Equality and Individuation in Punishment

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I. Introduction

The blaming and punishing practices of criminal justice, which give criminal law its distinctive point, involve the intentional infliction of pain on an agent and thus require justification. The current dominant justifications—retribution and prevention by deterrence and incapacitation—should be satisfied by the proper definitions of crimes and defenses and by appropriate sentences.¹ The characterization of variables that bear on blame and punishment as elements, defenses and sentencing factors is important and controversial both constitutionally and as a matter of policy. It affects who the decision maker will be, upon which party the burden

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I assume with most commentators that some combination of retribution and prevention is the best positive explanation and normative justification of current doctrine and of blame and punishment practices. I also assume, more controversially to be sure, that they are adequate justifications. I thus take the stance in this paper of an internal but critical participant in debates about our system of blame and punishment.
of persuasion should be placed, and what level of persuasion burden should be applied. There seems to be near uniform agreement, however, that imposing fair, individualized punishment requires that at least some factors that bear on enhancement and mitigation must be reserved for sentencing.

Justice Breyer’s dissent in Apprendi v. New Jersey contains a standard account of the common wisdom concerning why all factors potentially relevant to an offender’s sentence cannot be comprehensively included in the definitions of crimes, justifications, and excuses. Justice Breyer claims that there are too many potentially relevant sentencing factors to permit submission of all or even many of them to juries. “In principle,” Justice Breyer alleges, “the number...is endless.” Consequently, as a practical matter, neither a legislature nor a sentencing commission can consider all such factors, and judges must inevitably have some discretion at sentencing. He provides two lengthy examples, which I quote in full.

“[a] bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.”

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3Id. at 558.

4Id. at 557 (quoting the Sentencing Guidelines, Part A, at 1.2).
“A judge might ask, for example, whether an unlawfully possessed knife was ‘a switchblade, drawn or concealed, opened or closed, large or small, used in connection with a car theft (where victim confrontation is rare), a burglary (where confrontation is unintended), or a robbery (where confrontation is intentional).’”

Justice Breyer also mentions other factors that might differ even among offenders engaging in the same basic criminal conduct, such as the amount of drugs distributed, the amount of money stolen, the presence of a weapon, the vulnerability of or injury to the victim, “and many other offense-related or offender-related factors.” He again quotes the Guidelines approvingly: “a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and compromise the certainty of punishment and its deterrent effect.”

This paper challenges the common wisdom, arguing that juries can adjudicate at trial virtually all factors that should affect the condign punishment and that these factors can be applied in a principled, consistent manner. Contra Justice Breyer’s assertion, the number of enhancing and mitigating factors that can be consistently retributively justified is very small. Validated predictive factors concerning dangerousness, which respond to deterrence and incapacitation concerns, are likewise few.

I shall propose legislative adoption of a small number of generic enhancing and mitigating factors, largely based on desert and danger considerations, that can be charged and validated.
tried by a jury without unduly cluttering trials and that would result in a legislatively fixed increase or decrease in punishment.

The pursuit of ideally individualized justice through sentencing discretion is a chimera. In short, there is little and perhaps no need for judicial discretion in sentencing. I am proposing a modified return to the practice of the 19th C, during which judges had much less sentencing power.\(^8\) I recognize that such a system bears little resemblance to current arrangements and has virtually no realistic possibility of being enacted in the form I propose. Nonetheless, I offer this proposal as “ideal theory,” as an aspirational means to achieve more transparent and equal criminal justice.\(^9\)

Most of the scholarly debate concerning these issues addresses constitutional questions and doctrine. This article will depart from that tradition and make arguments that appeal to thoughtful, concerned legislators who are trying, as Spike Lee suggests, to do the right thing. Although I, too, would like the Supreme Court to constitutionalize much of substantive criminal law consistent with my views, the Court shows little inclination to constitutionalize anyone’s preferred vision of substantive criminal law and no inclination whatsoever to impose the type of scheme I suggest. Indeed, every time the Supreme Court appears to decide a case such as Mullaney v. Wilbur\(^10\) or Apprendi that might substantially constitutionalize substantive criminal

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\(^9\) I would also hope that legislatures would move towards more proportionate justice, but equality is the major goal that my proposal would guarantee.

law if its implications were pursued, the Court quickly seems to recognize this and to step back. Nevertheless, the states and Congress clearly have the constitutional authority to institute the type of regime I propose in which juries decide almost all questions that bear on the sentence the convicted defendant will receive. Indeed, as Justice Breyer recognized in *Booker*, that decision places the question of sentencing back in the legislature’s hands.

I recognize, of course, that focus on increasing the importance of crimes and defenses and enhancing the power of the jury might seem unrealistic folly in a criminal justice system in which over 90% of all criminal cases are disposed of by plea rather than by trial. There is dispute about whether *Apprendi* and *Blakely*, which apply to jury trials, help or hurt defendants in the plea process, but it is clear that any changes applicable to trials will have their greatest effect as background against which pleas will be considered. I wish, and believe that it is possible, that the system would permit most cases to go to trial. Even if the world of guilty pleas continues to be the world we inhabit, however, I believe that the system I propose would make plea bargaining fairer because defendants would know ex ante precisely what the risks of

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14Compare Bibas, *Stanford LR* (hurt) with Klein, *Stanford LR* (helped)

15See Schulhofer,
not pleading might be. Nothing except prosecutorial integrity can prevent over-charging, but, once again, transparent potential sentencing outcomes would at least provide the defendant with precise information to make strategic choices.

I first consider the general theoretical account for de-individuating criminal punishment. Then I turn to enhancement and mitigation. In each section, I address both the retributive and consequential justifications for discretion and why it may be abandoned without loss. I also consider related questions, such as the allocation of factors to the prima facie case or to affirmative defenses and the appropriate burden of persuasion.

II. De-Individuating Criminal Punishment

Virtually all factors that appear materially to bear on culpability and dangerousness are in principle matters of degree. Consequently, the impulse to individuate is perfectly understandable, and it is easy to tell “war stories” about why individualization of punishment is necessary to achieve justice. Probably every judge has a favorite example of when guidelines or some other fetter on discretion produced a punishment that was apparently too harsh or too lenient.16 Much of the debate is reminiscent of a similar debate among mental health professionals concerning the validity of various approaches to predicting future violent conduct. Although the research evidence is uniform that empirically-derived statistical prediction is always more accurate than clinical prediction,17 there are clearly individual cases in which the


17Meehl & Faust
“cookbook” is wrong. The difficulty, as Paul Meehl noted long ago, is that there is no algorithm to indicate when the clinician should abandon the cookbook. I claim that the same is true of criminal justice and that the search for individual justice will paradoxically produce less justice. A very few sizes will fit all.

Legislatures apportion punishment roughly based on the harm risked by the offender’s conduct. As the amount of harm increases, so generally does the offender’s culpability and danger to society. Although there is enormous agreement among Americans about the rank order of the seriousness of criminal conduct, there is much less agreement about how much punishment each crime warrants. Nonetheless, the amount of punishment does tend to follow the rank order of seriousness. When the legislature sets the punishment for a particular crime, in principle it is thinking of the core or average case of the harm risked. For example, although some robberies might cause more injury than some armed robberies, in general the latter are more dangerous and thus armed robbery warrants a higher penalty. If, as is commonly the case,

18Paul Meehl, Psychodiagnosis: Selected Papers

19U.S. Dept. Of Justice;. Most studies of this question involve the core crimes of harm to the person and property and do not include the vast array of new criminal legislation covering environmental crimes and regulatory crimes in general. I assume that there would be less agreement about the ordinal rankings of the latter because our society has much less experience with criminalization and in most cases it is difficult to understand the effect of these offenses on individual agents. We all have a basic sense of what it might mean to be killed, seriously assaulted or have our homes burned, but few of us will have a similar basis for a grounded reaction to, say, dumping prohibited levels of toxic substances into a waterway that impose a tiny risk to health.

20Many people think that the lack of obvious right answers to the question of how much punishment each crime warrants is a major problem for retributive justifications. E.g., Dolinko. I am unworried by such considerations, however. Who would expect that there would be a correct template in the sky or that we could discover it even if it exists? We can try to keep the order coherent and to inflict no more pain than is necessary.
the punishment is a range, the middle of the range represents the core or average case. As a result of a very large number of factors, many cases are not average, however, apparently necessitating judicial sentencing discretion. Thus, defendants convicted of the same crime can receive quite disparate punishments depending on the size of the punishment range for the crime.

The problem, most powerfully identified by Judge Marvin Frankel, was that the disparate sentences appeared to be based more on the characteristics of the judge than on the characteristics of the offense or offender. Sentencing reflected the individualization of the judges rather than the individualization of justice. Brief reflection indicates that this is an unsurprising result. Legislatures have provided judges with little guidance about the aims of punishment and how they are to be reconciled. This, too, is unsurprising because criminal law has developed piecemeal rather than according to coherent design and principles. Lacking guidance, judges naturally relied on personal principles, or worse yet, personality preferences. To compound the problem, the Supreme Court has made clear that judicial sentencing discretion is virtually unreviewable and judges generally need not give reasons at all for the sentences they impose.

To reduce the apparently unjust disparities, in the 1970s and 80s there was a nationwide move towards more determinate sentencing based in far greater measure than previously on just deserts. The adoption of sentencing guidelines at the state and federal level was an expression of this.

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23 E.g., *California Determinate Sentencing Law*, 1976. There were many books and studies that reached the conclusion that just deserts should play a greater role and that judicial sentencing needed to be reduced. Probably the most influential was, Andrew von Hirsch, *Doing Justice* (1976).
of this shift. Although disparity has decreased, which corrects some unequal justice, sentencing discretion remains and can be justified only if it achieves retributive or consequential justice. In those states that still lack guidelines or other limiting arrangements, the situation remains much like that which Judge Frankel decried.24

It is hard enough to justify state punishment tout court.25 Justifying disparate punishments is even harder. The usual response to this difficulty is to argue that as long as a convicted defendant is sentenced within the legislatively authorized range, he or she has no right to complain if his or her cellmate convicted of the same crime received less. I disagree. The intentional infliction of pain on another human being is a dreadful thing to do. Every day a prisoner is locked up, caged like an animal, is an immense harm. Before we lock up criminals longer than others convicted of the same crime, we should be able to justify the difference in principle and to confirm that the difference can be consistently imposed. No human institution can provide perfect justice. Some rough justice is inevitable, but unjustifiably broad “rough” justice is simply not adequate when the intentional infliction of pain by the state is at stake.

The problem is that justifying difference depends on relatively fine-grained adjustments to the core sentence. Much will then turn on factfinding at sentencing, but we have reason to doubt the accuracy of outcome-determinative facts because the convict receives substantially weaker procedural protections than those available at trial.26 Moreover, sentencing judges are


allowed to consider information not admissible at trial, including the commission of offenses for which the defendant was acquitted. This produces a risky situation for the convict, which in part explains the willingness of so many defendants to plead guilty in exchange for a certain sentence. This problem could be remedied by providing more procedural protections at sentencing, but this solution would be costly. Only capital sentencing tries to approach the ideal of trial. 27 Death is different, to be sure, but not different enough to warrant the disparity between capital and non-capital sentencing.

Even if we could be more sure of sentencing facts, the retributive or consequential relevance of many of them is not transparent or well-understood. Factors that are undoubtedly retributively relevant almost certainly do not provide the fine-grained guidance for adjusting punishment based on desert. The legislature or a sentencing commission might try to list and rank order all retributively relevant variables. I suggest, however, that it would be difficult and perhaps impossible to identify in advance all the retributively relevant variables—Justice Breyer would surely agree—and then to rank order them in a principled manner. Even within a particular crime type, consider how difficult it would be retributively to individuate. To see why, here is the parable of the stitches. Suppose a defendant charged with aggravated battery or mayhem permanently disfigured his victim by inflicting a facial wound with a knife with the

27See, e.g., Ring v. Arizona, 536 U.S. 584 (2002)(holding based on Apprendi that the 6th Amendment right to a jury trial requires that aggravating factors that support imposition of capital punishment must be found by a jury).
intent to cause a permanently disfiguring injury. The wound might require an extremely broad range of number of stitches to close. The lengthier the wound, the more disfigurement will result. Should a punishment be inflicted proportionate to wound length or number of stitches? Or suppose the defendant intends a shorter wound, but his hand slips and a longer wound results? I suggest that a principled, consistently applicable fine-grained retributive response in such cases would be impossible. We lack the moral and epistemic resources to use more than a few rough categories to individuate.

It is easier in principle to identify consequentially relevant factors because the predictive validity of a variable is an empirical issue that can be resolved with sufficient research. The problem here, of course, is that the necessary research is often lacking. For example, despite the many year’s experience with the Criminal History Score of the Federal Sentencing Guidelines and a data base of hundreds of thousands of cases, no research has empirically validated the predictive validity of the Score or even the reliability of its scoring.\textsuperscript{28} Even when we are certain that a variable is a valid predictor of future offending, such as sex and age, either we lack precise predictive information or we fail properly to employ the data we have. Further, strict evidentiary rules that govern the admissibility of scientific evidence at trials do not apply at sentencing.\textsuperscript{29}

Once again, too much is at stake to allow “fireside” empirical inductions to determine how much pain the State can inflict on a convict.

\textsuperscript{28}There have been a few correlational studies examining the relation between the score and other, validated predictive measures, but the comparison is not fully apt because these measures differ significantly from the score. See, e.g., Hoffman; Hoffman & Beck

None of the empirical problems troubles the legislatures or the Supreme Court. The iconic case in this respect is Barefoot v. Estelle, in which the Supreme Court considered whether the 8th and 14th Amendments were violated when a death sentence was imposed based on a clinical prediction of dangerousness—an aggravating factor in Texas—that was itself based on hypothetical questions and not on a personal examination of the capital convict. The evidence then available, confirmed in an amicus brief filed by the American Psychiatric Association, demonstrated that psychiatrists were not competent to make highly accurate clinical assessments of future dangerousness. Thus, imposing the death penalty based on clinical prediction seemed irrational and unfair. Writing for the majority, Justice White was unfazed, arguing that if future dangerousness was an acceptable aggravating factor, there was no reason to think that psychiatrists could not be helpful. Justice White explicitly rejected the implicit argument that perhaps no one could predict future dangerousness with sufficient accuracy to permit this factor to support the imposition of death. Any weaknesses in clinical prediction were issues going to the weight rather than the admissibility of such testimony.

If juries are allowed to consider and to credit undeniably invalid information for the purpose of imposing the death penalty, there can be no constitutional objection to fireside inductions guiding non-capital sentencing. Nonetheless, the State has a duty to justify its infliction of pain and it simply cannot morally do so on the basis of unvalidated or invalid predictor variables. It has no good answer to the convict who asks how the State knows that he is more likely to recidivate than his cellmate convicted of the same crime.

*Apprendi/Blakely/Booker* and their progeny will not solve the problems, even if they are

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30463 US. 880 (1983).
finally understood to impose Justice Thomas’ view that a “crime” includes any fact that by law is the basis for imposing or increasing punishment.\textsuperscript{31} It has been clear for decades that our Constitution permits legislatures to define crimes and punishments as they see fit.\textsuperscript{32} As the battle of the reductios in \textit{Apprendi} demonstrates, both sides were able to show that adroit legislative drafting could undermine the virtues each side presented.\textsuperscript{33} For example, instead of treating racial motivation as a sentencing factor that could increase a defendant’s penalty beyond the range for the crime charged, the state needed only to increase the maximum term and to treat absence of hate motivation as a mitigating factor that could be decided by the judge.\textsuperscript{34} As Justice O’Connor’s dissent recognized, enhancing or aggravating factors can always be changed into mitigating factors. Writing for the \textit{Apprendi} majority, Justice Stevens blithely claimed that political constraints would protect criminal defendants from the worst excesses that legislative re-definitions might produce to deprive defendants of the right to jury trial and the protections of

\textsuperscript{31}\textit{Apprendi}, supra note __, at 501 (Thomas, J., concurring). Oregon v. Ice, 2009 WL 77897 (OR.), makes clear that \textit{Apprendi} will not be so understood, at least if the dictates of logic control the argument.

Note that mitigating factors can be treated purely as sentencing factors under \textit{Apprendi}. As I argue in Part III, supra, almost all factors bearing on sentence should be tried to the jury, including mitigating factors.


\textsuperscript{33}See, Kyron Huigens, \textit{Solving the \textquotesingle Apprendi\textquotesingle Problem}, 90 \textit{Georgetown L. J.} 387, 405-407 (2002).

\textsuperscript{34}Except in the most extreme cases, it is clear that the Supreme Court will not invalidate as disproportionate a term of years as a violation of the 8\textsuperscript{th} and 14\textsuperscript{th} Amendments. Ewing v. California, 358 U.S. 11 (2003). Such an extreme case, such as life imprisonment for a parking ticket, would be beyond the ken of even the most vindictive legislature. Thus, it appears that the Court’s 8\textsuperscript{th} and 14\textsuperscript{th} Amendment jurisprudence will permit virtually any term of years that any legislature would be realistically willing to impose.
the reasonable doubt standard.\textsuperscript{35} But the increasingly harsh penalties that legislatures have been unthinkingly willing to impose in recent years provide scant grounds for Justice Stevens’ optimism.\textsuperscript{36} Manipulable labels and categories cannot dictate which questions should be charged and tried to the jury and which can be treated as sentencing factors and found by a judge using lesser procedures and a lower burden of persuasion. The majority may have had good intentions, but if \textit{Apprendi} results in the constitutional rejection of most guidelines, we will return to an era of unguided discretion. The injustice will be immense.

Sentencing is a mess, including more apparently fair and rational guideline schemes. Unjustifiable disparities will continue unless a fresh approach is adopted. The fresh approach I propose is, “back to the 19\textsuperscript{th} C,” when judges had less discretion. The system I am proposing will provide fully determinate sentencing and will make the jury the primary institution for determining what sentence the convicted defendant receives.\textsuperscript{37} In addition to the traditional definitions of crimes and defenses, the criminal law should adopt a limited number of enhancing and mitigating factors that could be either charged or raised at trial and adjudicated by the jury. Sentences would be fixed. All defendants convicted of the same offense with the same enhancers or mitigators would receive the same sentence. I believe that such a system would be

\textsuperscript{35} \textit{Apprendi}, supra note __, at 541, n.16.

\textsuperscript{36} See e.g., Marc Mauer, Ryan S. King & Malcolm C. Young, \textit{The Meaning of “Life”: Long Prison Sentences in Context} (The Sentencing Project, May, 2004)(one in eleven prisoners in state and federal prison is serving a life sentence, an increase of 83\% in the last ten years).

\textsuperscript{37} One might refer to the system as a modified form of jury sentencing. Prior to 1999, no one had advocated jury sentencing in over 80 years. See Morris B. Hoffman, \textit{The Case for Jury Sentencing}, 52 Duke L. J. 951, 951 (2003). Two recent articles have argued for a return to genuine jury sentencing, but in large part for different reasons and the proposals have substantially different details. See, Hoffman; Adriaan Lanni, \textit{Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?}, 108 Yale L.J. 1775 (1999).
vastly more fair than current sentencing regimes.

No social consensus exists concerning the appropriate justifications for punishment. If, as many believe, there are multiple justifications, no consensus exists concerning how they should be weighted or how potential conflicts among them should be resolved. Legislative statements of the purposes of punishment tend to be boilerplate laundry lists that have no conceptual or theoretical bite. Principled, finely-calibrated sentencing is impossible. In such circumstances, greater justice will be done if we recognize the inevitable limitations on fine-grained individualization and try to achieve proportionate equality within limited bounds.

A system in which fewer judgments can be made will necessarily produce more equality, especially if it is coupled with determinate sentences. This will produce “rough” justice based on the principle of equality, which is vastly better than rough justice based on no real principle at all. A “few sizes fits all” approach will treat similarly defendants who we know in theory are distinguishable, but we can not adequately distinguish them at present and they can not distinguish themselves.\textsuperscript{38} At the least, cellmates convicted of the same crime will have the benefit of understanding that no one similarly situated is getting less or more. At best, our judgments will be more valid because they will be more reliable. As any person who has applied a grading system knows and social science confirms, that we can be more sure of judgments that use fewer and broader categories than those that use more and narrower categories. Finer calibration is an ideal that is beyond us. It is a counsel of perfection that is the enemy of the good.

But why should equality be such a desirable ideal and is what I am suggesting genuine

\textsuperscript{38}In Parts III, I discuss possible exceptions.
equality? The literature on equality is immense and this paper will not settle disputes about whether equality is an empty concept\(^{39}\) or an intrinsic good\(^{40}\) or about whether it gains all its force from other moral or political considerations. I make the following assumptions and arguments, however. The desire for equal treatment has strong roots in the human psyche\(^{41}\) and is in principle the normatively desirable default position. What counts as equal treatment will depend on the existence of some relevant characteristic of the cases under consideration that seems to demand that like cases be treated alike. Treating relevantly like cases alike, and relevantly different cases differently, is either an intrinsic good or it is consequentially necessary to legitimate the institutions and decisions that distribute benefits and burdens, such as how much pain the state may intentionally inflict, or both.

Desert and danger, each of which may be comparatively evaluated, guide our judgments concerning punishment, but I have argued that we are unable adequately to calibrate differences finely. If so, we need to use grosser or “lumped” punishment criteria that can be reliably applied. Cellmates will then understand differences. Such lumped categories will treat similarly defendants who we know in some ultimate sense are genuinely different. Once again, neither the criminal justice system nor convicts can achieve such ultimate justice in principled, consistent fashion. Moreover, for purposes of criminal justice, I suggest that the desert and


danger characteristics among offenders within each of a few broad punishment categories are more alike than different. Consider again our mayhem defendant. Suppose we divided mayhem into two punishment categories of substantial and gross disfigurement, either by so defining the crime or by using an enhancement for the latter. All gross disfigurements are not the same, of course, but for criminal justice purposes all those who intentionally inflict gross and permanent disfigurement have demonstrated similar disregard for the rights and value of other people and similar danger. No mayhem convict will complain that he should receive a lesser sentence because the facial wound he inflicted took only 40 stitches to close whereas his cellmate’s took 50.

The major danger of lumping punishment categories rather than splitting them is that small differences can make very large differences. Consider the penalty differences at the margin of petit and grand larceny or drug possession crimes or the number of stitches in mayhem. A one dollar difference in the amount of goods stolen, for example, can lead to very large punishment differences. This problem seems especially acute when the criteria are reliably and objectively measurable, as the market value of goods or the weight of drugs. This is a genuine danger, but not decisive reason to reject the equality lumping produces. Most desert and danger criteria can not be reliably measured, but instead require rougher retributive judgments and speculative empirical assessments. Further, given the limits on human judgment and the greater

42In the economic literature on enforcement, a related problem is referred to as cliff effects, in which equal punishments for crimes of different seriousness produces crimes of greater seriousness. See George Stigler, The Optimum Enforcement of Laws, 78 J. Pol. Econ. 526, 527 (1970).
reliability of judgments with fewer categories, everyone can understand the need for bright line rules that risk some disparity at the margins. Less injustice will be produced than the inequality flowing from the unreliability of judgments involving more numerous categories. The disparate sentences of cellmates justified by a dollar difference in goods stolen can at least be explained by the necessity of having a rule, announced to all in advance, that treats all within a category alike.

It may be objected against the ideal of equality that I am promoting that the law already accepts exceptions, such as exemplary punishments, pardon, amnesty for conditions other than later-proven innocence, and selective enforcement. These practices do exist, but with limited exceptions, I do not accept them as justifiable and fair. There are problems with each on the merits. Exemplary punishments violate the Kantian ideal of treating people as ends–admittedly a difficult task–and it threatens punishment disproportionate to desert. Moreover, it is not clear that such punishments achieve the alleged end of deterrence. Under these conditions, it is doubtful that behind the veil of ignorance most people would agree to exemplary punishments. Selective enforcement is inevitable in a system that cannot arrest and prosecute all criminals, but it is an evil that should be strictly cabined at all stages to avoid the exercise of prejudice, racism and like ills. There is certainly no need to exercise it at sentencing. Similar arguments could be made about amnesty and pardons.

As the representative of the community, the jury is the appropriate body to make the moral and empirical decisions that will eventuate in the infliction of pain. The jury process is also considerably more public than low-visibility judicial sentencing. Juries can of course reach

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44Ashworth, supra note ___, at 64-65.
compromise verdicts, but it is unclear how often they actually do this, and it is even less clear that this is a defect in a system unguided by any unitary principle or consensually accepted set of considerations.

Suppose, as I will suggest in detail below, that the legislature expresses normative community judgment concerning punishment and provides for a limited number of enhancing and mitigating factors that could be adjudicated at trial and that would carry fixed sentences. Judicial flexibility concerning punishment would be eliminated. I claim that this would be objectionable only under the following conjunctive conditions that would suggest the need for greater discretion: 1) If the legislatively mandated scheme inadvertently omits mitigating factors that the legislature’s own more general responsibility theory implies, or if it includes factors that are inconsistent with that general theory; 2) If the judge can correctly identify both those instances in which the legislature made a “mistake” about these matters and those factors that are improperly omitted or included; and. 3) If the judge can apply the correct factors in a principled way. Otherwise, “flexibility” will serve only the judge’s personal preferences, not the society’s view of justice expressed by the legislature. Even if these conditions seem to be met, the sentencing judge will seldom be certain that the legislature made a mistake rather than a conscious decision. Consequently, it seems that the power to correct the mistake should be legislative, not judicial. Flexibility or discretion, essentially provides judges with the power, in direct proportion to the degree of flexibility permitted, to substitute their personal punishment theory for the legislature’s judgment.

But what about compassion? A determinate sentencing scheme with one size fits all

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45Hoffman, supra note __, at 989-990.
sentencing factors may seem to leave no room for compassion, and thus may seem violative of fundamental rights. It is unclear, however, that we could achieve consensus about what variables create the need for the exercise of compassion and how much role it should play. In this regard, it seems akin to the exercise of mercy. Who could be opposed to such noble things as mercy and compassion? The problem is that they are “fudge” factors that are usually adduced when no coherent retributive or consequential ground for mitigation seems warranted. If no such ground can be provided, however, why should the sentence be affected? If a retributive or consequential ground can be given, there is no reason that the legislature cannot consider the ground in the definitions of crimes and defenses.

The exercise of compassion may have more tractable meaning. I have emphasized the truism that State punishment involves the intentional infliction of pain. Even if doing so is justified by some adequate theory, it is nonetheless fellow human beings who are being made to suffer. When deciding how much pain it is necessary to inflict, the representative of the state should keep that pain present to its mind. I am not suggesting that the suffering of victims or their desire for justice should be ignored or minimized. There is no reason to believe, for example, that the lower punishments imposed in most of the developed world indicate a devaluation of victims or an unwarranted forgiveness of criminal conduct. I am suggesting that keeping the pain one will intentionally inflict in mind can help us to avoid unjustifiable excess,


which is simply cruel. There is no need, however, for a judge to accomplish this. Instead of current draconian punishments, the legislature can provide for less harsh responses. If compassion should be exercised, let the peoples’ representatives do it, and not an individual judge expressing personal preferences. I recognize, of course, that all the momentum in the criminal justice system now produces ever harsher sentences, but I assume that, finally, our society will rebel at the gratuitous cruelty we now inflict.

In addition to the benefit of equality without loss of attention to valid, relevant factors, determinate sentences based on many fewer factors will have other important benefits. There is good reason to doubt whether the subtleties and nuances of the substantive criminal law definitions of crimes and defenses have much ex ante influence on potential criminals’ calculations. Nonetheless, the common sense conclusion that different penalties have different deterrent effects is powerful and whatever guidance function the substantive criminal law plays will be enhanced by determinacy. Deterrence will be most fair and effective if the potential criminal has a reasonably accurate understanding of his or her exposure to liability. Such understanding can not be perfect, but the increased precision limited factors and determinacy promote is a virtue. Furthermore, determinacy will increase the potential rationality of the defendant’s conduct in the plea agreement process because the defendant will know precisely what sentence will be imposed depending solely on the outcome of trial or after a plea is entered.

III. Enhancement and Mitigation

This Part of the paper suggests how a relatively small number of enhancement and

mitigation factors can be considered at trial in order to achieve the goal of equal justice that is
the virtue of the determinate sentencing system that I propose. I begin by identifying the
simplifying assumptions that guide the analysis. Then I address enhancement and mitigation.

A. Assumptions

The first simplifying, but controversial, assumption is that criminal punishment should
punish criminals for what they have done, for violating prohibitory norms, and it should not
punish people based on who they are, on their characters. It is of course true that action is a
guide to character, but action is in important ways prior to character. We can judge an action
good or bad without knowing anything of the agent’s character, but we cannot judge an agent’s
character without knowing anything about how the agent acts.49 Moreover, most of what we
mean by character is not under our rational control, cannot be guided by reason. Among all the
aspects of the agent that can be evaluated morally, only action is potentially fully guidable by
reason.50

A second assumption, shared by most criminal justice scholars, albeit not universally, is
that no one should be punished more than they deserve and that desert sets an upper limit on
acceptable punishment. I am unpersuaded by the “desert range” theories of Norval Morris51 and
others,52 which hold that desert sets a proper range rather than a determinate sentence, but for my

49George Sher, Ethics, Character and Action, in Ellen Frankel Paul, Fred D. Miller, Jr. &

50Stephen J. Morse, Reason, Results and Criminal Responsibility, 2004 Illinois L. Rev.
363.

51Madness and the Criminal Law, supra note __, at 187-192.

52See, Richard S. Frase, Limiting Retributivism, in Michael Tonry, Ed., The Future of
Imprisonment 83 (2004)(reviewing and assessing Morris and other “desert range” theories and

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purposes it is sufficient that desert sets an upper limit beyond which punishment becomes disproportionately unfair.

A third, more controversial assumption, is that only the amount of harm a criminal intentionally risks contributes to desert; the amount of harm actually caused does not.\textsuperscript{53} Finally, I assume that with rare exceptions, no factor should increase or decrease desert and punishment unless it is related to fault.\textsuperscript{54} For example, there must be mens rea concerning every enhancing factor. Under present conditions, enhancement for dangerousness alone is unjustified.\textsuperscript{55}

Finally, I assume that State punishment must inflict some measure of pain and that imprisonment is effectively the only means we will use to accomplish this. Alternative responses that do not involve the infliction of pain are simply not punishment. Behavior that should be responded to without blame and punishment should not be criminalized. Moreover, under current conditions, it is hard to imagine pain-inflicting alternatives to prison. I doubt that we will return to the stocks, whipping, and nose-notching any time soon.

I recognize that basing a system on these assumptions risks making my entire scheme a house of cards, easily toppled by a good counter-argument about any of the assumptions. As I said in the introduction, however, my goal is a consistent, coherent, fair system to which we should aspire. It will ultimately be persuasive if its overall vision and functioning make it more

\textsuperscript{53}See, Stephen J. Morse, \textit{Reason, Results and Criminal Responsibility}, supra note __, at ___.

\textsuperscript{54}The exceptions, which apply only to mitigation and not to enhancement, are discussed in Part III.C.5, \textit{infra}.

\textsuperscript{55}I defend this conclusion is Part III.B.2. \textit{infra}.
appealing than alternatives.

B. Enhancement

A factor potentially should justify increased punishment if it indicates either greater culpability, and thus increases desert beyond the desert justified by the core offense, or it indicates greater dangerousness. I claim that only two categories of factors satisfy this disjunctive requirement: increased harm and dangerousness, especially as demonstrated by prior criminal history. Only the former should be employed; the latter should be ignored. After exploring the categories, I shall briefly address Professor Paul Robinson’s proposal to enhance confinement of dangerous offenders. I conclude this part with a discussion of the burden of persuasion for enhancement factors.

1. Aggravated Harm

In general, agents who risk greater harms by their conduct are more culpable than those who risk less. I propose that the criminal law should adopt a categorical enhancing factor, applicable to every crime, which I shall term aggravated harm. In brief, the prosecution would have to charge and then prove beyond a reasonable doubt that the defendant’s conduct culpably risked substantially more harm than the core offense foreseeably risks. I would prefer that a conscious mental state–purpose, knowledge or recklessness–should be required, but under no conditions should strict liability for the additional harm risked be sufficient. The judge would have to decide whether the harm alleged by the prosecution was sufficiently unforeseeable as an ordinary result of the crime charged to warrant upholding the indictment for the aggravation or giving instructions at trial. Proven harm aggravation would carry a legislatively-fixed addition to the fixed, core sentence. I assume that the adoption of such a generic harm enhancement
factor would obviate the need for victim impact statements because any harm requiring
enhancement would have already been charged and tried to the jury.

In many cases, an aggravation charge would not be necessary because the defendant’s
aggravating conduct might produce an independent crime that could be separately charged and
proven. For example, armed robberies are dangerous. Dangerous affrays are always a risk.
Suppose, however, that an armed robber decides gratuitously to pistol whip the victim. In that
case, the robber may also be charged with an independent aggravated assault. Individuating
crimes can be problematic, but that problem already exists and is not beyond the capacity of the
criminal justice system sensibly to resolve. When no independent crime occurs, one grade of
aggravation would suffice.

A central question is which type of harm can be a proper ground for aggravation.
Physical harm is the most obvious and justifiable example, but economic, psychological, and
diffuse social harms could also be used. Let us consider each type. Crime always carries some
risk of physical harm. Victims or others may always resist, for example. Unless grievous bodily
is already risked by the core offense, culpable risking of grievous bodily harm would be a fair
aggravating standard. If homicide occurs, this should be charged and prosecuted independently.

Differential economic harm grounds the distinction in theft between grand and petit
larceny. Wherever the line is drawn is a very rough cut and to some degree arbitrary, but this
seems to me to be sufficient. An alternative is to try to gauge the actual economic harm caused
to the victim, which would depend largely on the victim’s wealth. Money may have very
different utility for victims with the same degree of wealth, but trying to assess harm this
accurately is beyond the scope of the criminal justice system, which should treat all people
equally. Thus, it would not be irrational to aggravate property crime if the loss exceeds a certain percentage of the victim’s net wealth. But once again, one would need to prove that the defendant culpably risked the aggravated loss.\textsuperscript{56} In any case, the law already responds to differential economic harms by its definitions of property offenses that have different circumstance elements.

Psychological or emotional harm is a particularly difficult case. The criminal law does not punish emotional harms, no matter how intentional and serious they may be. Theft of a trinket is a crime; the intentional infliction of extreme emotional cruelty is not. On the other hand, all crime threatens the emotional well-being of victims. Greater physical or economic harm in general causes greater psychological pain, such as anxiety, fear, insecurity, and humiliation. Once again, victims may respond differentially. Some people are emotionally wounded by a mugging; others are largely unaffected. But individual differences are not important in criminal law. Moreover, there is less continuing psychopathology from crime than common sense might predict.\textsuperscript{57} Nonetheless, many crimes are committed with the specific intent to inflict greater than average degradation, subordination, humiliation, and fear or otherwise to deprive the victim of his or her dignity. The offender appears to enjoy the additional psychological pain inflicted beyond that inflicted by the core offense, which appears in part to motivate the criminal act.

\textsuperscript{56} Economic losses are insurable or may otherwise be reimbursed. A criminal defendant should receive no break, however, because the offender reasonably believes that the victim is insured. All victims should be treated as if they were uninsured.

I am ambivalent about psychological or emotional pain. On the one hand, it is a genuine harm, even if it is only transient; on the other, it is damnably difficult to measure, to assess. Our unwillingness to criminalize the infliction of psychological distress, whether for normative or practical reasons, suggests that perhaps we should not use it as an enhancing factor. But some infliction of psychological distress is so egregiously cruel that it seems justifiable to increase blame and punishment. The problem, of course, will be to craft a standard for the infliction of psychological distress that will provide fair notice and be capable of reasonable adjudication. I assume that such a standard could be created and that it would be no more vague, for example, than apparently acceptable criteria for fear induction associated with crimes like stalking.58

Enhancement for the culpable infliction of egregious psychological distress might provide the best means for dealing with hate motivation. Hate crime is a large and fraught topic.59 What is reasonably uncontroversial is that a killing is a killing, an assault is an assault, and vandalism is vandalism, whether or not it is motivated by hate. Many argue that hate motivation marks out the offender as particularly blameworthy,60 but the blameworthiness must derive largely from the offender’s character rather than his act.

Hate motivation would be act-related in those cases in which the offender culpably risks the infliction of enhanced humiliation, fear and subordination upon the victim and other

58 See, e.g., Cal. Penal Code, Sec. 646.9


members of the victim’s group. Picking out a victim because the offender hates the victim’s group is distinguishable from also culpably risking enhanced psychological distress. The vandal may choose a synagogue to deface because he or she dislikes Jews, but may have no intention of causing special distress to Jews. Unless the latter is demonstrated, however, it is difficult to understand why blame and punishment should be enhanced for what the offender has done rather than for what he or she is. Now, we may wish to assume that all crimes motivated by hate have the tendency to cause such additional distress, but unless the offender is consciously risking this result, we would be forced to accept a negligence standard for conviction.

Now let us turn to diffuse social harm, by which I mean the social harm caused by providing a good or service that the victim desires. One can of course try to rationalize criminalization of such conduct as harming the victim physically, economically, psychologically, and morally, but such harms are often indirect or do not occur at all. And, as is well known, many of the harms associated with such crimes are the product of criminalization itself. Still, there is an argument for traditional harms and one can argue that our society is less decent, less moral as a result of drug possession, use and dealing, gambling, prostitution, and the like. It seems to me that enhancement here is achievable with very few categories, all of which can be included in the definitions of offenses. Being a dealer is worse than being a private possessor or user. Selling to minors is worse than selling to adults. The borders between some of these categories can be hazy, but a few rough distinctions involving circumstance elements should suffice. The enormous punishment differences among categories, especially if the law accepts

61See Douglas Husak, Legalize This! The Case for Decriminalizing Drugs 133-151 (2002).
such outrageous results as adding the weight of the carrier medium to the weight of drugs, for example, 62 might not be justifiable, but that is a different question.

In sum, most enhancing factors can be incorporated in the definitions of offenses by creating appropriate circumstance elements. Otherwise, one aggravation category for culpably risked enhanced harm, especially physical and psychological harm, should fairly differentiate offenders.

2. Prior Conviction (and Prediction of Dangerousness Generally)

Apprendi conceded that prior conviction could be used purely as a sentencing factor and did not need to be charged and tried to the jury. The majority accepted this exception because prior conviction was based on proof beyond a reasonable doubt, thus obviating worries that creating the use of sentencing factors violated jury trial rights. Whether or not the exception was warranted, 63 properly established prior conviction is clearly relevant to the risk of future offending because the best predictor of future behavior is past behavior. Nevertheless, there are both empirical and theoretical problems with using it and other valid predictors of future offending to enhance sentencing.

Let us begin with the empirical issue. Although prior conviction does increase the risk, we often have little precise information with which to estimate in individual cases precisely how much the risk is increased or how much general deterrence will be increased by imposing


63 One may fairly wonder if even this factor should be considered only at sentencing. After all, it will extend the convict’s sentence beyond the range for the crime charged and the identity of the present convict and the convict whose prior conviction is used should be clear beyond reasonable doubt. See Huigens, supra note ___, at ___.

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recidivist enhancements. Recidivism interacts with other variables to create a complex prediction equation. There is so much crime in the United States and we have so much data, in principle we might develop an adequately accurate prediction tool based on recidivism that would permit rational enhancement on incapacitative and deterrent grounds. Nonetheless, present use of recidivism is too empirically blunderbuss to be fair.

For example, the 25 years to life enhanced sentence that Gary Albert Ewing received under California’s “three strikes law,” which the Supreme Court approved as not disproportionate and not in violation of the 8th and 14th Amendments, was vastly more than could be rationally justified on incapacitative or deterrent grounds. Now, Ewing was no choir boy. He had a long history of criminal offenses. While on parole after serving about 6 years of a potential 9 year sentence for robbery and burglary, Ewing shoplifted three golf clubs worth a total of almost $1200.00 and was immediately arrested. California chose to treat Ewing’s shoplifting offense as a third “strike” that would support the enhanced sentence of 25 years to life, which was vastly more than he could have received for the shoplifting. Ewing’s third strike was a non-violent, relatively minor offense, but it is legitimate to conclude that he presents a continuing danger to the public. A lengthy prison term for prior burglary and robbery had failed specifically to deter him. Apparently, only incapacitation could prevent him from re-offending. Moreover, although he was not deterred by the possibility of lengthy sentences, others might well be. Still, even if some enhancement were warranted, we have no sensible idea how much. One might argue that Ewing “assumed the risk” by offending again, but no citizen should be asked to assume such an irrational risk of State infliction of pain.

\footnote{Ewing v. California, supra note ___, at ___.}

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Enhanced sentencing based on incapacitative needs also raises the prediction problem generally. The difficulties attending accurate prediction of future behavior, especially low base rate behavior, such as very serious crime, present a serious moral and practical problem for the legitimacy of using predictions of future dangerousness to enhance criminal sentences. An enormous amount has been written about this issue, so I shall only cover the minimum necessary for the wider purpose addressed. To begin, however, note that using recidivism to enhance sentences at least uses a factor involving intentional criminal wrongdoing for which the agent was responsible. In contrast, demographic or personality characteristics, for example, are factors for which the defendant is not responsible.

It is a truism of behavioral science that statistical, “cookbook” prediction based on empirically validated risk factors is more accurate than clinical prediction, but despite advances in the data base that have improved the cookbook, highly accurate prediction by any method eludes us in all but the most obvious cases. Nonetheless, and although the limitations of prediction are well-recognized, our fear of danger permits prediction of dangerousness to ground sentencing length (and various forms of quasi-criminal civil confinement). The inevitable errors are morally and practically costly, however. The most common error, a false positive, is especially problematic because it results in unnecessary massive and expensive deprivation of liberty. Such erroneous deprivations for liberty may have general deterrent effects, but only at the expense of confining an offender who would not recidivate. Antony Duff tries to avoid this problem by claiming that dangerousness is not a prediction of future conduct but is instead a

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present state assessment of predisposition to re-offending. Thus, there is no genuine actuarial problem. We do not think a person has a predisposition, however, unless we also think that there is some substantial probability that it will produce action. If no such probability exists, we think that there is no predisposition or that it has eroded.

Despite the prediction problems, the gatekeepers, such as judges or parole boards, are conservative because false negatives tend to be more politically costly even though they are infrequent. The costs of unnecessary imprisonment of false positives are not before the public eye, we are not sure that they are false positives because they are confined, and convicts seldom have much sympathy from the public. On the other hand, if grave harm is done by a formerly imprisoned person who has been released although a longer prison term was possible, the public is outraged. The incentive structure predisposes decision makers in cases involving danger to overpredict, and thus to imprison longer than is necessary.

As noted, empirical problems may be solved by research. Increasing knowledge may allow us accurately to estimate the need for enhanced sentences based on recidivism and on other factors, such as sex and age, that we know are related to the risk of re-offending. Reliable information may permit rational enhancement and will decrease the especially worrisome false positive rate, but it might also lead to extremely lengthy confinement unless the technology of treatment increased simultaneously and we were willing to release offenders

\[66\text{Antony Duff, Dangerousness and Citizenship, in Ashworth & Wasik, supra note \(\_\), at 141, 152-156.}\]

\[67\text{There is a strong argument, based on our history of discrimination and negative stereotyping, that race is the only variable that might have validated predictive validity that nevertheless should not be used. John Monahan, A Juisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients, 92 VaLR 391 (2006).}\]
serving enhanced sentences prior to the termination of the enhanced term. Moreover, even effective treatments would raise serious moral and legal issues if they were intrusive and had likely and serious side effects. Administering treatment involuntarily also implicates important constitutional liberty interests recognized by the Supreme Court. On the other hand, few confined people would probably refuse safe treatments that would help them reduce their violence potential and thus gain their release. At present, however, this whole line of thought is speculative because the data are not yet available and we do not have safe, effective methods that can reduce the risk of future offending.

Even if the empirical problems were solved, the more important, theoretical problem with recidivist enhancements like Ewing’s sentence is simply that it is unfair because recidivists do not deserve enhanced punishment (and it is wildly expensive). No one deserves enhanced punishment based on characteristics, such as age and sex, for which the person is not responsible. More important, Ewing, for example, had already been fully punished for all the other crimes he was convicted for because the State had imposed whatever sentences it saw fit to impose. Even if the State had the legitimate authority to punish him more harshly than it did for previous crimes, it chose not to and Ewing had already done his time for those offenses. No further punishment was “owing” and the State could not re-sentence him for previous crimes. And, surely, 25 years to life was grossly disproportionate to Ewing’s culpability for shoplifting, even if it was justifiable on consequential grounds. The sentence was retributively unfair.

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69See Michael Vitiello, “Three Strikes: Can We Return to Rationality?,“ 87 J. Criminal L & Criminology 394, 398 (1997)(“Even if Three Strikes has led to a reduction in crime, we are paying too much for those benefits.”).
Repetitive offending certainly shows that the agent has antisocial dispositions and has done far more than his fair share of criminal harmdoing. Nonetheless, it is not a crime to have a criminal predisposition or criminogenic character and people do not deserve punishment for their characters. Persistent offenders have also received substantially more punishment than less repetitive criminals for the disproportionate amount of crime the former commit. To use a common metaphor, the slate has been wiped clean by prior punishment. Recidivism does not make the last crime worse or more culpable in itself than if it had been the agent’s first offense. It simply indicates that the agent is a worse and more dangerous person, but again, it is not a punishable crime to be a bad, dangerous agent. Defenders of a retributive justification for such enhanced punishment schemes are an extremely rare species precisely because it is so difficult, and perhaps impossible, to provide an adequate retributive justification for enhanced punishment.70

Antony Duff presents a recent, interesting attempt to justify enhancements as deserved. He asks,

[W]ether we can ever properly judge that a criminal has so persistently, inexcusably flouted significant social values that we can or should exclude him from full community: not just for whatever limited term can be justified in the usual way as an appropriate punishment for his present crime, but permanently.71

70 See Michael Davis, To Make the Punishment Fit the Crime: Essays in the Theory of Criminal Justice 129-145 (1992)(noting the scarcity of retributive justifications and offering an account of the “special advantage” recidivists receive by re-offending).

71 Duff, supra note ___, at 159. Duff does not think that recidivism per se warrants such exclusion. There must be such serious and persistent offending that the conclusion concerning contempt and rejection is warranted. Id. at 161.
This is the extreme case, of course, but the argument is generalizable. Duff claims that sufficient persistent offending demonstrates such profound contempt for and rejection of the values of our community that the criminal deserves to be excluded from that community. The unrepentant offender must always be offered a chance to demonstrate that he or she is ready to be restored to the community, which raises difficult assessment problems, but sufficient contempt and rejection expressed through action justifies exclusion.

Although this view has surface plausibility because Duff’s candidates for exclusion are reprehensible, the difficulty is that they are being punished for their attitude and not for their behavior. After all, we would not punish someone who exercised his or her right of free speech to demonstrate precisely the same contempt and rejection. On the other hand, Duff argues that “the kind of contempt and rejection that concern me are practical attitudes that are partly constituted by the actions that display them.” 72 This is fair enough, but why should persistent offending be required? A single criminal act that would not warrant life in prison may indicate both complete contempt and rejection. Duff’s answer to this concern is definitional. The kind of rejection he envisions must have a temporal dimension that includes “sustained rejection.”73 Nonetheless, one can imagine a single act so heinous coupled with an attitude of complete and settled rejection and contempt that would seem sufficient for exclusion. Moreover, such contempt and rejection do not demonstrate that these offenders are psychopaths or otherwise not moral agents who are not part of the moral community. We may wish to exclude them because they are dangerous, but not because their behavior expresses an attitude or set of values we

72 Personal communication (on file with the author).

73 Id.
detest. I conclude that Professor Duff’s account is the most powerful attempt to justify deserved enhanced sentencing, I fear that it also risks collapsing into consequential exclusion for dangerousness.

To the extent that the sentence punishes the offender more than he or she retributively deserves for the triggering offense, enhanced sentencing for recidivists is a form of pure preventive detention based on dangerousness and deterrence alone. Retribution is not a bar to punishing an offender as harshly as culpability permits. Punishing more than culpability permits, however, is undeserved punishment. Retribution can conflict with consequential concerns. Both cannot always be justifiably satisfied.

Legislative action can seem to dissolve the conflict. Few people think that there are clear right answers to questions concerning the proportionate relation between culpability and punishment. These are matters of normative debate. The Supreme Court has never adopted a substantive constitutional theory of culpability or of proportionality and thus it will defer to legislative judgments about retribution. As Ewing’s discussion of proportionality indicates, if a legislature wishes to increase the penalties for most crimes substantially because the legislature finds that culpability for most crimes deserves more punishment, there is no constitutional bar to

74 All in the Ewing majority agreed that great deference should be given to states as they legislatively decide what penal theories to adopt and what sentences to impose, but two—Justices Scalia and Thomas—argued that the constitution places essentially no proportionality constraints on acceptable lengths of imprisonment. For them the proportionality principle applies only to capital sentencing. The plurality of three justices accepted that the 8th Amendment contains some proportionality principle applicable to non-capital cases, but it does not require, ...strict formality between crime and sentence. Rather, it forbids only extreme sentences that are “grossly disproportionate” to the crime. Ewing, supra note __, at __. This is hardly a restrictive standard, and, unsurprisingly, the plurality concluded that the California legislature was free to adopt a stringently incapacitative and deterrent penological theory and that the three strikes law was not grossly disproportionate.
In sum, if the data were available, enhanced sentencing could be justified on consequential grounds, but it is retributively unfair. If our society is willing to punish disproportionately on consequential grounds, then I propose that it do so only if precise information were available, the factors used in making the prediction were proven to a jury beyond a reasonable doubt, and the sentence enhancement was fixed depending on the outcome of the prediction. One might object that this procedure would be terribly unwieldy because there may be so many factors the prediction equation uses or they are technical. Current understanding suggests, however, that the factors that will substantially increase predictive power concerning re-offending are limited and often easy to discern, such as age, sex, past criminal history, substance use, and others. A few may be more technical, such as intelligence or the presence of psychopathy. Valid but weak, difficult to measure variables can safely be excluded because justice does not demand the degree of precision they might add. If, contrary to my prediction, the prediction question became cumbersome, it could be relegated to a separate hearing, as long as the burden of persuasion beyond a reasonable doubt was retained. How long someone spends in prison is too important to be adjudicated according to a lesser standard.


In a recent, important Commentary, Professor Paul H. Robinson agrees that various criminal justice methods that substantially enhance criminal incarceration, such as habitual offender laws, are being used improperly. He affirms that such methods are a form of pure preventive detention because such enhanced prison terms are disproportionate to the offender’s desert. Professor Robinson proposes that rather than “cloaking” preventive detention in the guise of criminal punishment, social safety and respect for criminal law would be better served if
the law straightforwardly segregated proportionate punishment and preventive detention and adopted post-conviction civil commitment based solely on dangerousness. He claims that using civil commitment to protect society in the segregated system would provide more checks on unjustified loss to liberty than would using the criminal justice system to impose disproportionate sentences.75

Many criminal justice practices do punish terribly harshly and disproportionately to desert.76 I see little reason to believe, however, that the allegedly beneficial “protections” of indefinite civil commitment would be efficacious to protect liberty. For example, I strongly doubt that periodic review of sexually violent people civilly committed at the end of a prison term on the ground of dangerousness alone would lead to earlier release than enhanced prison terms. For another example, although pure preventive detention proceedings are civil and thus should require application of a least intrusive means principle, I doubt that many courts would be likely to find that means less intrusive than confinement would be sufficient to protect the public from criminals with a history of serious, persistent offending. Moreover, why should pure preventive detention require prior criminal or other dangerous conduct as a substantive rather than as an evidentiary criterion? After all, if the civil commitment is preventive confinement for future dangerousness alone and is not deserved punishment for past conduct, there is no need to rely on prior conduct if predictive methods are sufficiently successful without it. Pure


76 I have argued elsewhere that if the predictive and treatment technology were both sufficiently powerful to reduce a serious public safety threat, then perhaps pure preventive detention would be justified. See, Stephen J. Morse, Neither Desert Nor Disease, 5 Legal Theory 265 (1999).
preventive detention is likely to be an even greater intrusion on liberty and even more costly than enhanced criminal punishment. The Supreme Court is right to hold that preventive detention should not be based on dangerousness alone, even if it weakly adheres to this principle.\textsuperscript{77}

Finally, unenhanced but substantial determinate prison terms for dangerous offenders are both deserved and would protect the public sufficiently in a society that does not and cannot guarantee its citizens complete safety.

4. Burden of Persuasion

As should be clear from the prior discussion, I consider the amount of punishment the State inflicts a matter of such moral and political gravity that any factor that increases punishment, either on retributive or consequential grounds, should be proven to the jury beyond a reasonable doubt. This allocation of the persuasion burden clearly favors the error of punishing people less than culpability or dangerousness might in fact warrant from the God’s-eye view, but that is the price a society should pay to respect the liberty of its citizens when the State seeks to deprive them of that liberty.

C. Mitigation

A factor may justify decreased punishment either if it indicates lesser culpability, and thus decreases desert beyond the desert justified by the core offense, or if it indicates decreased dangerousness. In the section I shall first propose the adoption of two generic mitigating conditions, diminished rationality and lesser hard choice, that would address virtually all fault-based mitigation. Next, I suggest that cases of failed justification, those in which the defendant

\textsuperscript{77}E.g., Kansas v. Hendricks, 521 U.S. 346, 358 (1997). I claim it weakly adheres to this principle because the rationale the Court gives to support confinement is unjustifiable. See, Stephen J. Morse, \textit{Uncontrollable Urges and Irrational People}, 88 \textit{Virginia LR} 1025 (2002).
acted with the honest but unreasonable belief that his or her action was justified, should also provide a fault-based mitigation. Then I propose that accomplices who play a minor role in crime should have a mitigation for lesser accomplice liability. The number of fault-based mitigating factors is not theoretically unlimited, requiring judicial discretion at sentencing because diminished rationality, lesser hard choice, failed justification, and lesser accomplice liability exhaust the set of fault-based mitigating claims. The specific facts would simply be evidentiary considerations that the finder of fact would consider to determine if the mitigating factor was established. In all four of these cases, there would be a legislatively-fixed reduction in sentencing. I also address non-fault based mitigation, such as entrapment or hardship. Then I turn to consequential grounds for mitigation. I conclude that lesser dangerousness should not justify a reduced sentence and that unless one of the generic, fault-based mitigating factors has been established, defendants convicted of the same crime (plus applicable enhancements) should receive the same sentence. The allocation of the burden of persuasion can vary for mitigating factors, so I discuss this question in each subpart.

1. Diminished Rationality and Lesser Hard Choice

I believe that there are only two general excusing conditions based on lack of fault—lack of capacity for rationality and sufficiently hard choice\(^ {78}\)—that explain all the doctrines of excuse. The complete excuses of infancy and legal insanity are based on the defendant’s non-culpable lack of capacity for rationality, as are other mitigating factors such as low intelligence,

\(^ {78}\)Following H.L.A. Hart, many prefer the term, “lack of fair opportunity,” to describe this excusing condition. I believe this term is less precise and more open to confusion, however, and thus employ “hard choice” instead. I accept that duress is an excuse, although many think it should be treated as a justification. See, Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 *Buffalo Crim. L. Rev.*, 833 (2003).
intoxication, coercive persuasion, and stress. Duress as an excuse is based on the hardness of the “do it or else” choice that the defendant faced. The law draws bright lines, but the underlying justifications are matters of degree. The capacity for rationality may be reduced to varying degrees; the hardness of choice varies. Thus, mitigation could also theoretically be a matter of infinite degree, but we do not have sufficient moral or practical assessment capacity to make such fine-grained assessments. Nonetheless, we are capable of making a rougher judgment. Even if the facts do not warrant a complete excuse, a defendant who suffers from very substantially reduced rational capacity or faced a substantially hard choice is less culpable than a defendant with unimpaired rationality or who did not face a hard choice.

I have previously proposed a generic mitigating doctrine for diminished rationality that would be expressed by a verdict in the form of “guilty but partially responsible.”79 I now suggest a modified version of that proposal in which there should be two generic mitigating doctrines that would apply to all crimes and that would be tried by the jury: substantially and non-culpably diminished rationality and substantial hard choice. In the present proposal, there would be no need to express these in a separate verdict form. The jury would simply determine whether either or both of these factors existed and then a legislatively-fixed reduction in punishment would follow. The requirement of “substantially” would ensure that only deserving defendants received the mitigation and it would help solve the epistemic problem of identifying appropriate cases. The one-size fits all proposal will necessarily treat different defendants alike, but given our moral and epistemic limitations, no substantial injustice will be done. For purposes of criminal justice, the culpability of all defendants warranting the mitigation will be more alike

Diminished rationality and lesser hard choice are partial affirmative defenses rather than elements of crimes as traditionally conceived. The defendant has culpably committed a prima facie violation, but is claiming that he or she is less responsible than most culpable defendants who have committed the same crime. The constitution permits the State to decide whether the burden of persuasion for such defensive claims should be placed on the State or the defendant.80 There are good arguments on both sides. These claims do centrally involve culpability. Although the defendant effectively bears the burden of production, once that burden is met, requiring the State to disprove the factor beyond a reasonable doubt maximizes the likelihood that a defendant will not be blamed and punished for more culpability than in fact existed. On the other hand, mitigation is a matter of legislative grace and the defendant typically has the best access to the information. I have a strong normative preference against erroneous conviction and overconviction, so I would place the burden of persuasion on the prosecution, but I would not consider requiring the defendant to bear the burden an obvious injustice.

2. Failed Justification

A defendant who honestly but unreasonably believes that he or she is doing what is right or permissible has no intent to violate anyone’s rights and is therefore is less culpable than a defendant who commits the same act without justificatory motivation. Such a defendant does not deserve a full excuse because the formation of an unreasonable belief concerning the need to harm another is culpable, but mitigation is appropriate. A generic failed justification mitigating factor should therefore be available for all crimes that can be tried to the jury and that would

80Patterson v. New York, supra note ___.
carry a legislatively-fixed reduction in sentence.

Claims of justification are denials that the defendant has violated the prohibitory norm because justifications essentially are exceptions to what would otherwise be prima facie violations of others’ rights. \(^{81}\) Although the defendant again effectively has the burden of production, the argument is that no crime has been committed at all. Consequently, the prosecution should retain the traditional burden of proving that a crime has been committed beyond a reasonable doubt by disproving by that standard honesty and reasonableness.

3. Lesser Accomplice Liability

Although many people think that accomplices who play a lesser role deserve less punishment, deciding whether lesser accomplice liability warrants mitigation requires some understanding of why we punish accomplices at all. Accomplice liability is a puzzle. Accomplices are trying or at least willing to help another to commit a crime, which is certainly blameworthy, but there is no requirement that they engage in the prohibited conduct of the substantive offense or causally contribute to it. The perpetrator commits the crime, which is why accomplice liability is needed in the first place.

The usual justification for the accomplice’s derivative liability is that the accomplice has identified with or consented to the perpetrator’s crime. \(^{82}\) In essence, the accomplice has made the crime his or her own by giving effect to that identification or consent by aiding or encouraging conduct. Another justification is “forfeited personal identity:” the accomplice


allegedly “forfeits” his or her right to be treated as a separate person. But if the aiding or encouraging conduct is not independently criminal—or it is much less so than the perpetrator’s crime—and if the accomplice need not play any causal role, how can liability be justified by consent or forfeiture? Understanding why accomplices should be held liable at all and how they should be punished, requires a justification for accomplice liability different from the usual suspects.

The most promising basis for accomplice liability is simpler and more straightforward than consent, identification or forfeiture. As a general matter, furnishing aid or encouragement that might play some role increases the risk that the perpetrator will successfully commit the crime. It is simply a fact about human beings that potential encouragement or aid in principle increases the risk that the recipient will commit the act aided or encouraged. This is true even if we treat the perpetrator as a fully independent, responsible agent. Although responsible agents must “take responsibility” for what they ultimately do, other people can play a causal role in enhancing or decreasing the risk of what an agents does. Consequently, even if the potential accomplice is not perpetrating the deed, it is his or her duty not to enhance the probability that the crime will be committed. It is socially harmful to aid or encourage in fact; it is wrong to furnish aid or encouragement with the purpose of facilitating the crime. To accept the argument just presented is not to abandon important moral conceptions of agency. It is simply to recognize how the world works.

If this account is correct, accomplice liability should not be automatically equal to the perpetrator’s liability as it now is in the United States. Most important, in appropriate cases,

83 Dressler, supra note __, at 111. I find this justification too metaphorical, but I include it for completeness.
culpability should be proportionate to the substantiality of the aid or encouragement furnished.\textsuperscript{84} In general, the substantiality of the aid will be positively proportionate to the enhancement of the risk that the crime will be perpetrated and thus to the accomplice’s level of wrongdoing and culpability.\textsuperscript{85} Few accomplices will likely be as or more culpable than the perpetrator and those accomplices who know their aid is relatively insubstantial would be considerably less liable, even if the trivial accomplice were thoroughly identified with the perpetrator’s crime.

Accomplice liability would theoretically be a continuum, but, in practice, a generic mitigator of minor or lesser accomplice liability would be sufficient to do justice in a world of imperfect information. This form of mitigation could be treated by defining two classes of prima facie accomplice liability depending on the accomplice’s contribution. Whether treated as part of the criteria for accomplice liability or as a mitigating factor, however, the prosecution should bear the burden of persuasion beyond a reasonable doubt to establish the higher level of full accomplice liability because accomplice contribution is a matter of prima facie guilt.

4. Reduced Harm

This part will be brief because the issues are simply the mirror image of enhancement for aggravated harm and because the issue is unlikely to arise frequently. There are, I believe, few “therapeutic armed robbers” who demand money a weapon point and in a calm, measured, comforting tone assures the victim that the robber has no wish physically to harm the person or to cause any psychological distress if the victim will only comply with alacrity.

\textsuperscript{84}I would also individuate by mens rea for all crimes, not only for homicide.

\textsuperscript{85}See, George P. Fletcher, Rethinking Criminal Law 649-652 (1978)(noting that some criminal justice systems always treat accomplices as less culpable than the perpetrator and try to punish accomplices in proportion to their wrongdoing and culpability).
Whichever type of harm outside the ordinary range for the crime type that may be considered normatively acceptable for enhancement, should also be considered for mitigation. In some cases, the issue can be addressed through fairer fault rules. For example, a person selling a controlled substance to a minor but who reasonably believes that the buyer is an adult should not be convicted of the aggravated crime of selling to a minor based on the “lesser legal wrong” theory. This is a form of unjust strict liability that the criminal law should abandon. In all cases, the defendant would have to establish that he intentionally created a situation in which substantially reduced harm was risked or inflicted.

5. Non-Fault Mitigation

Entrapment, hardship, co-operation, and remorse are factors that might not produce an excusing condition based on fault for the crime committed, but might nonetheless be considered for mitigation. Let us consider whether each of these should be considered either at trial or as a sentencing factor.

Entrapment is not an excusing condition either according to the majority, subjective view, or to the minority, objective view. A defendant enticed by a private party is never entitled to the defense, even if the enticement is egregious and the defendant was not otherwise predisposed to commit the crime. Moreover, there is little theoretical reason to think that enticement should be a fault-based excusing or mitigating condition. Enticements are more like offers than threats; the defendant was not being coerced in any way. Agents should be fully expected to refuse offers to violate the rights of other people. If the law wishes to adopt a policy-based defense to deter police misbehavior or the like, it may of course do so, but enticement should not be a sentence-mitigating factor.

Reducing a sentence because a longer sentence will produce unusual hardship for the
See, e.g., United States v. Johnson, 964 F. 2d 124 (2d Cir. 1992)(defendant received substantially shorter sentence than co-defendant convicted of the same crime because defendant was the sole support of convict or her dependents is understandable consequentially, but the justification is independent of any rationale rooted in a theory of punishment and such reduction raises substantial equality problems. A lesser sentence may net cost our society much less in some cases, but hardship has no bearing on culpability unless it suggests some other mitigating factor, such as failed justification, in which case the other mitigating factor does the fault-based work. Hardship also has no necessary connection with the defendant’s dangerousness. A defendant who supports many dependents may be very dangerous and someone with no responsibilities may not be at risk for re-offending. Nonetheless, it is more socially costly to put some defendants in prison for longer periods than other defendants who are equally culpable and dangerous.

Although I understand the motivation behind hardship mitigation, the violation of equality is too strong to permit this. For example, it would be difficult to convince two criminals convicted of precisely the same crime, including the same fault-based enhancing and mitigating factors, that one should leave prison earlier because he or she had dependents. After all, achieving fair economic redistribution is not a goal of the criminal justice system. The rationale for hardship reduction is frankly too intellectual, too theoretical, to overcome the ideal of and social emotions associated with equality when suffering state-inflicted pain is at stake. This is especially true because many of the variables that would support a finding of hardship could be “gamed” or are genuinely matters of moral luck.

If we decided to adopt a hardship reduction, to avoid gross inequality it needs to be

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86See, e.g., United States v. Johnson, 964 F. 2d 124 (2d Cir. 1992)(defendant received substantially shorter sentence than co-defendant convicted of the same crime because defendant was the sole support of ).
cabined by clear, objective criteria that would apply to all claimants and that would carry a legislatively-fixed reduction in sentence. Hardship per se has nothing to do with criminal guilt, so there would be no objection to considering this factor at sentencing. For the same reason, I would place the burden of persuasion on the defendant to demonstrate that the criteria for hardship are met.

Co-operation is a difficult issue because it seems so necessary for effective law enforcement and prosecution, especially for those crimes without complaining victims, such as drug crimes that now account for 40% of the federal docket and 30% of state dockets. On the other hand, as a variable bearing on desert and danger, co-operation occurs after the crime charged and thus has no relation to fault for that offense. At most, it may indicate diminished future dangerousness. Mostly, however, it indicates that the defendant is bargaining for a reduction in time served.

It is impossible adequately to address co-operation without considering the crisis of over-criminalization. This topic goes far beyond the purposes of this paper, but many people think that the solution is not bargains for cooperation, and, instead, decriminalization of many of these crimes. Even if this solution were adequate for victimless crimes, however, it would not deal with the many undeniably serious offenses where the only effective witnesses may be co-defendants. If these cases were considered sufficiently serious to warrant a co-operation mitigation, I would require the co-operation to be necessary and substantial and would want a legislatively-mandated reduction. I would not consider ease and efficiency of prosecution to be sufficient reason to offer the mitigation. If the prosecution can prove its case without co-

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87But see, Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, Cincinatti LR (examining the costs of co-operation)
operation, it should do so. Again, only if co-operation will be a but-for cause of successful prosecution should the mitigation be offered.

Genuine remorse—assuming that we could be sure of its validity—again does not bear on the offender’s desert for the crime charged. It does indicate an acceptance of responsibility, an admission of moral guilt, and it may signal that the offender will be less dangerous in the future than if he or she had not experienced and expressed remorse. I would not offer mitigation for this factor. It is too difficult to be certain it is sincere and there is no guarantee that even the genuinely remorseful criminal might not later feel remorse about being remorseful. The criminal should have thought better about his duties and the rights of his fellow citizens before committing the crime. If he is genuinely remorseful and it should matter, I would leave the positive consequences to a higher power. If we accept the validity of remorse, the burden of persuasion should be on the defendant because the assessment is of a subjective state and one that almost always can not be confirmed by observations of objective behavior in contexts in which the defendant has nothing to gain from remorseful behavior.

6. Diminished Dangerousness

Although greater dangerousness might justify a sentence enhancement on consequential grounds, I have argued that the criminal law should not do this. But should a defendant receive a reduced, mitigated sentence because he or she is less dangerous than the average defendant convicted of the same crime? The person will be treated less harshly, so there is reason to be less concerned about the empirical validity of the judgment. On the other hand, the defendant who does not receive this mitigation has cause to feel aggrieved when others convicted of the

88Supra Part III.B.2
same crime suffer much less state-inflicted pain based on weak evidence. The ideal of equality suggests that there should be no mitigation for diminished dangerousness unless the empirical basis for the mitigation is well-established.

Assuming that the empirical basis for predictions is established, once again, clear, objective criteria for substantially diminished dangerousness should be developed for this mitigation. Controlling dangerousness is a central goal of criminal justice, so I would require that this factor be tried to the jury. *Apprendi* suggests that mitigating factors need not be tried to the jury,\(^89\) but I would make all core criminal justice concerns jury questions. The defendant effectively will have the burden of production, and because this factor does not involve fault, I would place the burden of persuasion on the defendant. The mitigation would carry a legislatively-fixed reduction in sentence.

Reduction of prison time for good behavior is distinguishable. It has nothing to do with culpability or dangerousness for the crime that resulted in the sentence. It is a way of rewarding cooperative prisoners and providing an incentive to all to cooperate. It also does not violate the equality principle. Assuming that it is administered fairly, all prisoners are precisely similarly situated and have the same opportunity for reduction.

IV. Conclusion

Contrary to the usual wisdom, the number of categories of appropriate sentence enhancement and mitigating factors is quite limited and all can be tried to the jury without unduly complicating or lengthening trials. Legislatively-fixed increases and decreases in sentences can achieve both reasonable fairness and equality. There is little reason to believe that

\(^{89}\) *Apprendi*, supra note __, at ___ (Thomas, J., concurring)
sentencing discretion exercised by sole, essentially unconstrained individuals will be fairer and
there is much reason to believe that it is often arbitrary. The system proposed will be vastly
more transparent to potential criminals, defendants and the public. For potential criminals, the
guidance function of criminal law and its deterrent function generally will be increased. For
defendants, greater certainty will be advantageous as they decide whether to plead guilty or go to
trial. For the public, greater transparency will inspire greater confidence that criminal justice is
being accomplished by the peoples’ representatives, legislators, and most important, the jury as
the bulwark between the State and the accused.

Nothing that this article proposes will prevent prosecutors from overcharging or will
prevent legislators from creating too many crimes and imposing unduly harsh sentences. There
is not much reason to believe, however, that judges with sentencing discretion are now
exercising a substantially corrective role, especially in an era of constrained discretion, and
discretion creates the dangers I have identified. The appropriate cure for the ills of overcharging,
overcriminalization, and overpunishing must come from within those institutions that create the
ills. Prosecutors and legislators must heal themselves. For the nonce, however, substantial
increases in transparency and equality will make the criminal justice system more fair.