but certainly inhabit, judicial opinions.

My other purpose has been to indicate that public law is one of the areas of our present culture that explicitly honors the non-selfish strain of individualism. Independence is not a government figure's autonomy to act by whim or bias. It is a concept grounded in responsibility. What is human, and therefore interesting, about the concept of independence is the way in which missions of responsibility can be taken to an extreme. Generative independence can become excessive, as with Presidents Roosevelt, Truman, and Reagan. The anxieties of judicial independence can lead to the extremes of mechanical analysis. Legislative independence in the sense of resistance to a culture in need of reform can mutate into independence in the sense of abdication from issues of value. And the independence of alienation can be blind and unfair. Still, it is somehow heartening that despite these frequent excesses, the American public law system, at its core, has faith in both the judgment and responsibility of individuals.

Estoppel p 1067

□ p. 1067
 Blackstone on Talion 1079
 Eye for Eye

□ Kant p 1072.



THE UPPER LIMIT OF JUST PUNISHMENT

Lawrence Crocker*

Table of Contents

I. INTRODUCTION	1060
A. <i>A Moral Theory of Maximum Criminal Penalties</i>	1060
B. <i>The Theory as a Justification for Punishment</i>	1063
C. <i>The Relevance of the Theory to Practice</i>	1066
II. RECIPROCITY	1067
A. <i>The Reciprocity Principle R</i>	1067
B. <i>A Brief History of Reciprocity</i>	1068
C. <i>The Moral Status of Reciprocity Principles in General</i>	1072
D. <i>The Moral Status of Reciprocity Within Criminal Justice</i>	1076
E. <i>Determining the Reciprocal Upper Limit</i>	1079
1. <i>Equating Impositions</i>	1079
2. <i>Imposition upon the Offender</i>	1080
3. <i>Imposition upon the Victim and Society</i>	1081
a. <i>Intentional Crimes</i>	1081
b. <i>Crimes of Risk Creation</i>	1084
c. <i>Malum Prohibitum Crimes</i>	1086
d. <i>Crimes of Lesser Culpability</i>	1088
F. <i>Reciprocity and Sentencing</i>	1092
1. <i>The Most Serious Offenses</i>	1092
2. <i>Offenses of Lesser Seriousness—The Underpunishment Problem</i>	1093
3. <i>Recidivist Statutes</i>	1097
4. <i>Categories of Crime</i>	1098

* Associate Professor of Law, New York University School of Law, New York, New York. I am grateful to Lea Brilmayer, David Crocker, Ronald Dworkin, James Jacobs, Christopher Eisgruber, Thomas Nagel, Lawrence Sager, Andrew von Hirsch, and attendees of the New York University Colloquium in Law, Philosophy, and Political Theory; to the New York University School of Law Faculty Workshop for their comments on an earlier draft of this Article; and to Eric Iversen, Jeffrey Nagel, Steven Ross, and Rifka Wein for their research assistance. I acknowledge the generous financial support of the Filomen D'Agostino and Max E. Greenberg Research Fund at the New York University School of Law.

5. <i>Allocating the Burden of Uncertainty</i>	1100
G. <i>The Superiority of Talion over Proportionality</i>	1101
H. <i>Comparison to Moral Balance Retributivism</i>	1106
III. CONCLUSION	1108

I. INTRODUCTION

A. *A Moral Theory of Maximum Criminal Penalties*

It would be unjust to punish shoplifters capitally, even if the existence of such a penalty would drastically reduce the incidence of shoplifting so as to maximize total utility. (Deterrence conceivably might work so well that executions would be extraordinarily rare.) Long sentences of imprisonment for shoplifting similarly would be unjust, however good their consequences. It is simply unfair to punish a minor offense that severely.

I have intentionally picked an easy, banal case to illustrate an absolutely central feature of criminal justice: for each offense there is an upper limit on the severity of just punishment. This upper limit is the soul of retributive justice. The purpose of this Article is to propose the greater part of a theory of retributive justice by exploring the normative roots and the consequences for criminal sentencing of the upper limit of just punishment.

In the public mind "retribution" is synonymous with "revenge."¹ As such, it is plausibly contended, retribution is something that an enlightened and humane criminal justice system can well do without. It belongs, along with whipping and the cutting off of hands, to the barbaric past.

¹ The popular association between retribution and revenge has received some theoretical endorsement. See generally J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3 (1982); Jeffrie G. Murphy, *Retributive Hatred; An Essay on Criminal Liability and the Emotions*, in LIABILITY AND RESPONSIBILITY 351 (R.G. Frey & Christopher W. Morris eds., 1991) [hereinafter *Retributive Hatred*]; Jeffrie G. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3 (1988); Jeffrie G. Murphy, *Hatred: A Qualified Defense*, in FORGIVENESS AND MERCY 88 (Jeffrie G. Murphy & Jean Hampton eds., 1988). If this is what retributivism amounted to, however, it would be no more than a wrinkle on the utilitarian prune. The satisfaction of whatever such desires there are would be included with the other consequences of a given punishment in computing what punishment maximized good social consequences. Still, there is, as I will argue here, some connection between aspects of retributivism and moral psychology. Our receptivity to desert principles, in which those who have injured us deserve something negative, is support for such principles.

This perception of retributivism is understandable, but jaundiced. Without taking the time to define retributivism,² and without denying the existence of a retributive sword, I shall concentrate on retributivism's ample shield. The principles of justice that make up that shield form a vital and morally compelling sphere of justice, related to but largely independent of other aspects of justice such as equality and liberty principles.

Retributivism provides an upper limit for punishment through a principle of reciprocal desert. Because of its emphasis on reciprocal desert, my account here is at home in the recent trend towards taking desert seriously when thinking about punishment—a trend led by Herbert Morris and Andrew von Hirsch.³

² Baier proposes that a theory is purely retributive if it endorses the following propositions:

- (a) All those convicted of a wrong-doing or crime deserve punishment;
- (b) only those convicted of a wrong-doing or crime deserve punishment;
- (c) the severity of the punishment should *not be less than* the gravity of the crime;
- (d) the severity of the punishment should *not be greater than* the gravity of the crime.

Kurt Baier, *The Strengths and Limits of the Retributive Theory of Punishment*, 2 PHIL. EXCHANGE 37, 39 (1977). The theory of the present article embraces conditions (b) and (d), and expressly rejects (c). Conditions (c) and (d), which link the severity of the penalty to the seriousness of the offense, define forms of "Talionic" retributivism, so called from the *(ex talionis)*. See discussion *infra* part II.B. Theories with neither Talionic upper nor lower limits are still sometimes called "retributive." A minimum requirement of a retributive theory is that it be backward looking in important respects. Insofar as the theory is retributive, it insists that justice require punishability to be a matter of the criminal act, not the future consequences of conviction and punishment. Beyond these generalities, the notion of "retributive justice" is disputed.

³ See Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968), and the following works of Andrew von Hirsch: PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS (1985) [hereinafter PAST OR FUTURE]; DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976) [hereinafter DOING JUSTICE]; *The Politics of Just Deserts*, 32 CANADIAN J. CRIMINOLOGY 397 (1990); *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"*, 1 CRIM. L.F. 259 (1990) [hereinafter *Proportionality*]; *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591 (1981); *Proportionality and Desert: A Reply to Bedau*, 75 J. PHIL. 662 (1978); *Giving Criminals Their Just Deserts*, 3 CIV. LIBERTIES REV. 23 (1976). Compare JOHN KLEINIG, PUNISHMENT AND DESERT (1973); WOJCIECH SADURSKI, GIVING DESERT ITS DUE (1985); GEORGE SHER, DESERT (1987); RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979); Max Atkinson, *Justified and Deserved Punishments*, 78 MIND 354 (1969); Elizabeth L. Beardsley, *A Plea for Deserts*, 6 AM. PHIL. Q. 33 (1969); Claudia Card, *Retributive Penal Liability*, in STUDIES IN ETHICS (Nicholas Rescher ed., 1973); Michael Davis, *Just Deserts for Recidivists*, 4 CRIM. JUST. ETHICS 29, 48 (1985); J.L.A. Garcia, *Two Concepts of Desert*, 5 LAW & PHIL. 219 (1986); H. Scott Hestevold, *Disjunctive Desert*, 20 AM. PHIL. Q. 357 (1983); H.J. McClosky, *A Non-Utilitarian Approach to Punishment*, 8 INQUIRY 249, 260-61 (1965); C.W.K. Mundie, *Punishment and Desert*, 4 PHIL. Q. 216 (1954); Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964); Ernest Van den Haag, *Punishment: Desert and Crime Control*, 85 MICH. L. REV. 1250 (1987); Lloyd L. Wein-

*See
Felson*

It is not essential to my primary thesis to determine whether there is a lower limit of just punishment, whether it is identical to the upper limit, or, if not, how criminal penalties ought be assessed between the two limits. It may help motivate the discussion, as well as contribute to the understanding of certain secondary issues, to set my arguments in the context of a larger theory of criminal punishment. I subscribe to the view that justice sets nonidentical upper and lower limits on punishment, and that utilitarian considerations such as general deterrence and restraint of the dangerous play a role in fixing sentences within those limits. This is very similar to the theory of punishment long championed by Norval Morris.⁴ Such theories have been called "hybrid" theories of punishment,⁵ or "weak" or "modest" retributivism,⁶ or the "middle way"⁷ in punishment theory. Their hybrid character is found in their combination of the retributivist limit or limits with utilitarianism, which is, of course, the chief nonretributive theory of punishment.⁸

reb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47 (1986); Edward M. Wise, *The Concept of Desert*, 33 WAYNE L. REV. 1343 (1987).

⁴ The theory is set forth in several writings of Norval Morris: NORVAL MORRIS & MICHAEL H. TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1990); NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982) [hereinafter *MADNESS*]; NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974) [hereinafter *FUTURE*]; Norval Morris, *Punishment, Desert and Rehabilitation*, in *EQUAL JUSTICE UNDER LAW* (1977). Although in agreement with the form of Morris' theory, this Article's treatment of the key matter of the upper limit is in considerable conflict with that of Morris. See MORRIS, *MADNESS*, *supra*, at 179.

⁵ See Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19 (1987); Andrew von Hirsch, *Hybrid Principles in Allocating Sanctions: A Response to Professor Robinson*, 82 NW. U. L. REV. 64 (1987).

⁶ See A.C. Ewing, *Punishment as a Moral Agency*, 36 MIND 292, 305 (1927); Gertrude Ezorsky, *The Ethics of Punishment*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* xi, xix (Gertrude Ezorsky ed., 1972); see also H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 236 (1968).

⁷ See Igor Primoratz, *The Middle Way in the Philosophy of Punishment*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 193, 193-220 (1970).

⁸ Theories that may fairly be considered hybrid are set out in BERNARD BOSANQUET, *SOME SUGGESTIONS IN ETHICS* 195, 202-07 (1918); HART, *supra* note 6, at 234-37; MORRIS, *FUTURE*, *supra* note 4, at 73, 75; EDMUND L. PINCOFFS, *THE RATIONALE OF LEGAL PUNISHMENT* 130-32 (1966); W.D. ROSS, *THE RIGHT AND THE GOOD* 63 (1930); SHER, *supra* note 3, at 77, 82-84 (1987); ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION* 24 (1975); Lawrence Alexander, *The Doomsday Machine: Proportionality, Punishment, and Prevention*, 63 MONIST 219 (1980); K.G. ARMSTRONG, *The Retributivist Hits Back*, 70 MIND 471, 489 (1961); Garcia, *supra* note 3, at 225, 231 n.14; R.M. HARE, *Punishment and Retributive Justice*, 14 PHIL. TOPICS 211, 219-22 (1986); McClosky, *supra* note 3, at 260-61; Andrew von Hirsch, *Proportionality*, *supra* note 3, at 264, 288. Representative punishment utilitarians include the following: JEREMY BENTHAM, *The Utilitarian Theory of Punishment: Of the Properties to be Given*

Hybrid theories typically assume that there is a substantial gap between the retributive lower and upper limits. I will make that assumption here, confronting only tangentially the opposite view that the upper limit is identical to the lower limit. One who is persuaded by the latter view will still be able to appropriate the greater part of my analysis of the reciprocity principle and its consequences.

B. *The Theory as a Justification for Punishment*

Essays on punishment are often promoted as providing a justification for punishment, no doubt because punishment is obviously very much in need of a justification.⁹ From a moral point of view there is something initially puzzling about the very existence of punishment. Punishment is, after all, the intentional infliction of suffering, or at least some deprivation, upon a human being.

I shall not deal in this Article with what might be regarded as the first issue in the justification of punishment—why it is a good thing that there should be an institution of criminal punishment.¹⁰ Permit me to suggest, without argument, that one good reason for the existence of punishment is that having some control of crime is a good thing. In addition, punishment is sometimes required (whether it controls crime or not) to express society's condemnation of the offense and to vindicate the rights of the victim.¹¹

to a Lot of Punishment I-V, in *INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1776); JOHN S. MILL, *ON LIBERTY* 76 (Notion Critical ed., 1975); Johs Andenaes, *General Prevention*, 43 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 176, 179-80 (1952); T.L.S. Sprigge, *A Utilitarian Reply to Dr. McClosky*, 8 INQUIRY 264 (1965).

⁹ See HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* ch. 9 (1979); TED HONDEREICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* chs. 1, 11-14 (1969); Richard A. Wasserstrom, *Punishment*, in *PHILOSOPHY AND SOCIAL ISSUES* 112 (1980).

¹⁰ The distinction between two species of justification is familiar from the celebrated essay, H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY*, *supra* note 6. What I call the first issue of justification is Hart's "general justifying aim." *Id.* at 8-11.

¹¹ The control of crime is the chief, or perhaps sole, means through which utility is maximized on the hybrid theory. The denunciatory function of punishment, in turn, is plausibly identified with the lower limit of just punishment on such a theory. For arguments in support of a denunciatory purpose of punishment see A.C. EWING, *THE MORALITY OF PUNISHMENT: WITH SOME SUGGESTION FOR A GENERAL THEORY OF ETHICS* 32-35 (1929); JOEL FEINBERG, *DOING AND DESERVING* 95 (1970); 2 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW IN ENGLAND* 81-82, 207 (1883); VON HIRSCH, *PAST OR FUTURE*, *supra* note 3; Jean Hampton, *The Moral Education Theory*

It is the second issue of justification that this Article addresses in pursuing the issue of the upper limit. How is it that we are permitted to punish people for purposes of crime control, official condemnation of crime, or for any other purpose? The point of this question is sharpened by the following Kantian observation. The control of crime, where successful, is a social good. Punishment is a deprivation intentionally visited by the state upon a particular individual. The punished individual is used as a means to secure the social good. The individual has not volunteered to serve this socially beneficial role. He or she is conscripted, usually very much against his or her will. We are not as a general matter morally permitted to sacrifice individuals to social purposes in such a dramatic way.¹²

In short, criminal punishment for the purpose of crime control facially violates the Kantian maxim that a human being is to be treated "always as an end and never as a means only."¹³ I will contend that part of the offender's immunity to being treated as a "means" disappears with the return of a guilty verdict. As a result, society is morally permitted to use him or her as a "means"—but only up to a limit. The commission of the criminal act is, of course, the pivotal point in the offender's loss of certain rights that he or she otherwise would have had. The perpetrator has voluntarily violated a prohibition of the criminal law. He or she was, or should have been, aware that the transgression would alter his or her relation to the criminal justice system. It is, therefore, fair to take the offender as having forfeited some part of the rights that formerly defined his or her relation to that system.¹⁴ One might call the forfeiture an "implied waiver," although it is not usually any part of the offender's intention to waive rights. Still, this forfeiture does have a certain affinity to the concepts of implied waiver and implied consent. It is triggered by a voluntary

of Punishment, 13 PHIL. & PUB. AFF. 208 (1984); Igor Primoratz, *Punishment as Language*, 64 PHILosophy 187 (1989); von Hirsch, *Proportionality*, supra note 3, at 259.

¹² See Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 327 (1985).

¹³ IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 100 (L. Beck trans., 1959).

¹⁴ See DAVID HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS III, part I, ¶ 10 (1957); ROSS, supra note 8, at 60-63; SHER, supra note 3, at 84; Alan Goldman, *The Paradox of Punishment*, 9 PHIL. & PUB. AFF. 42, 44-45 (1979); Christopher W. Morris, *Punishment and the Loss of Moral Standing*, 21 CANADIAN J. PHIL. 53, 63 (1991); Van den Haag, supra note 3, at 1255.

Corley No.

D

act that a reasonable person would expect to have exactly those consequences.¹⁵

The crucial issue is the scope of the forfeiture. I will argue that, subject to certain conditions,¹⁶ the offender forfeits immunity to criminal punishment in an amount determined by the principle of reciprocity. That principle makes it fair for the state to impose upon the offender to the extent that, in violating the criminal law, the offender has imposed upon society. Any penalty that is too severe to be countenanced under reciprocity is unjustly severe—however laudable its consequences.

I will show how reciprocity functions to justify criminal punishment and to set its upper limit. I cannot demonstrate that reciprocity sets the only potential limit. Reciprocity, as characterized here, is permissive. It licenses a degree of punishment. I offer no disproof of the existence of other principles that license punishment. Such an "impossibility proof" would be difficult at best. If there were some other moral principle that licensed criminal punishment, that principle might be more permissive than the reciprocity principle. Then, of course, it would be that principle that would set the true upper limit. It is up to the proponents of such principles to put them forward and to argue for their acceptance as a matter of moral theory.¹⁷

¹⁵ HART, supra note 6, at 22-24; D.D. RAPHAEL, MORAL PHILOSOPHY 61 (1981); Goldman, supra note 14, at 44-45; Mackie, supra note 1, at 3; Morris, supra note 3, at 479; C.S. Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFF. 289, 297-98 (1983).

¹⁶ I shall not discuss here such prerequisites of just criminal punishment as legality, good faith prosecution, and conviction under due process.

¹⁷ Perhaps the most promising alternative permissive principle arises from putting more moral weight on the concept of forfeiture. If one voluntarily commits an offense with notice that a specific penalty attaches to it, is one not morally estopped from denying the justice of one's receiving any penalty up to the notice penalty? This principle might be called "notice and waiver" or "imputed consent." The offender does not actually waive or consent, but what he does in committing the offense, under the appropriate circumstances, is arguably morally equivalent. To the extent this argument is plausible, the approach meets the Kantian prohibition against using persons only as means. One who consents to his or her fate is treated as an end. Unlike reciprocity, the principle of notice and waiver has no internal upper limit, at least on its face. It could apparently warrant capital punishment of shoplifters. One theorist has expressly drawn the conclusion, on the basis of this principle, that punishment of any severity is morally permissible so long as it satisfies utilitarian requirements. Nino, supra note 15, at 292, 297-99.

Notice and waiver will not, however, take us that far. It is not implausible that an offender might be deemed to have done the equivalent of consenting to a moderate fine, a term of supervision, or a very short jail sentence. It stretches the notion of consent beyond the breaking point to posit the equivalent of consent to more serious penalties. Moreover, imputed consent can never be more morally

reciprocity

No!!

wek.

law must be justifiable first!!

C. *The Relevance of the Theory to Practice*

It is a fair demand of an article in a journal written largely for lawyers that it should have some relevance to what some lawyers actually do. That an article is, as this one, theoretical in character does not make it immune to this demand. To the author of sentencing guidelines, the judge, the prosecutor, or the defense counsel, this Article primarily offers a conceptual framework for understanding the requirement of justice that sentences not be too severe. Most people who play roles in the criminal justice system have an intuition that there is an upper limit on punishment, but this may be nothing more than a very fuzzy intuition. The specificity of the intuition may go little further than this Article's opening illustration—that it is unjust to punish shoplifters capitally.

If you have such an intuition, this Article first argues that you are right to have it. The intuition is defensible as far as such matters ever are by considerations sounding in justice theory. Second, in analyzing the principle of reciprocity that underlies the intuition, this Article provides some guidance for the application of the intuition to actual cases. This does not mean that you will be in a position to put a numerical upper limit on shoplifting or armed robbery, in terms of months of imprisonment. However, if you accept the results of this Article, you will have a structure to work with in refining your intuitions about the fair penalty for a case of armed robbery. In many respects it would be desirable to have a formula that would produce a discrete numerical upper limit for each actual offense. It is neither surprising nor alarming, however, that there is no such formula and that we must depend upon intuition guided by a theory of justice. This use of intuition is an operation of what some philosophers have called "practical reason."¹⁸ Some vagueness in the deliverance of practical reason on such matters means only that we shall not arrive at perfect justice. It does not mean that the method is not conducive to justice.

powerful than actual consent. It follows from this observation that imputed consent will be constrained by proper notice, capacity, and unconscionability conditions. The unconscionability conditions, in particular, will typically limit the upper bound of an imputed consent punishment to that permitted under the reciprocity principle.

¹⁸ Compare this use of intuition with the "perception" of Aristotle's "practical wisdom." ARISTOTLE, NICOMACHEAN ETHICS 1140-42. See generally MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE ch. 2 (1990).

Finally, this Article argues for some specific results in the application of punishment theory to the real world of sentencing. I contend, for example, that it is the defendant who should bear the burden of uncertainty as to the precise level of the upper limit.¹⁹ Further, statutory maxima should be set based on the least serious possible crime within a given classification. Acts that do not impose at least some risk ought to bear no more than minor penalties. Finally, the upper limit of just punishment for a repeat offender should exceed that for the offender with a clean record who commits an identical offense, but only by the amount that the recidivist's prior sentences cumulatively fell short of their upper limits.

II. RECIPROCITY

A. *The Reciprocity Principle R*

Suppose that the offender is duly convicted and that at the time of conviction the society perceives some social advantage²⁰ that can be won only at the cost of visiting a deprivation on some member of society. Non-offenders may defend against being used in this way by pointing out that they have done nothing that would make society's intrusion upon them fair. The offender cannot raise the same defense. Having treated another person or the society at large in a fashion that the criminal law prohibits, he or she is morally estopped from asserting such unfairness. It is fair for society to treat him or her in ways he or she would otherwise be protected against. His or her claim to retain a full set of immunities after committing prohibited acts is essentially an assertion of special moral privilege relative to others in society. The offender cannot support this assertion.²¹

estoppel

NO!
go
st!

¹⁹ See discussion *infra* part II.F.5. That there may be some slippage here to the detriment of the defendant is just one of three inevitable varieties of injustice in the system, even when it is working as well as it can be expected to work in the real world. A second source of such injustice is the unintentional punishment of the innocent. See Larry Alexander, *Retributivism and the Inadvertent Punishment of the Innocent*, 2 LAW & PHIL. 233 (1983); Michael Philips, *The Inevitability of Punishing the Innocent*, 48 PHIL. STUDIES 389 (1985). A third source is overpunishment resulting from the fact that the system must work with a generic severity of punishment scale, rather than one perfectly corresponding to the preference structure of the particular offender. See *infra* note 53 and accompanying text.

²⁰ The social advantage that will normally be applicable is, of course, crime control, and it will typically come about through imposition of a punishment upon the offender. Serious, if subsidiary, questions of justice would be raised by using the offender for purposes other than crime control.

²¹ See Goldman, *supra* note 14, at 45; Alan Goldman, *Toward a New Theory of Punishment*, 1 LAW & PHIL. 57, 59 (1982).

Handwritten scribbles and a large 'D' at the bottom of the page.

At a deeper level, this moral estoppel follows from a long recognized principle of moral reciprocity:

(R) If *A* does *x* to *B* under conditions $c_1 \dots c_n$, then it is prima facie not unfair for *B* to do *x* to *A* under conditions $c_1 \dots c_n$.

R has "positive" applications when *x* is an action that *B* finds desirable, as well as "negative" ones when *x* is undesirable to *B*. Positive applications arise and seem at least not inappropriate in, for example, forming a guest list for a dinner party. It is not unfair to distinguish among persons otherwise equally eligible for the invitation based upon who has and has not afforded the host like hospitality in the past. The unfairness that would exist in the absence of the principle is morally weak. It is simply the unfairness of arbitrariness in a setting—private social decisions—in which a high degree of arbitrariness is tolerated as a corollary of individual liberty. Still, we talk about fairness and unfairness even in such settings.²²

R has its most telling applications, however, on its negative side. The negative applications are relevant to punishment theory, typically to situations in which there would be more serious sorts of unfairness or injustice in the absence of *R*. Suppose, for example, that *A* and *B* are shipwrecked on a deserted island. *A* makes use of the only firearm salvaged from the wreck to force *B* to build him a shelter. If *B* gains control of the gun, it will not be unfair for *B* to use it to force *A* to return the favor. Here the unfairness in the absence of *R* would appear as a significant interference with the other's liberty and autonomy—as is usual with criminal punishment.

B. A Brief History of Reciprocity

R is a member of a family of anciently recognized reciprocity principles that measure how a person is to be treated by how he or she treated others. One of the more congenial members of the family is the Golden Rule: "Whatsoever ye would that men should do to you, do ye even so to

²² For an argument that positive reciprocity is a virtue, see LAWRENCE BECKER, RECIPROCITY 89-94 (1986).

them."²³ Its positive cast, aiming at the production of good or charitable action, won this principle a permanent place in our moral consciousness. Aristotle reports that a reciprocity principle, which apparently embraced *R*, was part of the moral common sense of his day and was recognized by the Pythagoreans of the sixth and fifth centuries, B.C.²⁴ Other than the Golden Rule, the best known reciprocity principle and the one most associated with punishment theory is talion: "eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."²⁵

Despite its seniority over the Golden Rule, talion has not been treated as kindly by commentators. The accepted wisdom is that the principle is archaic and uncivilized.²⁶ Despite this consensus, I will argue that where talion governs (suitably interpreted and generalized), it is highly protective of the offender.

Although the Code of Hammurabi contains the first written record of talion,²⁷ it was not the Code's primary principle of punishment. There were also many monetary compensatory penalties²⁸ and certain "sympathetic" penalties (for example, severing the hand of the malpracticing surgeon).²⁹

²³ Matthew 7:12; see also 1 CONFUCIAN ANALECTS 15:23 ("What you do not want done to yourself, do not do to others."); THE BABYLONIAN TALMUD: *Tractate Shabbat* 31a ("What is hateful to you, do not to your neighbor." (attributed to Hillel)).

²⁴ ARISTOTLE, NICOMACHEAN ETHICS V ch. 4. Aristotle himself preferred a modified principle of reciprocity that would mete out different penalties depending upon such matters as whether it was an official or an ordinary person who was assaulted.

²⁵ Exodus 21:24-25; see also Genesis 9:6; Leviticus 24:19-20; Deuteronomy 19:21.

²⁶ See GROSS, *supra* note 9, at 414, 457 ("the primitive idea of a harm for a harm"); KLEINIG, *supra* note 3, at 50; VLADIMIR S. SOLOVYOV, THE JUSTIFICATION OF THE GOOD 302 (N.A. Duddington trans., 1918) (Retribution is "incompatible with any degree of developed human feeling."); see also HART, *supra* note 6, at 234-35; HANS Kelsen, WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE 44 (1957); THEOPHILE J. MEEK, HEBREW ORIGINS 66, 68 (1936); Albrecht Alt, *Die Ursprünge des israelitischen Rechts*, in KLEINE SCHRIFTEN ZUR GESCHICHTE DES VOLKES ISRAEL 305 (1953); Armstrong, *supra* note 8, at 489.

²⁷ See 2 THE BABYLONIAN LAWS 77-83, §§ 196, 197, 200, 210, 229, 230 (Godfrey R. Driver & John C. Miles trans., 1955); ISRAEL DRAPKIN, CRIME AND PUNISHMENT IN THE ANCIENT WORLD 27 (1989). It has been argued that the Biblical legal code and that of Hammurabi both stem from a single earlier code. D.H. MUELLER, DIE GESETZE HANMURABIS UND IHR VERHÄLTNIS ZUR MOSAISCHEN GESETZGEBUNG SOWIE ZU DEN XII TAFELN (1903). However, there is no direct evidence of such a code containing talionic laws.

²⁸ THE BABYLONIAN LAWS, *supra* note 27, at §§ 198, 199, 201, 203, 204.

²⁹ *Id.* § 218.

The development of talion against a background of private pecuniary penalties arguably paralleled the development of a concept of offenses against the state or society as a whole. That is, talion was part and parcel of the development of the concept of distinctively criminal wrongs.³⁰ Thus, contrary to the popular assumption that talion was a remnant of primitive personal and clan retaliation, the principle appears to have been part of an innovation of criminal law as it arose from private law. Talion measured the wrong by its seriousness from a social point of view, rather than by what would make the victim, as a private party, whole. This is not to say that talion, and the other corporal and capital punishments that flowed with it, were necessarily humane advances in society's response to wrong. In other countries and times the development of a distinctively criminal law has also sometimes been a story of increasingly excessive harshness to offenders. But this is not the fault of talion, the essential insight of which is that criminal punishment should be bounded by the seriousness of the crime.

There is further evidence supporting the proposition that talion in Babylon was closely connected with the development of criminal law. Although pecuniary compensation governed injuries to the lesser strata of society, talion was applied when both the victim and the perpetrator were members of the upper stratum.³¹ This stratum controlled the state and plainly was the stratum with which the state identified. Offenses involving the upper stratum would be expected to be most clearly identified as offenses against the state rather than merely as private wrongs.

The historical materials are not crystal clear on this point, but under Hammurabi's Code, talion probably operated as an upper limit on punishment.³² There is some evidence that the Roman use of talion shared this limiting, nonmandatory character.³³ Similarly, the Bible is forceful in its admonition that the proper limit on criminal penalties must not be

³⁰ See DRAPKIN, *supra* note 27, at 68; CLAUDE H.W. JOHNS, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS 74 (1904); David Daube, *Lex Talionis*, in *STUDIES IN BIBLICAL LAW* 108, 146 (1969); Arthur S. Diamond, *An Eye for an Eye*, 19 *IRAQ* 151, 151-55 (1957); Shmuel E. Lowenstamm, *Midah Kinaged Midah*, in *ENCYCLOPEDIA MIKRA'IT* 840, 844 (1962).

³¹ JOHNS, *supra* note 30, at 74.

³² See HYMAN E. GOLDIN, *HEBREW CRIMINAL LAW AND PROCEDURE* 19 n.5 (1952); see also J.M. SMITH, *ORIGIN AND HISTORY OF HEBREW LAW* 237 (1931) (Assyrian Code).

³³ TABULA 8:2; Cohn, *Punishment*, in *THE PRINCIPLES OF JEWISH LAW* 524 (Menachem Elon ed., 1975).

exceeded: "Forty stripes he may give him, and not exceed: lest, if he should exceed, and beat him above these with many stripes, then thy brother should seem vile unto thee."³⁴ For the Hebrews, talion originally may have been mandatory,³⁵ but later became nonmandatory.³⁶ The Sadducees believed that talion should be interpreted literally.³⁷ The Talmudic rabbis, by contrast, interpreted noncapital talion as calling for monetary compensation designed to make the victim whole.³⁸ They made capital punishment largely a dead letter through evidentiary restrictions.³⁹ Humanistic impulses were no doubt of central importance in these Talmudic developments, but it is tempting to speculate that the movement away from criminal concepts toward tort concepts was a reflection of eroding Hebrew state power.⁴⁰

After Biblical talion, two millennia passed before the next significant appearance of the talionic concept for jurisprudential thought. That appearance was in Immanuel Kant's theory of punishment. Although Kant's punishment theory has not been as influential as his moral or political theory, he stands in the first rank of punishment theorists and is generally regarded as the paradigmatic retributivist. In Kant's retributivism, considerations of justice under talion that focused only upon the offense itself dictated the exact amount of punishment for a given offense. Thus, "Only the Law of retribution (*jus talionis*) can determine exactly the kind and degree of punishment. . . . All other standards fluctuate back and forth and, because extraneous considerations are mixed with them, they cannot

³⁴ *Deuteronomy* 25:3.

³⁵ See *Numbers* 35:19, 21; *Deuteronomy* 19:21; GOLDIN, *supra* note 32, at 19 n.5.

³⁶ 2 Josephus Flavius, *Antiquities of the Jews*, in *THE WORKS OF FLAVIUS JOSEPHUS* IV:280 (William Whiston trans., 19xx).

³⁷ *Id.* at 610.

³⁸ See *THE BABYLONIAN TALMUD: Tractate Baba Qama* 83b.

³⁹ Cohn, *supra* note 33, at 521.

⁴⁰ See JACOB NEUSNER, *A HISTORY OF THE JEWS IN BABYLONIA* I:212, III:221 (1965-1970). The hegemony of the Talmudic interpretation was not immediate. Philo, in the first century A.D., still supported talion. He warned that any other method of punishment would "subvert rather than uphold legality." 7 PHILO JUDAËUS, *De Specialibus Legibus*, III §§ 181-182 (F.H. Colson trans., 1937). Moreover, the written Talmud apparently continues to endorse a form of reciprocity. "[T]he measure by which man measures is that measure by which he will be measured." *THE BABYLONIAN TALMUD: Tractate Sotah* 1:7; *Tosefot Sotah* 3:1. Presumably this means at least that the severity of a criminal penalty ought to depend in some way upon the seriousness of the offense, as was expressly biblically ordained in the case of flogging: "And it shall be, if the wicked man be worthy to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, according to his fault, by a certain number." *Deuteronomy* 25:2.

be compatible with the principle of pure and strict legal justice."⁴¹

Talion plays a central role in the account of punishment by Sir David Ross, the influential twentieth century moral intuitionist. According to Ross, an offender's violation of the rights of others leaves the state "morally at liberty to injure him as he has injured others, or to inflict any lesser injury on him, or to spare him, exactly as consideration both of the good of the community and of his own good requires."⁴² For Ross, justice puts a prima facie upper limit on punishment at the talionic level.⁴³ Consequentialist considerations can be used to fix sanctions below this upper limit, and sometimes beyond it. The good consequences of crime control give rise to an independent prima facie duty to maximize those consequences.⁴⁴

In seeking the extent to which talion can be seen as providing an upper limit for criminal punishment, I will generalize and extend the talionic principle. In brief, I understand talion to entail that the severity of an offender's punishment ought to be no greater than a limit fixed by, and when possible, identical to the seriousness of his offense. That is, talion is an instance of, and is justified by, the more general principle *R*. As such, talion is licensed only to prevent unfairness. *R* does not require the application of talion in a given case. Thus, as I employ it, talion is limiting rather than mandatory. It follows from *R* that even mandatory talion would not be unfair. But *R* does not speak contrary to the perception that many applications of mirror-image talion would be morally repulsive.

C. The Moral Status of Reciprocity Principles in General

The long history of the reciprocity principle *R* does not, of course, establish its truth or the truth of its subprinciple, talion. Indeed, the historical record undoubtedly harbors more detractors than defenders, at least of talion itself. The reflexive way we use *R* in everyday life, however, shows the continuing vitality of the principle. It is often unwise or unworthy to give fit for fit, but we rarely think it unfair. And when it is unfair,

⁴¹ IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101 (J. Ladd trans., 1965).

⁴² ROSS, *supra* note 8, at 61; see also *id.* at 16-47, 56-64.

⁴³ *Id.* at 62.

⁴⁴ For a more recent argument for talion, see GRAEME NEWMAN, JUST AND PAINFUL 25 (1983).

it is more often than not because the conditions in which the two actors find themselves are relevantly different.

I shall not attempt to give anything as strong as a moral deduction of the reciprocity principle from other moral principles. *R* and the broader family of reciprocity principles are fundamental features of the moral landscape. In this respect they are like principles of equality or principles upholding individual autonomy and liberty. Although there are relations among these basic principles of justice, none is wholly dependent upon the others. For this reason, moral intuition is essential in establishing the existence and force of these principles. Reciprocity, like equality and liberty, is part of our sense of justice.

A little reflection will show, in fact, that the family of reciprocity notions has a strong hold on our moral sense. There is a clear moral appropriateness to giving positive rewards to those who do good and negative rewards to those who do evil. Consider the poor woman who, at great risk and some injury to herself, pulls an injured man from his burning Rolls Royce. She deserves a reward. The force of the appropriateness of the rescued man's rewarding his benefactress approaches that of an obligation. The bore who spends his time at a party bending any available ear on matters of jurisprudence does not deserve to be invited back. However, the force of the appropriateness of issuing no further invitations is somewhat less than an obligation.

Some theorists are satisfied to point out in defense of a candidate principle of justice that the principle seems to capture strong intuitions of justice in particular cases. Indeed, forceful and influential arguments have been made that we really can never do more as a matter of principle.⁴⁵ This view seems to me too pessimistic. To say that reciprocity principles are part and parcel of our sense of justice is a statement of the greatest importance, but it is not quite the last word.

Principles of justice, like other moral principles, may be examined against the background of the project of social coordination, and against the background of our psychological makeup. In an effort to understand or to modify our network of principles of justice and our own intuitions of justice, we may put a given principle or set of principles hypothetically at

⁴⁵ ROSS, *supra* note 8.

issue. If we go through this exercise for reciprocity principles, we will find that the prospect of deleting them would leave us with an overall moral theory that would be both impoverished and of doubtful workability.

To see why this is so, it is helpful to trace the role of reciprocity within the system of moral notions. Reciprocity always gives rise to desert. It is not the only sort of moral principle that gives rise to desert, but reciprocity gives rise to a special and easily identifiable kind of desert that looks exclusively to some prior act or acts. What is deserved depends upon how the absolute or comparative goodness or badness of the act affects some other person or persons. The moral force of the desert bears a complex relationship to the goodness or badness of the act and to the institutional setting in which it took place. For example, a minor favor between friends gives rise to a morally modest appropriateness to return the favor. The heroic rescue from the burning car, by contrast, creates desert with very nearly the force of an obligation.

The capacity of reciprocity to engender desert, both positive and negative, gives it a striking role among the cast of our moral principles. The call of reciprocity is different in kind from that of maximizing utility or of maximizing the lot of the worst off. It is less abstract, less universal, and more a matter of values generated at the level of the moral subject and his or her particular relations to others. In this respect, reciprocity is something like promising or restitution, except that reciprocity desert does not give rise to obligations. (A promise or other moral consideration may, however, promote a reciprocity desert to the status of an obligation.)

In fact, a prime function of reciprocity within moral theory is to act as a counter against what might otherwise be an obligation. Moral universalism urges us to count each person as having utterly equal moral status. Such universalism has its place, but it is not every place. A thoroughly universalistic morality might be appropriate for angels, but it will not do for human beings. Any *prima facie* duty to treat everyone alike or to maximize total utility must sometimes fall to the moral force of specific institutions such as promises, and to morally significant relationships such as family and friendship. Reciprocity desert is another such defense available to the individual against the universalistic demands of public morality.

Moral psychology strongly supports the proposition that being a benefactor (or the opposite), like being a friend, makes a moral difference.

That is the sort of creatures we are. A morality that omitted such features likely would be too rigorous to endure. It would certainly be a continuing source of conflict. Moreover, there is every reason to believe that reciprocity desert, like friendship, represents a deep feature of our moral psychology, not a shallow feature that might be modified through education or social change.

To conceive of a society in which individuals felt no pulls of reciprocity desert is to conceive of a society bereft of the emotions of gratitude or revenge. What would such people be like? Would they recognize the receipt of a gratuitous benefit and fail to have any positive feelings toward the benefactor? Would no gratuitous insult or injury lead to any diminution of regard for the author? Perhaps such people are possible, but they are, at the least, very unlike us.

Many have observed that people naturally resent criminal behavior—a resentment that would be difficult, if not impossible, to prune through education.⁴⁶ Moral psychology's support of the retention of reciprocity principles, however, does not reduce the moral force of reciprocity to the satisfaction of our desire for punishment (or reward). Similarly, the moral force of equality is exhausted neither by our feelings of satisfaction when opportunities are made available to groups previously discriminated against, nor by our resentment when aid is withdrawn from the dispossessed.

As a matter of genetic psychology, the propensity to favor reciprocity desert may be explained in part by the fact that tit for tat behavior has a strong tendency to induce cooperative behavior among egoists, as game theoretic experiments have shown.⁴⁷

Suppose that you were choosing moral principles of wide applicability from behind a veil of ignorance that would prevent you from knowing whether you would directly benefit or be burdened by a candidate principle.⁴⁸ You would, I think, give reciprocity desert a vote of confidence. Rec-

⁴⁶ See, e.g., STEPHEN, *supra* note 11, at 81-82; Mackie, *supra* note 1; Murphy, *Retributive Hatred*, *supra* note 1, at 351.

⁴⁷ See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

⁴⁸ See generally JOHN RAWLS, *A THEORY OF JUSTICE* 136-39 (1971). I have doubts that Rawls would think that this illustration is a well formed application of his "veil of ignorance," inasmuch as I am at this point thinking about *R* as a free floating moral principle rather than as a principle connected directly to the structure of institutions. Still, there is something to be said for any principle that

iprocity is a natural basis for coordinating the actions of free and equal moral agents constituted roughly as we are. In short, reciprocity is not only a basic part of our sense of justice, it is also a part that would be difficult to excise and still retain an acceptable moral theory.

D. *The Moral Status of Reciprocity Within Criminal Justice*

These considerations make it plausible that reciprocity principles have some proper scope in guiding the affairs of human beings. However, they do not yet show *R*, in particular, to be an acceptable principle in justifying and delimiting criminal punishment by the state.

The principle *R* is not stated in terms of desert, but in the related language of unfairness. Whenever something is deserved it is, with respect to the conditions that make it deserved, not unfair that the deserving person receive it. Of course, this is not to say that it is fair once everything is taken into account. Reciprocating a minor rudeness would be unfair if it were perpetrated in the course of what was otherwise a good deed. *R* shares the moral force of reciprocity as desert, while leaving space for the operation of other morally relevant considerations.

Because criminal punishment carries a significant stigma, and often a significant deprivation of liberty as well, we are well advised to be cautious in mandating it. In particular, punishment that goes beyond what is essential for the control of crime and the expression of social denunciation requires, at the very least, a moral justification of a weighty sort.

The mandatory retributivist believes that affirmative desert is of that weight, and that punishing less than what is deserved is morally no more permissible than punishing more than what is deserved. I shall not give my reasons for doubting that the mandatory retributivist can support these contentions with an appropriately probative argument. Certainly the moral force of reciprocity does not generally extend so far. It is not unfair to exclude the bore from the next party, but it is not required. Of course, reciprocity in the realm of criminal punishment conceivably might be more demanding than it is in other contexts, but a general presumption in favor of liberty and against serious stigmatizing intervention by the state

seems plausible when one abstracts from one's own particular circumstances.

makes this possibility implausible as an initial matter.⁴⁹

Unquestionably, there are some situations in which it would be improper for a state actor to consider *R*. Suppose, for example, that *A* is a renowned hostess whose party invitations are much sought after. She has, almost pointedly, never invited *B*, the chairman of the local zoning board, to one of her parties. *A* has occasion to seek the rezoning of her property to make it possible for her to accommodate the automobiles of additional guests at her parties. When the matter comes to *B* for action, it would clearly be inappropriate for *B* to apply *R* and to reason that ruling against *A*'s petition would cause injury to *A* roughly equivalent to *B*'s pain from being excluded from *A*'s parties.

Presumably, *B* is required to decide all questions raised by *A*'s application on their merits. Giving tit for this tat would be misconduct. This is not a case where it would be even prima facie just for *B* to exercise the reciprocity principle. The principle has no proper scope of application here whatsoever.

As posed, the misadventures of *A* and *B* do not rise to the level of a counterexample to *R* or show it to be a generally unacceptable principle. We may save *R* simply by observing that in this case one of the morally relevant conditions is not the same for *A* and *B*. *A* was acting as a private citizen in her role as hostess. She had carte blanche in creating her guest list; organized society imposed no obligations upon her. *B*, by contrast, was acting in an official capacity under a rather stringent set of obligations, including an obligation of impartiality.

Criminal offenders are (usually) private citizens acting in a private capacity. Legislators, judges, and prosecutors, when concerned with matters of sentencing, are not. More importantly, however, *A*'s snubbing of *B* has no relevance to the zoning issue or to the institution governing zoning variances. *B*'s application of *R* is thus clearly improper. An offender's commission of a crime, by contrast, is exactly what is relevant in a criminal prosecution. In fact, the institution of criminal justice seems to have been designed with *R*, or something like it, in mind. As I have suggested, some historical evidence bears this out.⁵⁰

⁴⁹ See discussion *infra* part II.H. for a criticism of the most influential contemporary version of mandatory retributivism.

⁵⁰ See *supra* notes 23-40 and accompanying text.

But, even if the state's use of *R* is not immediately excluded as a clear violation of institutional duties, one might still object to *R*, at least in its negative applications, as an unworthy principle for a state to adopt. One suggestion is that a state should be magnanimous towards its own citizens, offering more than simple reciprocity for bad deeds.

This might be a plausible criticism of mandatory retributivism and thus of those stronger variants of *R* on which justice *requires* the state to give tit for tat. Such mandatory forms of retributivism are especially dubious when the reciprocal penalty accomplishes no further purpose. *R*, however, does no more than license penalties up to the reciprocal level as not *prima facie* unjust. Where *R* governs, the state must still clear additional hurdles before any penalty may be handed down. In particular, the state must determine that the penalty will serve the purpose of crime control—maximizing social benefits—after subtracting its costs, including costs to the offender, or, alternatively, that the penalty will serve the purpose of minimum adequate denunciation.

In short, a limited use of *R* in a hybrid regime of criminal punishment would not reflect lack of magnanimity by the state. Indeed, *R* would protect individuals against the state's overreaching in pursuit of its own ends. It is a corollary that *R*, applied to criminal punishment in this fashion, yields a system that protects the offender more than does either a utilitarian system lacking the upper limit that *R* sets in place,⁵¹ or a mandatory form of retributivism. Indeed, a hybrid theory with an upper limit based upon *R* probably intrudes less upon the interests of offenders than any other theory that could plausibly justify a system of criminal justice like ours.

For these reasons, *R* would be a suitable limitation upon punishment for selection from behind a veil of ignorance as to whether one will be an offender or a victim. Any principle that does not put some upper limit on punishment is unlikely to be chosen. On the chance that it is my lot to be punished, I will want some floor under my prospects.

⁵¹ This is not to say that treatment of offenders pursuant to *R* is more favorable to the offenders than any imaginable teleological principle. For example, the principle that we are to maximize the well being of the offender would probably get the votes of more offenders than would utilitarianism limited by *R*. However, the principle of maximizing the well being of offenders is not a particularly plausible end for a penal system.

Although not crucial for present purposes, a plausible argument from behind the veil of ignorance can be made that punishment below the upper limit should be sensitive to utilitarian considerations such as crime control. I would not risk any deterioration of my prospects as an offender that does not improve my prospects as a victim. Additionally, a "what else could it be?" argument for a specifically talionic upper limit from behind the veil could be offered, but providing the proper foundation for such an argument would involve a lengthy and difficult discussion of the appropriate sort of veil. In any event, the force of the argument is not dependent upon its being set in an idealized choice situation. If justice requires an upper limit on punishment below which considerations such as crime control can function, then over two thousand years of history have offered no suggestions except that the upper limit on the punishments be equal to the seriousness of the crime.

E. Determining the Reciprocal Upper Limit

1. Equating Impositions

The reciprocity principle *R* permits the state to do to the offender what the offender has done in committing an offense. Historical talion was set forth through the enumeration of examples such as the taking of an eye for an eye. Since the Talmud, however, such mirror-image talion has been, at best, restricted in its scope of application: "there are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery."⁵²

Still, the insight behind talion has some validity that outruns its mirror-image form—a parity between the offense and the sanction. It is possible to think of equal impositions that do not involve identical acts. For example, if someone intentionally damages my house, requiring me to spend ten hours to repair it, he has imposed upon me at least to the same extent as if he took ten(*n*) dollars from me, where *n* is the value in dollars that I place on an hour of my time. By generalizing talion in terms of equality of impositions, it gains applicability to offenses and penalties that do not involve physical injury.

⁵² 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 13 (Oxford, Clarendon Press reprint ed. London, 1966) (1769).

2. *Imposition upon the Offender*

Generalizing talion in this fashion, however, raises a host of difficult questions. If we are to define the severity of impositions in terms of preferences, whose preferences matter? Consider, for example, the offender who has the very strongest aversion to spending a day in jail. (Such offenders, common at least in fiction, would rather die than be taken in.) If we measure the seriousness of a sentence of incarceration by the preferences of the offender, we might find ourselves restricted to very short sentences for very serious crimes. In one respect there would be no injustice in such a sentence, although there might be a substantial disutility because of its *perceived* injustice to a public that did not understand or did not believe the determination of the offender's preferences.

Kant is often thought of as an adherent to mirror-image talion because he supported the death penalty for murder. Kant recognized, however, that different offenders would have different preferences and recommended that this be taken into account by crafting certain punishments to take advantage of the sensibilities of the social class of the offender.⁵³ Today we should be less comfortable fitting the offender's punishment to his social class, even if we were confident that generalizations about class preference functions were statistically sound. The idea of taking the offender's preference function into account, however, is at least a theoretical component of any application of the reciprocity principle to criminal punishment.

Practically, determining the offender's true preference function would be expensive, if possible at all. Therefore, we would have to settle for an approximation of reciprocal justice under our generalized talion—taking the preference function for various penalties to be those of a "statistically normal" offender. However, when we construct the statistical norm that determines the seriousness of a penalty for an offender, there will inevitably be a degree of arbitrariness. The justice resulting from measuring the seriousness of penalties in this way will be rough. Some individuals with nonnormal preference functions will be punished more severely than reciprocity permits. This injustice parallels that of punishing those who are innocent but found to be guilty at trial and believed to be guilty by all

⁵³ KANT, *supra* note 41, at 101.

relevant state actors. Punishment in both cases is genuinely unjust under the reciprocity principle. Nonetheless, the reciprocity principle could license the system as one in conformance with justice up to the limits of reasonably available information. Ultimately, one consequence of dealing with issues of justice as they apply to real world institutions is that we must be satisfied with such justice (and injustice).

3. *Imposition upon the Victim and Society*

a. *Intentional Crimes*

To turn to the other side of the equation, first consider intentional crimes. If the offender intends to bring about a state of affairs, it is fair to charge him with most aspects of the imposition he thereby makes. Finding the total imposition may require summing harms to a large number of people. First, there is disutility caused by the offense, including the disutility of its secondary effects, for each member of society. For those crimes that have specific victims, the chief summands will be the disutility for the victims, their friends, their families, and, to a lesser extent, their immediate community.⁵⁴

It follows that retributive justice is typically fostered by admitting victim impact statements into evidence at sentencing. In *Payne v. Tennessee*,⁵⁵ the Supreme Court held that the Eighth Amendment is neutral with respect to victim impact statements in capital cases. I would go further and argue that prima facie justice *requires* "informing the sentencing authority about the specific harm caused by the crime."⁵⁶ It does not follow that in murder cases the sentencing authority is permitted to count the violation of one victim's right to life any differently from another's. The violation of the right to life in one murder is the *same* as that in any other. The right to life does not vary with facts about the victims. However, the loss of utility does vary from victim to victim. A healthy two-year-old victim has lost more than a ninety-five year old victim. The death of a victim who is a member of a close family and has many good friends

⁵⁴ This is similar to Davis' auction of licenses to commit crimes, so long as the auction is restricted to those who wish to buy up the licenses so that no crimes will be committed—under the assumption, utterly extravagant in practice, that no crime will be committed without a license. See Michael Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726, 744 (1983).

⁵⁵ *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

⁵⁶ *Id.* at 2608.

is a greater loss than the death of a mountaintop hermit.⁵⁷

Nonetheless, justice does require some restrictions in counting disutilities. Suppose that a vandal chops down a tree in the victim's yard. The tree had little market value, but was greatly prized by the victim because it was planted and nursed from a seed by her mother when the victim was a little girl. For the victim, the loss of this tree might be a genuine catastrophe. If, however, the vandal knew nothing of its sentimental value, the fairness of charging him the full tariff of the misery he has caused is doubtful. This does not mean that we should punish only reasonably expectable consequences. It does mean that we should give special treatment to consequences that are radically worse than expected. I cannot say that a sentencer ought to give no consideration to such idiosyncratic suffering, but only that it would be unfair to take one's victim as one finds him or her in all respects.

Other consequential harms and costs of an offense are more diffuse, such as the offense's contribution to public apprehension leading to, for example, restrictions in activities of law-abiding citizens and their expenditures on security devices. Each offense also imposes upon society insofar as it becomes a precedent for further crimes by those with similar inclinations.

Having summed the appropriate disutilities, we must take into account any rights violated by the offense. In principle there may be serious rights violations even in the absence of significant disutility. The rape of an unconscious victim is a paradigm example. Even in the unlikely circumstance that neither the victim nor anyone else ever becomes aware of the assault, there has been a substantial violation meriting severe punishment. There will, of course, be no punishment if no one but the assailant ever

⁵⁷ It could be argued that under this theory these utilitarian losses should count only in cases other than intentional murder. In the case of intentional murder, the upper limit of capital punishment is reached as soon as there is a violation of the right to life. The upper limit is, therefore, not in question; witness impact statements can do nothing but prejudice the sentencer. However, I believe that most opponents of victim impact statements would be uncomfortable arguing that intentional killing automatically raises the upper just limit to the capital level. A large part of the point of sentencing evidence is its relevance to the issue of whether the capital penalty is unjustly severe given the particular crime and the particular defendant. Certainly, opponents of victim impact statements would oppose even more fiercely a jury instruction to the effect that the capital penalty is not unjust as a matter of law wherever a human life has been intentionally taken.

learns of the crime.⁵⁸

Disutility and rights violations sum together no better than weight in pounds and color in angstrom units. The operation of moral judgment that accompanys a sense of the overall seriousness of a criminal offense is not arithmetical. It is, rather, akin to what a judge does when purporting to balance a number of incommensurable factors. The balancing metaphor, beloved by both judiciary and intuitional moral philosophers, trivializes its actual operation. Weighing or balancing is thoroughly additive. It can be done only with things that are alike in character. Moral judgment, however, is not similarly limited. Intuitive valuation may be multidimensional. For example, consider the many different factors that we take into account in judging the goodness of someone's character.

At bottom, the possibility of such multidimensional judgments depends on each of us being able to declare our own values. This embraces an element of "moral relativism" though it is not relativism in a strong sense. Rights may have an objective existence through the role they play within the moral and political community. There is, however, no substitute for individual intuition in determining the seriousness of a given rights violation. I plead agnosticism, for present purposes, as to how much intersubjective agreement might be produced by reliance upon intuition in idealized discourse situations.

One might think that we could render rights violations into a single common coin by considering the victim's preference that a particular right not be violated. This proposal has an initial plausibility. The seriousness of a rights violation may typically correspond to the strength of the rights holder's preference that there be no violation. It will not, however, always correspond. Two people have equal rights to life even though one of them intends suicide. Other consequences to one of the victims may be less, but the rights violations remain the same.

Therefore, although we could ask people to gauge the seriousness of a

⁵⁸ An actual prosecution could result if police observe the rape of an unconscious victim and then lose track of her in the confusion of the events. This victim might not learn of the rape. Nonetheless there would have been a substantial violation of her rights that the sentencing mechanism would be morally required to take into account. To put the same point in a more realistic way, if a rape victim dies without regaining consciousness, the prosecution may properly charge the rape. The central evil of the offense, the violation of the victim's rights, does not disappear just because she was never conscious of it.

given offense by looking to its disutility or dispreference and the seriousness of its rights violations, such a survey would only serve to aggregate intuitions. We cannot monetize, because if we asked how much our respondents would pay to prevent a given crime, rights violations would be taken into account only to the extent of the negative preference.

Empirical research on the harmful consequences of different sorts of crimes would be more helpful than a survey in guiding the intuitions of sentencing policy makers. One example, cited by von Hirsch, is that people may believe that burglary leads to physical injury more frequently than it actually does.⁵⁹ By correcting our misapprehensions as to such matters, empirical studies should help us to improve our intuitions insofar as those intuitions reflect our beliefs as to the risk of the criminal conduct.⁶⁰ The matter of risk is the next stage in the analysis of reciprocal impositions.

b. Crimes of Risk Creation

Included in the harm imposed upon society is the risk of concrete harm arising from unsuccessful attempts and other inchoate crimes and from reckless or negligent behavior that did not lead to concrete harm. The reciprocity principle requires that this risk must be objective to be penalized. In counting the number of times out of a hundred that a conduct would result in actual harm, we must not relativize the initial conditions to those of the world as it is understood to be by the offender—as the Model Penal Code would advise us to do.⁶¹ To do so might give us a measure of the offender's moral depravity or dangerousness. The reciprocity principle, however, turns upon the real risk the offender imposed upon the society. The social harm of objective risks is, as a theoretical matter, quite determinate: an offense creating a risk of $1/n$ of concrete harm h imposes a harm of h/n .

The theory of punishment outlined in this Article has concrete and concededly radical implications for substantive criminal law. On the received

⁵⁹ VON HIRSCH, PAST OR FUTURE, *supra* note 3, at 66.

⁶⁰ Empirical studies of harmfulness are relevant only to the point of risk. As to the concrete harm, the judge can look to the actual offense before the court. The legislature or sentencing commission should look to the least serious offense in any crime category. See discussion *infra* part II.F.4.

⁶¹ MODEL PENAL CODE § 5.01(1) (1985); see also N.Y. PENAL LAW § 110.10 (McKinney 1987).

view, criminal attempts are punishable because the offender has given sufficiently good evidence that he is dangerous to society.⁶² On the theory of this Article, not even the strongest evidence of an individual's dangerousness is sufficient to expose him to criminal sanctions. The individual is not punishable even if he takes definite steps in furtherance of wicked schemes. Until those steps constitute some imposition upon society, the state is not permitted to intrude with the criminal apparatus upon the individual's liberty. Dangerous acts are punishable; acts by dangerous people are not.

Imposition is an inevitable requirement of the reciprocity principle. In effect, it is the same requirement as that of guilt. This of course places the theory of this Article—and any theory based upon reciprocity—in conflict with parts of existing law governing impossible attempts, conspiracy, and certain other inchoate offenses. The excess criminalization of inchoate crimes is a testament to the hold on criminal justice decision-makers of the dangerousness theory—a theory well suited to overly zealous prosecution and “war on crime” legislation.

In the end, whether behavior that imposes no objective risk ought to be criminalized comes down to the following question: Should one be subject to criminal penalties solely because a completely reliable predictor determines that one is certain to commit a criminal offense in the future? Put aside any cavils about the possibility of such a predictor; they are only psychology, physics, or metaphysics. The dominating point is one of moral theory. What licenses the intervention of the criminal justice system—individual dangerousness or imposition upon society? Considerations of liberty and autonomy, as well as those of desert and retributive justice, require the latter answer.

This thesis, that criminal attempts are those that impose risk (“possible” attempts), not those that fail to do so (“impossible” attempts), requires a basis for distinguishing the possible from the impossible. The theory must specify the objective risk that is to count as an imposition. Obviously the point is lost if the objective risk turns out to depend ultimately upon the dangerousness of the defendant. A suitable characteriza-

⁶² MODEL PENAL CODE § 5.05 (1985); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.2(b) (2d ed. 1986); GLANVILL WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 202 (2d ed. 1961).

tion of objective risk can be given, though I will not do so here.⁶³ It turns out to be only somewhat more complicated than the concept of probability, under which a given roulette wheel will hit "7" on the next spin with a probability of one divided by thirty-two. That may be, and usually is, the relevant probability even if a highly instrumented examination by experimental physicists made at the onset of the spin revealed a quite different probability distribution.⁶⁴

c. *Malum Prohibitum Crimes*

Inasmuch as the present theory puts the upper limit of the criminal penalty at zero for an "offense" that imposes nothing upon anyone, it might reasonably be expected that *malum prohibitum* offenses⁶⁵ could not be subject to criminal penalties at all. Many statutes that are commonly thought of as *malum prohibitum* are actually designed to minimize certain kinds of risk imposition. Consider a law requiring the licensing of handguns. Owners of unlicensed handguns as a class are clearly risk imposers. Insofar as each offense would impose some risk, the present theory has no qualms as to its punishability, even if a court denominates the offense *malum prohibitum*.⁶⁶

What are we to say, however, in some instances the offense imposes no risk, and it is such a case that is before the court? Consider the particular handgun owner who keeps his unlicensed pistol locked in a safe to

⁶³ See Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1061 (1992).

⁶⁴ Many academic lawyers are skeptical that there is a notion of "objective risk" that will survive scrutiny. A little reflection, however, would show that we use such notions of probability and risk all the time. A given stretch of roadway was dangerous when wet, even before it was open for the first car. It is a property of the road, not of any collection of statistics or the contents of anyone's mind. There is a nonzero objective probability that any given car will slip. It is a subtler point that the relevant sense of probability in such cases is not fundamental physical probability. Rather, the state descriptions that define the reference class for the probability ratio are defined more inclusively than the probabilities of the physicist. The particular widening of the state description depends upon the purpose of the probability. For criminal attempts, the state descriptions should be defined so as to reflect our intuitive sense of improper risk imposition.

⁶⁵ A *malum prohibitum* offense is "wrong only because made so by statute" as contrasted to a *malum in se* offense, which is "one that is naturally evil as adjudged by the sense of a civilized community." State v. Horton, 51 S.E. 945 (N.C. 1905).

⁶⁶ See, e.g., State v. Dyer, 289 A.2d 693 (Me. 1972) (driving under the influence of intoxicants); Commonwealth v. Adams, 114 Mass. 323 (1973) (driving over speed limit); State v. Carty, 620 P.2d 137 (Wash. Ct. App. 1980) (failing to yield right of way).

which only he has the combination. It appears that he imposes no risk upon anyone. Can we nonetheless hold him responsible for some portion of the total risk attendant upon unlicensed handgun possession? After all, he does intentionally possess the pistol, knowing that possession violates the law. Is he not estopped from denying his membership in the risk imposing class, and therefore his share of the risk?

He is not so estopped. It would run counter to all forms of retributivism to make one person responsible for the acts of another where there is no connection between the two other than violation of the same ordinance. One person's punishability ought not depend upon what other unrelated people do. Suppose that all other unlicensed handgun owners turned in or licensed their handguns. Now the total risk imposition of the class is zero. It would be bizarre to hold that the upper penalty limit for this nonimposing offender dropped from a significant figure to zero because someone at the other end of the state (the penultimate holdout) turned in his pistol.

Many cases will be like that of the unlicensed gun in the safe. It will be impossible to prove that the *malum prohibitum* defendant imposed any objective risk. Does this mean, on the present theory, that the case must be dismissed? Not quite. The defendant, even if he has not created what would have counted antecedently as an imposition, has at least imposed in one way. Assuming the legitimacy of the authority enacting the *malum prohibitum* statute, the offender has violated that authority's right to ensure that the particular state of affairs not exist.

Suppose that the town council passes an ordinance that the owners of all stores in town are to have their store display windows washed on Tuesday. The town eccentric washes his windows on Monday night instead. Can he be fined for thus flouting the council's will? I am inclined to think that he can, but that the fair upper limit of the fine is very low. This might be called a pure *malum prohibitum* statute. The violation contravenes no public purpose of any significant weight, but only the largely arbitrary will of the legislature. Under the reciprocity principle, the offense is the violation of the arbitrary will of a legitimate authority. This violation is very low on the seriousness scale, but it is not quite off the scale altogether.⁶⁷ The owner of the unlicensed gun in the safe should be

⁶⁷ It is not clear to me that any such offense ought to be denominating a "criminal" offense as opposed to a violation. There is another potential argument, however, that might plausibly support

treated similarly.

d. Crimes of Lesser Culpability

The recognition of rights violations as a component of the seriousness of criminal offenses brings with it an ineliminable reliance upon moral intuition. Intuition will turn out to be essential once again when we turn to crimes that are less than fully intentional or that are mitigated by diminished capacity or extreme provocation.⁶⁸ These offenses are recognized most liberally in the several levels of criminal homicide.

The reciprocity principle has a looser grip on crimes of lesser culpability because the state does not punish negligently, recklessly, or with diminished capacity (although various state *actors* can behave in these ways). The state punishes with full intentionality. Therefore, there can be no direct penal equivalent of the act of negligent or reckless homicide. There is no mirror-image talion. Can we nonetheless find penalties that are equal in seriousness to these offenses? The best that we can do, I think, is to capture the intuition that the offender has only partial criminal liability for the harms in these cases. He or she may have caused a death just as clearly as did the intentional murderer, and the tort liability of the two may be the same. But the intentional murderer must accept criminal liability for the whole harm while the negligent killer has a reduced liability for that harm. The harm is the same, but the seriousness of the offense is different,⁶⁹ and considerations of justice require us to gener-

somewhat higher penalties in *mala prohibita* cases, and perhaps even the legitimacy of criminal status for these pure cases. This is the argument for notice and waiver. This argument works best for offenses with small penalties. See *supra* note 17.

⁶⁸ The seriousness of an offense is a function of both its imposition and the offender's culpability. It is implicit in the structure of substantive criminal law at least as far back as the distinction in treatment between murder with "malice prepense" and other homicides in the sixteenth century, SINGER, *supra* note 3, at 18, and is a premise that is almost inevitable for any desert theorist, see generally VON HIRSCH, *DOING JUSTICE*, *supra* note 3.

Utilitarianism, in contrast to retributivism, may actually decree a more severe penalty for less culpable crimes than it does for crimes of greater culpability because the former are harder to deter. Crimes of passion and provocation are candidates for severe utilitarian punishments. See IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 38 (1989); EDWARD A. WESTERMARCK, *THE ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS* 83 (2d ed. 1912). But see F.W. Maitland, *The Relation of Punishment to Temptation*, 5 *MIND* 259 (1880).

⁶⁹ See von Hirsch, *Proportionality*, *supra* note 3, at 266.

alize talion along the latter lines.⁷⁰ This means, of course, that we are thrown back to rather vague intuitions about the degree of criminal responsibility.

The whole process may be described as one of intuiting the seriousness, blameworthiness, or wrongfulness of the criminal act. So described, the theory may seem to give little or no guidance to any participant in the sentencing process. This assessment would, however, be far too pessimistic. In the first place, as with other forms of retributivism, the theory insists that the relevant object of attributing blameworthiness is the criminal act, not the criminal actor. We must then look to the actual consequences of the act and not those of similar acts. In principle, one component of those consequences is amenable to empirical investigation—the consequences in conflict with social preferences. This provides a floor to the reciprocal upper limit for a given fully intentional, unmitigated offense before we bring intuition into play. When we do turn to intuition, the process is guided to some extent by its division into two steps: first, determining the seriousness of any rights violations; second, determining the appropriate discount for crimes other than the fully intentional and unmitigated.

The retributive focus on act rather than actor also guides this latter determination in that it requires us to disregard the offender's mental states that do not turn on fairly narrowly defined intent. For the purposes of the retributive upper limit we ought to make the same distinction as is made between motive and intent by the substantive criminal law. Intent counts in the determination of the retributive upper limit; motive comes into consideration only at the utilitarian stage in determining the probable future dangerousness of the offender. That one offender killed out of a misguided sense of mercy, another out of spite, and a third out of the joy of killing is not irrelevant to their punishment. Typically, the third will be a greater continuing threat to the society than the first, and for that reason will properly receive a punishment that takes the continuing threat into account. However, the offense that each of the three has committed is the same: intentional murder. Here, the substantive criminal law shows its retributive roots. It defines crimes by concentrating on the wrongness of

⁷⁰ Kant apparently understood talion in this way, taking the "inner viciousness" of the act as requiring its talionic equivalent. KANT, *supra* note 41, at 103.

the act rather than on the wickedness of the actor, and the determination of a retributive upper limit on the punishment of a particular offense follows suit.

How much of the offender's state of mind is included within "intent" and how much is relegated to "motive" is, in part, arbitrary. Causing the death of a terminal cancer patient simultaneously ends his suffering. In principle the law could recognize a form of manslaughter defined as causing death with the intent to end the suffering of a terminally ill person who is in pain. The decision to define homicidal intents more thinly than this is not dictated by fundamental principles of moral theory or the metaphysics of the mind, but by policy. Retributivism presses upon substantive criminal law the principle that crime categories should correspond to our sense of the act's blameworthiness—not of the actor's blameworthiness or dangerousness. In some instances of euthanasia there well may be an intuition of lower act blameworthiness. However, this retributive consideration must contend with respectable arguments that we ought not broaden our notion of homicidal intent in this way because to do so would encourage feigned euthanasia or would weaken the force of the prohibition against intentional killing in general.⁷¹

In any event, the concept of *mens rea* taken to define the criminal act usually should also define the seriousness of the offense for purposes of setting the retributive upper limit on punishment. This is a matter of consistency. The seriousness of the act turns on how it is officially defined. Consistency in this matter, however, would become a vice rather than a virtue if the legislature smuggled an improper element of actor dangerousness into the definition of the offense. Consider, for example, an offense defined as an assault with intent to cause serious injury to more than five persons. A particular defendant charged with the offense had such an intent, but in fact injured only one person. A judge with discretion in sentencing matters ought to disregard the actor's intent to injure people other than his one actual victim in determining the upper limit on the penalty.

⁷¹ Retributivism favors the thicker over the thinner conception of intent only if the crime so characterized still turns on act blameworthiness. Often the more detailed intent description would, in fact, import what is exclusively a matter of bad character or dangerousness. Racial bias as an aggravating factor in assaults may be a good example. Such laws would have the severity of the penalty turn upon whether the assailant's motive was animus against the victim because of his race, as opposed to, for example, his political beliefs. Does the vileness of racism make the assault itself worse?

To take the surplus intent into account would be to punish the actor for his dangerousness rather than his conduct.

It would be possible empirically to explore the intuitions about offenses turning on different levels of intent. We could ask members of the society questions such as "How much would you pay (or should the state pay) to secure the conviction of an offender who committed crime *x*?" It should be explained that the price would secure only a conviction and the official denunciation that accompanies it, and not any particular criminal penalty.⁷² Even without knowing anything about sentences, we would pay more to bring intentional murderers to justice than we would pay for negligent killers. Collecting the data would not tell us the total seriousness of the offenses, but it would give an indication of the respondents' sense of the relative seriousness of the offenses. It would provide proportions. For example, the respondents might be willing to pay five times as much to secure a conviction in the case of an intentional homicide than in the case of a negligent homicide. The appropriate figure for the total imposition or total seriousness of the negligent homicide would then be one-fifth that of the intentional murder. In other words, we would have determined that the community sense is that the negligent killer must accept one-fifth of the criminal responsibility for the death.⁷³

Intuitions aggregated by a survey, however, remain intuitions. If the lesser culpability offender complains of the arbitrariness of treatment produced by this layer of intuition, one might respond that punishing him less severely than the equivalent of the harm he caused is an act of grace on society's part. He cannot complain that the measure of grace does not correspond to an objective scale. But this response is inadequate. The negligent killer *deserves* a lower sentence than the intentional murderer. The retributive upper limits must be fixed at substantially different points as a matter of retributive justice, not of grace. It is the same consideration of justice that rules out any criminal penalty for the person who causes a death without any fault. The proper response to the lesser culpability offender is that there is nothing *but* intuition underlying his entitlement to a

⁷² Without this explanation, the respondents might indicate that they would pay more for those convictions that they anticipate would have higher penalties just because they would be getting more punishment for their money.

⁷³ See Donald Scheid, *Theories of Legal Punishment* 68 (1977) (unpublished Ph.D. thesis, New York University).

discount under the reciprocity principle. We can agree that the intuitions of degrees of liability shall govern in a regularized and impartial fashion. That there is nothing more objective to rely upon in assessing this side of the seriousness of the crime is just the nature of the case.

F. *Reciprocity and Sentencing*

Is there anything that can be said about the consequences of the reciprocity principle to criminal sentencing prior to an empirical investigation of the disutilities of offenses and penalties? In the following subsections I briefly explore a few such consequences.

1. *The Most Serious Offenses*

For the most serious physical injury offenses, the traditional home of talion, reciprocity would fix a high upper limit. Capital punishment for intentional murder is the most obvious example. The negative social consequences, including most prominently the violation of the victim's right to life, presumably are typically at least as great as the disutility of death to our statistically normal offender.⁷⁴ Of course, that it passes the test of reciprocity is not enough to justify capital punishment. If the theory of this Article is right—that reciprocity sets the upper limit on punishment, rather than a mandatory punishment—then a consequentialist argument is still required to justify capital punishment. That debate has been well joined indeed.⁷⁵

⁷⁴ Of course, the point of the reciprocity principle as a measure of the murderer's forfeiture is that it strips him of his right to life. This forfeiture, does not, however, make the offender's disutility count any less when we consider, under the reciprocity principle, how serious death is to him consequentially. The disutility to him of his death will also matter at the next stage, in which the state must establish that capital punishing him would maximize good consequences.

⁷⁵ Part of that debate took the following chronological form: Ernest Van den Haag, *On Deterrence and the Death Penalty*, 78 *ETHICS* 280 (1968); Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 *AM. ECON. REV.* 397 (1975); William J. Bowers & Glen L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 *YALE L.J.* 187 (1975); Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: Reply*, 67 *AM. ECON. REV.* 452 (1977); Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 *J. POL. ECON.* 741 (1977); Peter Passell & John B. Taylor, *The Deterrent Effect of Capital Punishment: Another View*, 67 *AM. ECON. REV.* 445 (1977). As already suggested, my unargued belief is that justice sets a lower limit on punishment, especially for the most serious offenses. This lower limit is a matter of morally adequate censure that expresses appropriate social disapproval of the offense. One could argue that, at least for some murders, the lowest morally

Talion as a limiting principle cannot be criticized just because we cannot repeatedly punish the serial killer capitally, or because we would not torture the sadistic killer before execution. These are objections to mandatory talionic retributivism (which places great value on correcting imbalances), but not to limiting retributivism, the more modest ambition of which is to ensure that offenders are not punished beyond what is fair.

Consider now an assault that cripples, disfigures, or disables. It does not take us too far into speculation to conclude that such an assault would, under principles of reciprocity, be a candidate for a lengthy term of imprisonment. Again, one need only consider the cost to the victim to find license for a substantial imposition upon the offender.

2. *Offenses of Lesser Seriousness—The Underpunishment Problem*

It is considerably more difficult to estimate the talionic upper limit for offenses of lesser seriousness. Consider a petty theft committed in such a way that there was no risk of its deteriorating into a physical confrontation: an employee left alone in an office during lunch hour helps himself to a dollar from another employee's desk. The victim suffers a minimal loss in terms of utility. The greater part of such a loss would be a sense of violation in discovering the theft, but we may imagine that the victim fails to notice.⁷⁶

Looking at this offense in terms of utility alone, there could be almost no talionic punishment. A one dollar fine would exhaust what could be imposed upon the offender under the principle of reciprocity. While this theft does not intuitively merit a very stiff punishment, it does seem that the upper limit of its just punishment would exceed a one dollar fine. This is an example of the problem first brought explicitly to the attention of punishment theorists by Goldman,⁷⁷ who saw the problem as posing a

acceptable censure requires a penalty of death. This avoids the consequentialist argument, but relies upon an intuition that is not universally shared and that has questionable theoretical support.

⁷⁶ You may wonder how we would get to the point of sentencing for a crime of which even the victim was unaware. The low probability of such a prosecution does not, of course, affect the theoretical point. But sometimes there are prosecutions for crimes of which the victim may never have become aware. These are usually police-observed offenses. The most common of these charges is attempted pickpocketing, in which the victim becomes lost in the crowd while the observing officers are pursuing the pickpocket.

⁷⁷ Goldman, *supra* note 14.

paradox for any hybrid theory. Penalties sufficiently stiff to deter acquisitive crimes typically will be more severe than would be fair in terms of the magnitude of the offender's imposition upon his victim. Because only a small percentage of offenders are apprehended and convicted, the rational offender will only be deterred by a penalty considerably in excess of the anticipated profit from his offense.⁷⁸ This problem is at its sharpest in the case of small thefts, but it arguably extends to any theft.⁷⁹ Indeed, the general problem extends beyond simple thefts, and beyond cases in which the offender is acting as a rational profit maximizer. If forced to choose, one might prefer to be beaten, absent severe pain or long-lasting physical effects, rather than face the criminal penalty for the assault. This shows that typical penalties for such assaults are greater than the disutility that the assailant imposed upon the victim. Arguably, the severity of the punishment is still too great in utility terms even when we take the secondary and tertiary effects of such assaults on the rest of society into account.

Looking only to the disutility that the offender imposes upon society, current penalties appear too high for many thefts, probably for all minor offenses, and very likely for some middle level and more serious offenses as well. Although some of our existing criminal penalties are no doubt substantially too severe, and most of them may be somewhat too severe, the problem goes beyond the intuitively excessive sentences. To apply the reciprocity principle based only on utilities would rule out many penalties that seem perfectly reasonable and would result in upper limits for many crimes that are too low for acceptable crime control.

For purposes of exposition, I have described the underpunishment paradox in terms of utilities. Goldman's original statement of the problem embraced a rights violation version of reciprocity. A closer consideration of

⁷⁸ This assumes, as Goldman notes, that the offender is not weighed down by any substantial moral scruples or other psychological disinclinations to crime—an assumption that is, at least, a good working approximation for many offenders. See *id.* at 48; Alan Goldman, *Beyond the Deterrence Theory: Comments on Van den Haag's 'Punishment as a Device for Controlling the Crime Rate,'* 33 *RUTGERS L. REV.* 721, 727 (1981). Goldman's assumption that in thefts the loss to the victim is typically equal to the gain to the offender requires substantial qualification for nonmonetary thefts. The street value of stolen goods usually is only a fraction of their value to their original owners.

⁷⁹ For larger thefts, the rational thief may want to consider the advantages to his life plan of maximizing minimum outcomes rather than maximizing expected utility. The appeal of this consideration is increased by the somewhat higher apprehension and conviction rates for such offenses. Thus, the investment banker who concludes, on the basis of expected utility calculations, that she ought to augment her six (or seven) figure income through embezzlement is daft.

the role of rights, however, shows the solution to the dilemma. Reciprocal penalties can be higher than Goldman thought—indeed, high enough to correspond to intuition and to much, if not all, existing sentencing practice. Return with me to the example of the nonconfrontational theft of a dollar. The primary imposition of the offense is not found on the side of utility but in the rights violation. The theft is an assault against the victim's right to hold personal property and more broadly, if less immediately, it is an assault on the institution of private property. The seriousness of the rights violation is a reflection of the social importance of that institution. This is why the theft of two dollars is not twice as serious as the theft of a single dollar. The offender clearly should be charged the full tariff of the rights violation. Similarly, the justly punished offender can claim no violation of the rights that he would have had if he had not committed his offense. If the thief had not stolen the dollar, the state's arbitrary confiscation of a dollar from him would have violated his right to property. Whether it would be as serious a violation of his right to property as his theft is to his victim's right might depend upon further information about both violations. In any event, if the offender's right is weighed against the victim's on the reciprocity scale, it is doubtful that we would have made much progress against the underpunishment paradox.

But of course it would be a moral error to consider the offender's subjunctive rights violation if he is justly punished. His rights changed when he committed the offense. The state does not violate the rights of the dollar thief by fining him one dollar. The offender, in committing his offense, forfeited his right not to be punished. If his punishment takes the form of a fine, then the forfeiture of his right to be punished is a forfeiture of part of his right to property. Indeed, merely to fine the dollar thief a dollar would leave an unbalanced equation: a rights violation and the disutility of a dollar loss on the one side, and only the disutility of a dollar loss on the other. Unless a more severe penalty is reciprocally imposed, the offender is left with a rights violation surplus.⁸⁰ This imbalance was implicitly recognized in the Bible. In the case of theft where the stolen beast was not recoverable, the Bible did not ordain wound for wound, but "five oxen

⁸⁰ Inasmuch as the reciprocity principle only establishes an upper limit upon punishment, there is nothing morally objectionable if the offender "retains" this "surplus." What is objectionable, however, is the offender's claim that it would be unfair not to leave him with the surplus.

for an ox, and four sheep for a sheep."⁸¹

At this point, the reader may have the uncomfortable feeling that there is a circularity lurking in my reasoning. I assert that, in applying the reciprocity principle, we should not count violations of rights that the offender could have claimed had he not committed his offense because those rights have been forfeited. But, the reciprocity principle is supposed to measure the extent of the forfeiture. How can I assume that the rights have been forfeited while applying the principle that is supposed to establish the limits of the forfeiture, that is, the limits of just punishment?

If one imagines starting by testing the reciprocity against a penalty that is intuitively too high, one finds a loss of utility and a rights violation on the side of the victim (and society). On the offender's side, there is a disutility and the violation of the right not to be overpunished. Subtract successive small quantities from the offender's disutility. At some point the rights violation will disappear from the offender's side of the inequality—that is the point at which the total imposition upon the offender will equal the total imposition upon society. Of course, I understand that we cannot in fact exhibit quantified equations. The point of the exercise is to demonstrate that there is nothing circular in using the reciprocity principle to measure the maximum just imposition upon the offender—an imposition which, if exceeded, would violate his rights. Thus, a proper treatment of rights violations resolves Goldman's paradox.⁸² Reciprocity in its

⁸¹ *Exodus* 22:1. Peculiarly, if the beast was recoverable, the culprit only had to "restore double." *Exodus* 22:4. I speculate that the reason for the lesser punishment is that it was considered a less serious violation of the owner's property rights.

⁸² Of course, this solution depends upon the intuition that for certain offenses, including most thefts, the rights violation is considerably more substantial than the injury to the victim and society viewed in purely utilitarian terms. Goldman might agree that the penalty for a minor theft could be several times the amount of the theft because of the significance of the right violated, yet deny that it could be as great as are typical sentences for theft. I believe that he would make just that denial. See Goldman, *supra* note 14, at 49. Again, I concede that some penalties for thefts are too high. This is most often the case when the offender has a prior record of convictions. In these cases, the excess punishment is more the product of mistake as to the proper role of that prior record than mistake as to the significance of a violation of an individual's right to property through theft. See *infra* notes 83-86 and accompanying text. Still, I suspect that Goldman and I would genuinely disagree as to the moral importance of the rights violation involved in theft. I believe that the root of that disagreement is his assumption that the significance of rights violations can be equated with the victim's preference that they not occur. See Goldman, *supra* note 14, at 46. As I have argued, this approach may substantially understate the significance of certain rights. See *supra* notes 58-59 and accompanying text. In the end, I would argue that our intuition that significant criminal penalties are not always unjust for

talionic form does not saddle us with punishments for lesser offenses that are unintuitively too low, or that are too low to be effective.

3. *Recidivist Statutes*

Recidivist statutes, now widely in place, mandate higher penalties for repeat offenders.⁸³ This development is, on its face, one of the more significant departures by current sentencing practice from retributivist theory. The penalty under these statutes is not solely a function of the seriousness of the crime of conviction. Rather, it is a function of n arguments, the first being the seriousness of the crime of conviction, and 2, 3, . . . n being the seriousness of the prior convictions considered under the statute.

Some retributivists view recidivist statutes as meeting moral scrutiny so long as the statutes only modestly enhance the final sentence.⁸⁴ Other retributivists explicitly or implicitly condemn recidivist statutes.⁸⁵ I submit that both approaches are wrong. Any enhancement above the retributive upper limit is unjust, however modest it might be. Dangerousness does not override retributive justice. Still, sometimes it may be appropriate to take the offender's prior record into account to mete out a more severe penalty than otherwise would be permissible. There only appears to be a contradiction. My contention is that the prior record may properly elevate the upper retributive limit for the current offense.

Although talion, as it is traditionally understood, looks only to the crime

theft shows that the rights violation is, in fact, of considerable moral importance.

⁸³ See, e.g., CAL. PENAL CODE § 667a (West 1988) (mandatory five year sentence enhancement for each similar prior conviction); MODEL PENAL CODE §§ 7.03, 7.04 (1985) (extended terms for persistent offenders); N.Y. PENAL LAW § 70.08 (McKinney 1987) (two to six year minimum sentence for class B violent felony; 10 years to life minimum sentence for class B violent persistent offender).

⁸⁴ See Davis, *supra* note 3, at 48; GROSS, *supra* note 9, at 451 (stating statute permissible if it makes unavailable the first offender discount by ruling out a mitigation but impermissible if it punishes more than the crime of conviction deserves).

⁸⁵ For example, Norval Morris would permit the upper limit to be set by "the last crime, or series of crimes, for which the offender is being sentenced." See MORRIS, *FUTURE*, *supra* note 4, at xi. There is an ambiguity here, in that one could interpret "series of crimes for which the offender is being sentenced" as including an offender's convictions prior to the conviction giving rise to the sentencing in question if those prior offenses are taken into account in the current sentence. On this interpretation, Morris could countenance recidivist statutes so long as the punishment is "not undeserved," taking the whole series into account. Morris does not, however, give any indication that one criminal act could be part of the desert base for two different punishments, and it is doubtful that he intended any such possibility. See also VON HIRSCH, *DOING JUSTICE*, *supra* note 3, at 251.

of conviction, the reciprocity principle *R* is more broadly applicable. We can include within the offender's acts (*x*) the whole series of offenses for which he or she has been convicted. If he or she had previously been convicted but not punished, it would be possible to add the seriousness of the different offenses to determine just how far the state could go in punishing him or her. If the offender has been previously punished, the state will have to that extent already exhausted its permission to punish him or her. However, if one or more of the offender's prior convictions did not result in the maximum talionic sentence, then the state has available, under *R*, the "unused" punishment. In brief, the reciprocity principle would permit a recidivist premium equal to the sum of the maximum penalties that the offender could have received on each of his prior convictions, minus the sum of the penalties that he actually received.

It is settled that a recidivist premium is not double jeopardy,⁸⁶ but is it moral double jeopardy? The offender has already paid the penalty that was required of him. Indeed, it may have been the highest penalty that the state could justly demand, given utilitarian constraints. Typically, the offender's receipt of a less severe penalty on his first conviction was not due to an act of grace, but rather to the state's calculation that a more severe penalty would not serve the common good. Still, the state would not have been unjust in making further use of the offender had there been a need to do so. Now the state has found such a need in deterring recidivism and in incapacitating the dangerous. There is no compelling reason why the state may not call in its chips.

4. Categories of Crime

Until this point, I have been intentionally vague as to whether the sentencer is a trial judge considering the sentence for a particular offender, or a legislature or commission setting a sentence range for an offense under a particular general description, possibly including descriptions of certain offender characteristics. The recommendations of the present theory differ somewhat in these different settings. The particular offenses that fall under a general description can vary substantially. For example, this is obviously the case if an element of the crime is "serious physical injury." The range of such injuries with respect to, for example, the pain suffered

⁸⁶ *Burks v. United States*, 437 U.S. 1, 18 (1977).

by the victim, the extent and duration of disability, and the degree of disfigurement can be vast. Even if the crime is the theft of a certain sum of money, the effect upon the victim will vary greatly depending upon whether that sum was the life's savings of a retiree or a barely noticed fund of a large financial institution. How is it possible to apply talionic penalties to a generally described offense, given this range of potential harms? A typical legislative device has been to set the maximum penalty for each offense based upon the most serious version of the offense imaginable.⁸⁷ The present theory advocates a nearly opposite approach: the upper penalty limit for a generally described offense should be set at the level corresponding to the least serious crime fitting within the category as defined.

No offender can complain that his sentence is unfairly severe with this treatment. By contrast, any offender punished for the harm of his actual offense above the talionic upper limit could, under the reciprocity principle, claim that this extra punishment was no less unjust than the same punishment of an innocent person would be.⁸⁸ It is true that those who commit the more egregious offenses within a given category get a "free ride" from this approach. It would not be unfair to punish them more severely. However, it is also neither unfair nor unjust to punish them less severely. (The mandatory retributivists think otherwise, but none has yet advanced a good reason to credit that view.⁸⁹) The crime categories exist

⁸⁷ VON HIRSCH, *PAST OR FUTURE*, *supra* note 3, at 74-76.

⁸⁸ See Goldman, *supra* note 14, at 46.

⁸⁹ The most plausible form of mandatory retributivism would make desert a matter of reciprocity. The offender deserves a penalty equal in severity to the seriousness of his offense. Undoubtedly there is such a sense of "desert." See *supra* notes 45-48 and accompanying text. The state's obligation to give the offender what he deserves is doubtful if it is a punishment more severe than serves the social welfare. The best argument for such an obligation was made by von Hirsch: "Once one has created an institution with the condemnatory connotations that punishment has, then it is a requirement of justice . . . to punish offenders according to the degree of reprehensibility of their conduct." VON HIRSCH, *PAST OR FUTURE*, *supra* note 3, at 35-36. If this argument is correct, then what I take to be the upper bound upon punishment is the lower bound as well. No one, however, has a telling complaint if we fall short of even-handedness among offenders by failing to punish a particular individual with a high sentence that lacks social benefit. Even if, as I would deny, proportionality of treatment as among offenders is a significant matter of justice, that would not justify all socially valueless upper limit penalties. It is possible that a "deserved" punishment be socially counterproductive as applied to each and every member of an offender class.

Note that what would be a mandatory retributivism of desert at the level of moral ontology could be turned into a hybrid theory once the level of moral epistemology is taken into account. See *infra* note 98.

for the state's administrative convenience. Why not guarantee that this convenience will never be bought at the expense of an offender? If the state wishes to divide up a category to separate out the more egregious members into a different category, that option is always available.

5. *Allocating the Burden of Uncertainty*

I suggested in the introduction to this Article that there is some inevitable injustice resulting from the gap between the talionic penalty and a penalty that we could, as an epistemic matter, be confident was excessive. Clearly this injustice will arise only if we put the burden of uncertainty upon the offender by requiring him to establish that the limit has been exceeded rather than by requiring the state to show that it has not been. By contrast, I have just argued that the burden created by categorization should fall upon the state rather than the offender. Why this difference in allocation?

The primary reason is that the state has a choice with respect to the scope of its own categories. The state cannot, however, remove the uncertainty that is attendant upon an intuition of the upper limit for a particular offense any more than the offender can do so. Therefore, some other consideration must govern the allocation. Allocating the burden to the state would minimize the risk of injustice. However, it would require society to pay the entire cost of the uncertainty out of the utilitarian benefits of punishment. With the increasing problem of crime, should society be asked to bear all of the costs of epistemic vagueness in determining the just upper limit? The state, in effect, may say to the offender, "We have determined that social welfare will be maximized by penalizing you as follows: You challenge the penalty because it *may* be excessive as a matter of justice. We should not be asked to sacrifice social welfare for a speculative matter of justice. The burden should properly be upon you to establish the injustice of the penalty."

The appeal of placing the burden of uncertainty upon the offender is increased by the practical consideration that the opposite allocation would very likely require a politically impossible large-scale downward revision of criminal sentences.

G. *The Superiority of Talion over Proportionality*

Except among hard core utilitarians, there is widespread agreement that the severity of punishment should bear some relationship to the seriousness of the crime.⁹⁰ However, leading punishment theorists such as H.L.A. Hart, Norval Morris, and Andrew von Hirsch have expressed strong opposition to talion's playing the role of providing the relation.⁹¹

The chief reason for the rejection of talion by these sophisticated theorists is not the old concern that state officials would actually be plucking out eyes. Rather, the opposition to talion stems from the belief that it is either difficult or utterly impossible to equate seriousness of harm with severity of punishment.⁹² The conclusion, nearly always drawn, is that we should be more modest in our pretensions and seek only the severity of the punishment that is "proportionate" or "commensurate" with the seriousness of crime.⁹³

A genuinely modest approach is simply to coordinate orderings. Some proponents of proportionality probably intend no more than the following: first, order all possible criminal offenses from least serious to most serious; second, produce an order for possible criminal punishments. Put the orderings side by side with whatever scales you choose. "Proportionality" then amounts to this: Penalties are assigned to offenses in such a way that the line connecting one offense with its penalty will never cross the line connecting a different offense with its penalty. A more serious crime will never receive a less severe penalty than a less serious crime.⁹⁴

⁹⁰ See, e.g., HART, *supra* note 6, at 236; ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 62 (1974); SADURSKI, *supra* note 3, at 26-27; VON HIRSCH, *DOING JUSTICE*, *supra* note 3, at 59-60; ARMSTRONG, *supra* note 8, at 486; DAVIS, *supra* note 3, at 727; A.C. EWING, *ARMSTRONG ON THE RETRIBUTIVE THEORY*, 72 *MIND* 121 (1963); PRIMORATZ, *supra* note 7, at 210.

⁹¹ HART, *supra* note 6, at 233; MORRIS, *MADNESS*, *supra* note 4, at 149 n.58, 179; VON HIRSCH, *PAST OR FUTURE*, *supra* note 3, at 43. See also the condemnations of talion *supra* note 26 and accompanying text.

⁹² See GROSS, *supra* note 9, at 438-39; HART, *supra* note 6, at 233-34; VAN DEN HAAG, *supra* note 8, at 193; Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 *U. PA. L. REV.* 297, 297 (1974).

⁹³ HART, *supra* note 6, at 233-34 (1968); MORRIS, *MADNESS*, *supra* note 4, at 197; SADURSKI, *supra* note 3, at 237; VON HIRSCH, *PAST OR FUTURE*, *supra* note 3, at 40-41; ARMSTRONG, *supra* note 8, at 486.

⁹⁴ See, e.g., David A. Richards, *Rights, Utility, and Crime*, 3 *CRIME & JUST.* 247, 275 (1981) (first principle of proportionality).

Proportionality

(S)

This result, of course, is not proportionality at all. It is simply ordering. Consider a society in which there are only three offenses: walking on someone else's grass, grand larceny, and murder. The present requirement is consistent with respective penalties of twenty-five years imprisonment, twenty-six years imprisonment, and twenty-seven years imprisonment; a ten dollar fine, an eleven dollar fine, and a twelve dollar fine; or a ten dollar fine, an eleven dollar fine, and the death penalty. Perhaps this is all that justice can sensibly require, but we should be driven to this conclusion only as a last unhappy resort.

The more ambitious proportionalist insists on doing more than merely producing orderings. He or she purports to induce metrics on the seriousness of offense scale and the severity of penalty scale. He or she might put it as follows: "I can determine, at least roughly, when one penalty is twice as severe as another, and, perhaps somewhat more roughly, when one crime is twice as serious as another. What I deny is that these two scales have anything more to do with each other than a scale of temperatures does with a scale of distances. There is proportionality within each scale. However, we cannot speak of the identity of penalty to crime as Talion requires, because any coordination of the two metrics is utterly arbitrary."

This is similar to Hart's view.⁹⁵ Given the difficulty of comparing rights violations with their consequences, there is some initial plausibility to such a position. However, a closer look reveals unacceptable results. Suppose that offense *C* is twice as serious as offense *B*, which is twice as serious as offense *A*. Suppose also for the moment that the length of a prison sentence is linear with respect to its severity for the offender. Then the penalty (or its upper limit) for *A* under this system could be one day, for *B* two days, and for *C* four days. Alternatively, and with just as much warrant, the penalty for *A* could be ten years, for *B* twenty years, and for *C* forty years. Proportionality would have nothing to say as between these choices. But, depending upon whether *A* was petty shoplifting or aggravated robbery, I submit that our sense of justice would have a great deal to say.

The proportionality-commensurability theorist may respond, in retreat from his or her prior position, that a feature of his or her theory rules out assigning intuitively very severe penalties to intuitively minor offenses and

assigning intuitively low upper limits to intuitively major offenses.⁹⁶ This retreat is a step in the right direction, and is, in fact, something that many people who have talked about proportionality or commensurability intended. Serious offenses are lined up against severe penalties, and minor offenses against light penalties. Achieving this result, however, requires more than one or a few "anchor points" securing one scale to the other. We must insure that the seriousness of offense scale and the severity of crime scale do not expand or compress relative to each other. (Wildly non-linear metrics between anchor points could always produce unintuitive disparities—right up to the limits of our ability to make intuitive judgments.) Therefore we must, in effect, presuppose a common metric for the two scales.

Once we have a common metric, however, the reasons for preferring the "vaguer" commensurability or proportionality over the more "precise" talion vanish. We have accomplished the identification of seriousness and severity, which was thought to be impossible. In short, "commensurability" or "proportionality," if it is to rule out capital punishment for shoplifting or a five dollar fine as an upper limit for murder, is committed to the same goal as talion—identifying offense seriousness with penalty severity. Indeed, once we have assumed the existence of this common metric, it is unclear how any principle other than talion could possibly be the right principle. For example, consider a formula for offenses and penalties that consistently gives a penalty more severe than the seriousness of the offense, requiring two eyes for an eye. What licenses society to impose more upon the offender than he imposed upon society? How would this differ from punishing an innocent person? Now consider a function that assigns (as an upper limit) penalties less severe than the seriousness of the offense. It metes out only one stripe for two. Why should society be limited to a range of penalties that imposes less on the offender than he imposed upon society? Why should the offender automatically be given a free ride?

Thus, if one is concerned about more than justice for offenders insofar as it is guaranteed by a system of simple serial ordering, that is, that the particular offender's punishment not be too severe for the crime he committed, then proportionality of offenses to penalties is simply not enough.

⁹⁵ H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 36-37 (1963).

⁹⁶ See Richards, *supra* note 94, at 276.

The only acceptable position is the identity of the upper limit of the penalty with the seriousness of the offense.

Because the commensurability or proportionality position has very wide appeal, it will be useful to consider in a little more detail how this mistake arises and why it seems appealing. This detail will review some of the points of the preceding argument from a different point of view.

It is a confusion between moral theory and moral epistemology that led to the mistake. There is no disputing that in a typical case it is difficult to say what penalty is equivalent in severity to the seriousness of a given offense. The best we can come up with, consulting both the relevant empirical data and our own intuitions, is a broad range. It is tempting to conclude that the relationship between severity and seriousness required by moral theory must be something less precise than identity. To describe this less precise relation, the words "commensurate" and "proportionate" have been called into service. Insofar as the "proportionate" terminology is concerned, the first mistake is the suggestion that there is something vague or imprecise about proportions. To say that the severity of the penalty or its limit must be proportionate to the seriousness of the offense is to say that there is some number, whole or fractional, which is multiplied by the latter to yield the former. Maximum penalties would be one-third as severe as offenses are serious, or five times as serious. It might be suggested that the proportionality intended is not that of any particular numerical proportion. Instead, the vagueness of our intuitions demonstrates that the proportion is variable. Hence some prefer the word "commensurate."⁹⁷ But it is hard to see how it could be a matter of justice that the penalty for murder be, for example, half as severe as its offense seriousness while the penalty for aggravated assault would be twice as severe. To say that the proportions themselves may vary is to divest the proportionate theory of content as well as of any connection to principles of justice.

The proportionalists' second mistake is to conclude from our inability to determine the value (output) of the punishment function, that there is no precise function. Consider the following function: $x =$ the least prime number of n digits. When $n = 2$, the value of this function x is 11; when

⁹⁷ Strictly speaking, if things are commensurate, they have, or can be made to have, the same metric. Again, this is in conflict with the idea that penalties should be commensurate with, but not equal to, the seriousness of offenses.

$n = 3$, x is 101. No one knows what value this function takes on when n is one billion. We can specify only a broad range within which it must fall. The human race will probably never know the exact value. But we know that there is a value, and it is perfectly precise.

It is a fact of moral epistemology that we cannot determine with any certainty the precise number of years in prison equal in severity to the seriousness of a particular aggravated robbery. The proper accommodation to this fact is to ask a different question: "What is the least penalty of which I can say with some confidence that would be too severe, given the seriousness of the offense?" The mandatory retributivist could not, of course, let himself or herself off quite so easily.⁹⁸ Under the present theory, however, talion is relevant only as an upper limit. It is therefore appropriate to approach the talionic relationship between crime and punishment from the standpoint of that limit. Not coincidentally, I think that this is the question that prosecutors, judges, and sentencing commissioners ask when left to their own devices.

⁹⁸ A form of mandatory retributivism could proceed by adding the following question to that stated in the text: "What is the greatest penalty of which I can say with some confidence that it would be too lenient, given the seriousness of the offense?" The answers to the two questions will give the mandatory retributivist a range of possible penalties. To permit utilitarian considerations to specify exact penalties within that range would convert the position into a hybrid theory similar in its practical implications to Norval Morris' theory, although it is very different in its theoretical underpinnings. A given offense would have a single deserved punishment as a matter of moral ontology. Yet, if the best that moral intuition can do is to specify a range within which the deserved penalty must fall, then utilitarianism could fill in the region of uncertainty. If the defendant protests the injustice of a penalty that maximizes good social consequences, then the burden falls upon him to show that the sentence is undeservedly high. If the state seeks a penalty higher than what would maximize good social consequences, then the burden is upon the state to show that any lower penalty would be undeservedly low. This theory has a certain formal elegance. It conflicts, however, with the compelling intuition that we could know with a high degree of certainty that the perpetrator of a heinous murder deserves at least life in prison, and yet accept that a penalty of 30 (actual) years would not be so low as to be unjust.

If the mandatory retributivist remains pure (rejecting even a secondary role for utilitarian concerns) then the (unique) proper penalty under her theory would just slightly exceed the minimum penalty that she could say with some confidence would be too lenient. I contend that she would have to be satisfied with this way of handling the uncertainty of intuition, because she would not have available this Article's argument for allocating the burden of uncertainty to the defendant. The mandatory retributivist state has no independent purpose (e.g., crime control) that must be overcome by something with positive force. If the *only* consideration in allocating the risk of uncertainty is choosing between the risk of doing injustice to the offender or doing injustice to society by punishing (imperceptibly) too leniently, it would seem that we must do the latter. Conceivably, the mandatory retributivist could respond that on her intuition the risk of overpunishing is no more to be feared than that of underpunishing, and that the line should be drawn down the middle of the range of possible penalties.

H. Comparison to Moral Balance Retributivism

Retributivists have often spoken of "restoring the moral balance," or of the offense as creating a "debt" to society. The leading contemporary version of moral balance retributivism is Herbert Morris' theory of burdens and benefits.⁹⁹ This theory has been expanded upon and converted from a mandatory to a limited retributivism by George Sher.¹⁰⁰ There is a certain kinship between moral balance retributivism and the present theory. The reciprocity principle, *R*, could be described in moral balance language. There is nothing wrong with this metaphor, so long as one does not take it with ontological seriousness by expecting that there is some *thing* to be weighed in the balance.

Morris and Sher look to social contractarianism for the proposition that the benefits of an ordered, generally peaceable society are purchased at the expense of certain individual liberties, which, if exercised, would violate the criminal law. Of course, not everyone relinquishes these liberties.

A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased. Another way of putting it is that, he owes something to others, for he has something that does not rightfully belong to him. Justice—this is punishing such individuals—restores the equilibrium of benefits and burdens in taking from the individual what he owes, that is, by exacting the debt.¹⁰¹

But is there anything that the offender has "acquired" that he "has" and thus "owes to others"? The offender certainly need not have acquired a benefit in any ordinary sense of that term. His crime may have been utterly unproductive. I have heard criminals report (usually at sentencing, but with apparent sincerity) that they took no pleasure in committing their offenses. At least occasionally offenders deeply regret their crimes.

Can benefits and burdens theories be saved from this objection by a

⁹⁹ Morris, *supra* note 3, at 475; see also JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE AND THERAPY 82-115 (1979).

¹⁰⁰ SHER, *supra* note 3.

¹⁰¹ Morris, *supra* note 3, at 478.

prospective account of the benefit? After all, the offender did commit the offense. Therefore, it must have been his preference from among his options at that time. In this respect, commission of the offense must have been relatively advantageous from the offender's point of view, although the advantage could be vanishingly small.

This thinking might bring us to an acceptable benefits and burdens view of criminal motivation, but it is hard to see that it accomplishes anything for a theory of punishment. It would be no more proper to base the severity of punishment upon how much the offender *anticipated* benefiting from his crime than it would be to base it upon how much he *actually* benefited. Some shoplifters may have strong urges to steal particular trinkets. Some murderers may be almost indifferent about whether to kill a victim. No one would propose that the former crime deserves a more severe penalty than the latter.

Morris and Sher are aware of the paradoxes that would flow from making criminal penalties depend upon an advantage measured from the offender's perspective. The advantage the offender gains in violating the law is incommensurable with what would ordinarily be called his benefits.¹⁰² It cannot be aggregated with the offender's stock of utility. The Morris-Sher theory is, for this reason, immune to the criticism that taking the offender's life as a whole, he may have no unfair advantage.¹⁰³ Indeed, most offenders have been significantly disadvantaged. But that is not to the point.

The offender's "advantage," in the special use of the term employed by Morris and Sher, is measured from the perspective of society in terms of "the strength of the moral prohibition he has violated."¹⁰⁴ It follows that this advantage may be quite large while the benefit to the offender may be nonexistent. But this gives the game away. The offender has availed himself of a forbidden option. That act, however, is not to be evaluated according to its actual or potential contribution to the offender's life, but from society's view of the seriousness of the offense. The seriousness of

¹⁰² SHER, *supra* note 3, at 84. Similarly, Murphy's benefits and burdens retributivism interpreted the benefit to be the scope of freedom of action rather than an ordinary benefit. MURPHY, *supra* note 99, at 85-87. But see Davis, *supra* note 3, at 726 (literal benefit to offender quantified in terms of price he would pay for license).

¹⁰³ See Goldman, *supra* note 14, at 44.

¹⁰⁴ SHER, *supra* note 3, at 81.

offense governs, not the advantages or benefits to the offender.¹⁰⁵

The advantages language and the balance metaphor are thus otiose. There is no harm in saying that the offender has appropriated an extra measure of liberty so long as we remember that this is really nothing more than a grand way of saying that the offender has performed a prohibited act that others have foregone. The offender, in doing something that is prohibited, has created society's right to treat him in a way that it is morally prohibited from treating others. The offender has forfeited certain rights. That the measure of that forfeiture is to be, in effect, the seriousness of the offense, leads directly to the reciprocity principle, *R*.¹⁰⁶

III. CONCLUSION

I will summarize the conclusions of this Article from the perspective of a judge, prosecutor, and defense counsel. I assume that most of them, like those that I have known, have an intuition that there are some criminal penalties that are unjustly severe given the seriousness of the offense. The intuition is quite vague as to where the limit lies—vague enough that prosecutors and defense counsel frequently find themselves in genuine conflict in a particular case as to whether the limit has been exceeded. These practitioners, especially the judges and prosecutors, feel some frustration as a result of this vagueness. In addition, some of these participants in the system wonder whether there is anything at all to the intuition, beyond reactions arising from their knowledge of local sentencing practice.

This Article is intended to assure these participants that there is some validity to the intuition. The proposition that there should be an upper limit on punishment follows from an independently plausible moral principle—the principle of reciprocity. Moreover, this principle lies at the heart of a plausible justification of punishment. Reciprocity justifies punishment in that it shows the permissibility of using the defendant as a means to control crime. It illumines the respect in which he has forfeited antecedently held rights, and it measures the extent of the rights forfeited.

¹⁰⁵ Cf. von Hirsch, *Proportionality*, *supra* note 3, at 268-69.

¹⁰⁶ See David Dolinko, *Some Thoughts About Retributivism*, 101 *ETHICS* 537 (1991), for a similar but distinct criticism of Morris' and Sher's positions.

The participant thinking about the appropriateness of a particular sentence will, following the theory of this Article, focus his or her attention on the offense's total imposition on society. This includes consequential harms such as pain, loss of enjoyment of property, and apprehension (including the apprehension induced in those who learn of the offense). These matters are, in principle, capable of quantitative analysis, although the front line participants will not be in a position to carry out that research. Still, the prosecutor and the judge usually have good information as to the extent of the victim's pain and the disruption of the victim's life—chief elements of the consequential harm.

In addition to the harms that can be analyzed in utilitarian terms, the upper limit depends upon the seriousness of the rights violated by the offense. This is a different matter because two victims may suffer differently from the violation of identical rights. The rights violation may be morally weighty even when the victim is unaware of it or values it lightly. In some cases the seriousness of the rights violation dwarfs the seriousness of the consequential harms.

The participant must make an independent analysis of the seriousness of the rights violated. This analysis cannot be undertaken through quantitative empirical research. It requires the application of moral intuition guided by one's lifelong participation in a moral community.

If the offense was intentional and unmitigated, the determination of the seriousness of the offense is complete. However, if the offense is one of lower mental culpability, one must resort to intuition once again to determine the appropriate discount in seriousness for the particular culpability involved.

In thinking about the severity of the penalty, the judge, prosecutor, or defense counsel may be able to take some account of the preference structure of the particular defendant. Insofar as that is impossible to determine, the participant ought to be guided by his or her understanding of average preferences, for example, for periods of incarceration. Some offenders will benefit from this element of approximation; others will suffer some injustice. It is not an injustice avoidable in practice.

If one goes through these steps in thinking about the upper limit on punishment, then the range of vagueness or uncertainty as to the upper limit will diminish. Certainly the upper limit for an intentional crime will

exceed the sum total of suffering caused. Because moral intuition remains an essential part of the process, however, vagueness and uncertainty cannot be expected to disappear. The burden of this uncertainty should be placed upon the defendant. Therefore, the proper question for the judge and the prosecutor to ask is, "What is the least penalty that I can say with some confidence would be too severe, given the seriousness of the offense?" This recommendation as to the allocation of the burden of uncertainty does not imply that one may relax one's efforts to shrink the domain of uncertainty. It does show that one ought not be reduced to indecision by the region of uncertainty that unquestionably will remain.

Of course, judges, prosecutors, and defense counsel are not alone in having a practical, professional concern with the upper limit on punishment. Legislatures or sentencing commissions may seek to exercise close control over sentencing. They too must face the issue of the upper limit. The less discretion that remains with the trial judge, the more the policy makers should insure that the upper limit is not violated. The recommendation of this Article is that the most severe penalty in any offense category should be the upper limit for the least serious imaginable offense within that category. If that provides too much of a free ride for those who commit the worst offenses in the category, then the category ought to be divided further. Any other approach risks sacrificing offenders by giving them sentences that are unjustly severe for no better reason than the administrative convenience of the offense categorization scheme.

This Article has proceeded under the assumption that forfeiture and reciprocity are the only principles that properly serve to strip the offender of his immunity to being used as a means to control crime. I am not under any illusion that I have accomplished a nonexistence proof—a difficult undertaking at best. In the end, the burden is on those who support any third principle to state and to defend it.

REVIEW ESSAY

WHEN DUTY CALLS?

Rights Talk: The Impoverishment of Political Discourse. By Mary A. Glendon. New York: The Free Press, 1991. Pp ix, 211. \$22.95

Timothy P. Terrell*

Reviewing Mary Ann Glendon's new book, *Rights Talk*,¹ ought to be easy for me. Professor Glendon and I seem to share the view that all forms of morality—individual, political, legal, and so on—are complicated rather than simple, constructed of principles that are contingent and competitive more often than inviolate. And we both apparently believe that reasoning about morality is inseparably linked to the language used to express it—that the form of our discourse can reveal much of its substance. And we both worry about how superficial much of that reasoning and substance has become.

I nevertheless found her book a serious and troubling challenge. Even though it is characteristically well-constructed and written with the force of conviction, a basic difficulty leaves the book, for me, less than the sum of its parts. By the end, its point remains elusive and perhaps even self-contradictory.

I. THE BOOK

Initially, the point seems straightforward. Professor Glendon's thesis is that contemporary American dialogue about moral values and social priorities is being badly distorted by our unique urge to characterize relationships with others in terms of "rights"—that is, claims that are seemingly absolute and highly individualistic, and that correspondingly devalue compromise and a sense of responsibility to others.² The paradigm of a right

* Professor of Law, Emory University School of Law.

¹ MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

² *Id.* at 14.