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Desert and Fairness in Criminal Justice

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ABSTRACT: Moral condemnation has become the public narrative of our criminal justice practices, but the distribution of criminal sanctions is not and should not be guided by judgments of what individual wrongdoers morally deserve. Criteria for evaluating a person's liability to criminal sanctions are general standards that are influenced by how we understand the relative social urgency and priority of reducing crimes of various types. These standards thus depend on considerations that are not a matter of individual moral desert. Furthermore, the moral desert is doubtful when members of socially disadvantaged groups face unequal prospects for being subjected to criminal justice sanctions. Social injustice is an intolerable context for distributing punishment according to individual desert. A rights-protecting scheme of criminal justice might permissibly burden individual offenders, but not as an expression of what they morally deserve.

I

Distributive justice and criminal justice appear to be complementary and non-overlapping dimensions of social justice. Distributive justice concerns our collective responsibility for the background social and institutional conditions of individual choice. Criminal justice concerns our individual accountability for abiding by the background social rules. In fact, precisely because just institutions protect a realm

of individual liberty and choice, it would seem that questions of background institutional design can and should be separated from the criminal evaluation of individual conduct.

We should accept a division of labor between distributive justice and criminal justice. It is plausible to maintain that distributive justice concerns our collective responsibility for the background institutions and that criminal justice concerns the accountability of individuals for abiding by the background rules. Still, it is a mistake to hold that the criteria of individual accountability can be settled apart from considerations of distributive justice. The criteria for evaluating a person's liability to criminal prosecution and criminal sanctions and for determining the appropriate severity and social meaning of criminal sanctions are and should be influenced by how we understand the requirements of distributive justice. This means that criminal accountability should not be understood as a matter of individual desert.

II

Distributive justice, broadly speaking, is a subject that concerns the distribution of the benefits and burdens of social cooperation. Distributive justice spans questions about the just distribution of education, medical care, and opportunities for political participation, as well as basic rights and liberties, and income and wealth. In connecting the distribution of these burdens and benefits with a notion of social cooperation, a conception of distributive justice expresses a social ideal. Working out principles of distribution is a way of giving content to this ideal. It is a way of elaborating an understanding of the sort of society we would like to live in and of what members owe one another. Since the mutual obligations of justice can be achieved only through social cooperation, a conception of distributive justice expresses a conception of collective or shared responsibility. Justice is something that we should and could only bring about together.

Philosophical accounts of distributive justice advance claims about the content of distributive justice as well as views about its source and justification. These claims span a spectrum from libertarian defenses of a minimal state to ideals of egalitarian redistribution. A view that is not particularly popular among political philosophers is the notion that a just cooperative scheme should be meritocratic. A reason this is not popular is that it is hard to square the notion of a meritocracy with the premises of a democratic form of government. A meritocracy is an institutional arrangement that is set up to reward participants differently according to what they deserve, where the notion of desert has enough substance to function as a reason to organize institutions in a particular way. Desert, in this sense, contrasts with what John Rawls referred to as legitimate expectations—the notion that people are entitled to what it is legitimate to expect under established institutional rules.¹ The notion of legitimate expectation, as Rawls develops it, is not freestand-

ing, but rather belongs to a conception of justice that specifies the content of relevant institutional rules on grounds that have nothing to do with desert.

While some people are drawn to the idea that the distribution of income and wealth should, in some sense, reflect the value of individual contributions to the economy, few philosophers would defend the idea that the distribution of basic rights and liberties should reward desert, whatever that could mean, as though some people might fail to merit basic liberties or civil rights. An unequal distribution of basic rights and liberties according to desert would depart radically from the idea that all citizens are political equals and should enjoy the same basic rights, liberties, and fair opportunities.

When it comes to criminal justice, however, the idea that desert is the proper basis for revoking or qualifying some people's most basic rights and liberties is a popular view. Criminal offenders are deprived of their basic liberty during a period of incarceration and are often denied their political rights and entitlements to social benefits—such as student loans, housing assistance, and unemployment payments—even after release from prison and sometimes for the rest of their lives. According to a familiar moral philosophy, these measures could be justified if and only if they are deserved. As Douglas Husak puts it, "Punishment is justified only when and to the extent it is deserved."² Mitchell Berman writes, "A person who unjustifiably and inexcusably causes or risks harm to others or to significant social interests deserves to suffer for that choice, and he deserves to suffer in proportion to the extent to which his regard or concern for others falls short of what is properly demanded of him."³ Herbert Fingarette calls retributive justice, "a necessity internal to law."⁴

At the core of this view is the retributive ideal: that wrongdoers should receive their just deserts and, specifically, that wrongdoers should suffer in proportion to their culpable wrongdoing. This notion of just deserts is taken to be a foundational notion that itself justifies a criminal justice system. That is, retributive justice, as I will understand it, is a view about the overall purpose of a criminal justice system—to give wrongdoers their due. It is also a view about how punishment should be distributed within the system: the guilty ought to be punished and they ought to be punished in proportion to their culpable wrongdoing. Note that on this view, culpability and wrongdoing are separable elements. Wrongfulness is a feature of the agent's act while culpability characterizes the ill will with which the agent performs the action. Only when both elements are present is an agent thought to deserve a retributive response. A wrongdoer is blameless when her wrongdoing is excused and, conversely, a person's motives might be blameworthy although her behavior fails to bear these motives out.

The contrast between distributive justice and retributive justice has been emphasized explicitly by Samuel Scheffler. Scheffler stresses as fundamental this distinction: distributive justice is holistic while retributive justice is individualistic. As Scheffler explains it, correctly in my view, distributive justice is holistic in this sense: its allocation of a benefit to a particular individual depends on the place of that allocation in an overall distributive scheme.⁵ A person's productive contribu-

tion, as well as its appropriate reward, depends on the productive activity of other people—it depends on a scheme of social cooperation. For example, a surgeon relies on a team of assistants. A server depends on a cook. As these examples indicate, the economy is organized around a distribution of labor and requires social cooperation. Furthermore, in a market system, economic benefits are subject to laws of supply and demand. The economic value of an individual's contribution depends on other people's values and choices, and the relative scarcity of her skills and products. It is not plausible to maintain that these factors reflect considerations of individual desert. Distributive justice is also holistic in this sense: conferring economic benefits on some people affects the socioeconomic status of others. Increasing the wages of some people may result in layoffs for others. Wealth brings with it social privilege, including political power, which reduces the political voice and influence of the less wealthy. Distributive shares in these and other ways are interconnected, making it difficult to anchor the notion of desert.

Criminal justice, however, is individualistic, or so the retributivist believes. The idea is that when the choice to commit a moral wrong is "freely chosen"—that is, when the choice is not coerced or otherwise caused by another person—or when choice accurately reflects traits of the offender's character or will, the subject deserves a blaming response. Punishment is a kind of blaming—more specifically, harming—response. It is individualistic in this core sense: its appropriateness is determined not in connection with the anticipated social effects of punishment but solely by the offender's morally culpable wrongdoing, which is conceived to be disconnected from other people's choices. Aside from complicity or conspiracy as criminal offenses, individual offenses are not understood, morally speaking, in relation to interpersonal dynamics or design. The wrongdoing of one person does not increase or decrease the guilt of others (unless they conspire), and culpable wrongdoing, individualistically conceived, is understood as necessary and sufficient to merit a harming response.

It is true that retributive justice is individualistic, in some if not all of its central aspects. It is not clear, however, that we should think of criminal justice in retributive terms. I believe our understanding of criminal justice is ethically distorted when we understand criminal justice apart from the framework of premises and principles that comprise a conception of distributive justice and its associated notion of collective responsibility. Criminal justice, as I will discuss it, can and should be thought of in relation to the requirements of distributive justice. Distributive justice, I have emphasized, is a matter of collective responsibility to promote certain basic shared interests. The joint nature of this responsibility and aim bears on the formulation of a defensible conception of criminal justice. This means that criminal justice cannot be individualistic in the way proponents of the retributive view suppose.

In what follows, I will argue that criminal justice concerns the just allocation of the burdens of preventing future crime and of properly acknowledging and affirming the rights of crime victims. I will defend the view that these burdens are

calibrated within a conception of social justice that aims to advance collective aims and priorities. I will specify some holistic elements of this scheme and show how they bear on the moral assessment of individual wrongdoing. Then I will sketch out the parameters of a nonretributive account of criminal justice that fits comfortably with these holistic elements.

III

Many problems of justice involve wrongdoing on the part of some people and a responsibility on the part of other people to address that wrongdoing. Facts about who has acted wrongly do not settle the matter of who is obligated to respond. Duties of humanitarian assistance to victims of unjust wars, and other duties of rescue from mistreatment, comprise familiar extensions of responsibility to encompass the wrongful behavior of other people. Facts about who has acted wrongly also do not settle the matter of how wrongdoers should be treated. Appropriate responses to wrongdoing will be influenced by the collective aims and responsibilities of the people who are obligated to respond and to reckon with the moral significance of harm done. Notions of shared responsibility can weaken or displace a focus on individual desert.

The idea that justice is a shared responsibility—that we share responsibility, generally speaking, to promote justice and to combat injustice is, in fact, quite pervasive. It belongs to any conception of justice that incorporates a norm of reciprocity. A person's part in the joint enterprise of justice depends on and is demanded by shared commitment to collective aims within a cooperative scheme.⁶ Even the most individual assessments of accountability—for criminal wrongdoing—reflect collective obligations to respond to the violations of individual rights: to take these violations seriously, to address the offender, and to vindicate a victim's rights and equal social standing. It is easy to overlook important senses in which assessments of individual accountability depend on a measure of collective liability. While collective liability for individual criminal wrongdoing does not drive out assessments of individual accountability, they provide the context for interpreting and calibrating those judgments. I want to call attention to three holistic aspects of the assessment of criminal guilt.⁷

First of all, an appropriate institutional response to individual criminal wrongdoing must generalize across a class of offenders: it must apply to future as well as to present cases and should do so in a consistent way. This pressure to generalize is a matter of fairness: it involves a judgment that we make relative to a comparison class. Fairness requires that offenders who have committed similar wrongs should be treated similarly. A legitimate legal system—the integrity of its core principles—relies on this principle. This pressure to generalize means treating some individuals more harshly or more leniently than they might individually deserve, whatever

exactly the retributivist's measure of individual desert might be.

Second, an appropriate institutional response to criminal wrongdoing will reflect a justifiable allocation of the expenditure of collective resources. This judgment is a function of the scale of a type of criminal behavior—how widespread it is—in addition to the seriousness of an offense, as judged by its impact on individual victims. In other words, the gravity of a crime type is a function of the overall harm done by offenders of that crime type, as well as the typical harm done to victims. Appropriate punishment is scaled not just according to the urgency of preventing wrongdoing that is particularly serious from a victim-centered perspective, but also with attention to how widespread that type of offense is or threatens to be. In criminalizing types of wrongdoing, we determine which forms of misconduct are causing serious problems, as judged by this complex measure. In this sense, assessments of individual liability to punishment reflect social priorities. They are made with reference to generalizations about the relative social importance of securing compliance with the norms in question. We rank the social urgency of types of criminal offense, whether gun violence, drug use, or embezzlement. The evaluation of individual offenders is guided by social norms that rank social priorities according to a collective measure of their urgency. In that sense, relevant judgments of criminal liability are not individualistic. They are not determined by autonomous considerations of individual desert.

Third, an appropriate response to unjust violations of individual rights is a function of what makes the exercise of coercive political power legitimate. Political legitimacy concerns matters of proper moral authority in the administration of state power. Politically legitimate institutions, at least on a liberal and democratic understanding, must comprise a scheme of social cooperation on equal and inclusive terms. If they do not, the public discourse that purports to justify state policy and institutional practice does not either represent or address persons who are socially subordinated or excluded. Officials whose institutional authority derives from a democratic populace would lack the representative authority their actions purport to express. This is especially troubling when it comes to the coercive functions of the state, since coercion requires robust and careful justification. Threats to equality and inclusion challenge the democratic legitimacy of coercive functions of the state—unless the threats are met by a collective expression of commitment to recovering and maintaining cooperation on fair terms.

A criminal justice system is especially vulnerable to legitimacy challenges, because the burdens of crime and of criminal punishment fall so heavily on persons who are already socially disadvantaged. To forestall the challenges to criminal justice institutions posed by social inequality, a criminal justice system should be designed to promote a collective expression of commitment to the value of social cooperation on equal and inclusive terms. A legitimacy-protecting response to criminal violations must be (at least) two-fold. First, criminal justice institutions must recognize that violations of basic rights generate collective duties of redress. Citizens, generally speaking, share a duty to redress the criminal violation of any

member's rights. In the next section of the paper I will elaborate the idea that a collective commitment to the protection of equal rights is required for democratic legitimacy.

In the remainder of this section, I discuss a second aspect of the legitimacy-protecting response to criminal acts: the equal status of citizens in a democratic society requires protective measures that reasonably and fairly induce all citizens to comply with the law. That is, the legitimacy of our criminal justice practices depends on whether our social institutions include measures designed to shape the conditions of individual choice in a way that is conducive to successful compliance with morally defensible social norms: our institutions should support compliance, generally speaking, with just law and do this on equal terms. The deterrence value of punishment serves this function but so do other crime-preventing aspects of social justice, like fair equality of opportunity for education and employment. Crime prevention should be connected in this way with social justice.

Acknowledging this role for collective responsibility means that we should be especially sensitive to contingencies that bear on individual choice that are not random. Specifically, we should be sensitive to whether criminal choices are conditioned by a broader context of injustice that incentivizes the transgression of social norms and legal prohibitions, such as poverty in a context of limited opportunity and serious material inequality, as in the United States, and even mass incarceration itself, which renders those caught up in the criminal justice system more vulnerable to future involvement in crime.⁸ We should also be sensitive to whether law enforcement, criminal prosecutions, and sentencing practices display patterns of social discrimination.⁹ We should be alarmed by the fact that members of racially disadvantaged groups have a significantly higher chance of being under the control and supervision of the criminal justice system—overwhelmingly for nonviolent drug offenses, which they commit at no higher rate than whites.¹⁰ This unequal probability constitutes an objectionable form of social inequality, and it suggests complicity or complacency on the part of more privileged groups—an abdication of shared responsibility to ensure favorable odds of compliance, on equal terms, with just law, and to ensure the equal standing of persons before the law. We should expect that under conditions favorable to social justice, prospects for being subjected to the criminal justice system would be more or less evenly distributed across the population. In a society that implements principles of distributive justice, including relevant measures to prevent racial domination, and that has redressed its history of racial injustice, all persons would have substantially equal opportunities to lead a decent, materially secure, and law-abiding life. The criminal justice system would not be heavily racialized.

Retributivists are woefully indifferent to facts about standing social inequalities. This seems especially repugnant in a philosophy that is already deeply situated in the territory of nonideal theory. We can and should maintain that individual wrongdoing is a necessary condition of just punishment, but this does not imply that a measure of an offender's just deserts is provided by the nature of his wrong-

doing. Instead, I have argued, socially urgent priorities, going beyond a deontological assessment of individual wrongdoing, will affect the criminalization of offenses as well as a just schedule of punishment. These considerations—such as the scale of a social threat—can, we have seen, be at odds with the notion of individual desert. Furthermore, as I will elaborate shortly, the wrong done to victims and, indirectly, to other people can give rise to reasons to punish wrongdoers even when social injustice undercuts assessments of individual desert.

I am arguing that even when social injustice does not undermine reasons to punish, it can undermine the moral standing of public authorities to stigmatize offenders as deserving punishment. When officials who administer punishment cannot represent in good faith a collective commitment to reasonable and equitable measures to incentivize compliance with the law and to apply the law on equal terms, they do not represent the equal standing of all members of society. This limits the moral authority of not only officials, but also the constituencies they represent *de facto*. When we admit collective responsibility for the conditions of individual choice, *i.e.*, for social justice, this should deepen our sense that social injustice is an intolerable context for distributing punishment according to individual desert. I am stressing the relevance to criminal justice of standing inequalities. Affirming individual desert as the basis of punishment signifies a collective abdication of responsibility for ensuring that all citizens have an equal opportunity to enjoy their basic rights and liberties and to lead a materially secure and law-abiding life. Social and institutional inequalities that affect a person's liability to punishment seriously threaten the legitimacy of our punishment practices.¹¹ In particular, the presence of social injustice threatens the legitimacy of our practices of criminal punishment when these practices purport to be grounded by individual desert.

This argument depends on a view of punishment as blaming behavior, in a retributive sense—the view that punishment stigmatizes offenders as deserving retribution. Insofar as punishment expresses retributive sentiments, those who administer punishment in the context of social injustice will lack moral authority. The legitimacy of the state's power to stigmatize offenders as deserving the hard treatment and social exclusion they experience is compromised by social inequality, even when the criminal behavior in question is morally wrong. The authority to focus punishment as a matter of individual desert requires that the boundaries of individual responsibility, so to speak, be drawn with collective moral authority.

Legislation regarding criminal justice is surrounded by a vituperative public moral discourse that enflames righteous condemnation of offenders and hard treatment of them. We should care about the public practice of stigmatizing offenders as deserving to be hurt and ostracized because it is connected with a social tendency to overpunish. Even after sentences are served, the stigma of incarceration generates permanent social exclusion that expresses a form of hatred. My hope is that moral scrutiny of this discourse of condemnation could lead to more rational and ethical punishment practices.

IV

Next, I want to consider a second aspect of the political legitimacy requirements on our criminal justice institutions. I have suggested that a collective commitment to equality and inclusion in a scheme of social cooperation implies a collective duty of redress for rights violations. Without a commitment to redress, a political society is not serious about rights. I will now elaborate this notion of redress and argue that collective measures to defend against threats to basic rights lead us to a certain notion of individual accountability—without desert. This notion of accountability is required by rights-protecting measures that could be defensible even under unjust social conditions.

Criminal justice always describes a realm of nonideal theory: how we ought to respond to infractions of the requirements of justice. Basic to institutions with democratic aspirations is a collective need and prerogative to defend against violations of individual rights. This prerogative applies even when people who threaten or violate other people's rights do not deserve to suffer because they are not, in a relevant sense, morally blameworthy. Our obligation to protect one another's basic rights is stronger than our obligation to protect rights violators from defensive measures. We can and should defend against rights violations—even under conditions of social injustice. But since offenders might not morally deserve the burdens we impose upon them, defensive measures should not express blame. A victim-centered approach to defending rights can and should denounce the violation of rights without engaging in moral blame.

This position expresses an alternative to retributive thinking about justice.¹² I propose that we think of a justifiable criminal sentence as a burden that, with certain important limits, can reasonably be placed on offenders in response to persons harmed or threatened by the offender's crime. Although the punitive burden is placed on offenders, its imposition expresses our collective obligation to address the offender's violation of other people's rights. The notion that citizens generally incur obligations to address, indeed, to *redress*, the transgressions of our compatriots signals that harms done directly to victims, and indirectly to other people, are morally significant and of collective concern. Harms are morally significant when the interests involved are fundamental and when the harms were caused by wrongdoing. The basic normative claim I am defending is this: when offenders cause and continue to threaten significant harms through their criminal wrongdoing, we may collectively impose costs on offenders in order to defuse the threat they pose. Specifically, we may avert harms to potential victims or to the public's interest by burdening offenders with punishment in order to deter crime. By doing this we affirm the importance of the rights that were violated as well as the urgency of advancing their protection.

This rationale describes a burden-shifting principle of distributive justice.¹³ The principle maintains that it is more appropriate that offenders bear the burden of defusing the threat of harms of the sort they have wrongfully caused than that

persons whose rights were violated should suffer without redress. This distributive principle represents a fair way to distribute the burdens of defusing unjust threats because the alternative is to burden victims with un-redressed rights violations. As I have already suggested, our obligation to protect basic rights is stronger than our obligation to protect rights violators from a burden of redress. Redress is achieved, it might reasonably be claimed, when future crime is deterred and the value of basic rights is affirmed. While the distribution of punishment tracks offenders' criminal guilt, the burden on offenders is not determined autonomously or individualistically, as a matter of desert but, instead, in relation to all the factors relevant to the criminalization of offenses, including the burdens other people could reasonably be expected to bear. People whose rights were violated cannot reasonably be expected to bear the burden of that violation without redress, when coercive rights-protecting measures could instead be borne by the individuals who make those measures necessary. This is true even when the imposition of these measures on offenders must be viewed as a matter of their bad moral luck.

The burden-shifting principle I have described does not invoke the notion of moral blame that is central to the retributive view. There is no foundational claim that culpable wrongdoers deserve punishment. Offenders are burdened with punishment when and only because the alternatives are morally worse: that persons whose rights have been violated should suffer without redress. Moral assessment of offenders is limited to an assessment of their criminal acts as wrongful violations of individual rights or the public's interest, together with a comparative claim about the relative appropriateness of distributing a collective burden of redress for harm done. The distributive claim depends, it is true, on the notion that we may burden offenders in order to redress wrongful harms they have caused. But this may be true, I have proposed, even when wrongdoers are not to blame (or are not fully to blame) for their wrongdoing. Perhaps blame is shared, if it is appropriate at all. Still, persons who have wrongfully harmed other people are in a different moral position than are people who have done nothing to violate or directly to threaten victims' rights. This claim is familiar from tort law, which maintains the liability of tortfeasors apart from their moral blameworthiness. Corrective justice, as some philosophers of tort law call it, reflects the moral importance of redressing harms caused by behavior that violates an objective standard of due care, whether or not the tortfeasor is morally blameworthy for having violated that standard.¹⁴ Criminal law requires, in addition, a notion of subjective fault (*mens rea*), but it does not depend on a claim about individual desert.¹⁵ I am arguing that this notion of individual responsibility is better construed as a matter of accountability without desert.

Those who violate the rights of other people incur a liability relevant to redressing harm done. In tort law a duty of redress takes a private form; in criminal law redress is formulated in terms of the public's interest and obligation. A duty to address criminal wrongs generalizes across the citizenry, burdens the class of offenders of a crime type with punishment, and is addressed to the class of victims

and potential victims of that crime.¹⁶ The permissibility of a collective scheme of redress is driven by the moral importance of rights and the basic function of law to guide people's actions, generally speaking, in a way that respects and protects rights. That is, collective moral authority to implement a scheme of redress comes from our shared obligation to protect rights and other fundamental common interests.

The moral importance of redress for wrongdoing remains relevant under conditions of injustice, provided that the offender's crime is in fact morally wrong under those conditions and that the punitive burden is required to accomplish redress.¹⁷ Socially urgent grounds for punishing offenders of certain crimes obtain under unjust conditions since, as I have already affirmed, offenses such as murder, rape, and kidnapping are offenses we should repudiate and take measures to deter, despite the presence of serious social injustice. We may rightly reject much criminal wrongdoing on moral grounds, even under unjust social conditions. When this is not the case, serious questions about the permissibility of punishment arise.

Under a legitimate scheme of redress, the relevant burden imposed on offenders would be specified as a function of the moral significance of the harm done and the expected value of the sanctions imposed. Expected value must be positive or redress is not accomplished. Value is generated by preventing future crime, by vindicating the rights of victims and, when relevant, by clarifying legal prohibitions and the grounds for their importance. Preventing crime is accomplished through the deterrence, rehabilitation, or incapacitation of offenders and potential offenders. It is also accomplished by consolidating public commitment to respecting the equal rights of all members of society. When this public commitment is expressed in the repudiation of criminal acts and in associated efforts to reduce crime, the rights of victims are vindicated. The burden on offenders could be justified, I am proposing, when their subjection to criminal sanctions generates beneficial consequences such as these.

Because this justification of punishment requires a positive result, a redress approach contrasts with retributive thinking about punishment. The retributivist, as we have seen, maintains that a just sentence is a function of the magnitude of an offender's wrongdoing and his culpability for that wrongdoing. The retributivist seeks an equivalence between blameworthy wrongdoing and the offender's pain. By contrast, on the rationale I am proposing, a just sentence would be calculated by considering the importance of redressing harms done and the prospects for achieving redress. Punishment would function both as a means to achieving redress and as a symbolic expression of public commitment to seeking redress. It would not literally constitute justice.

The expressive dimension of punishment requires careful attention. Expressing the importance of redressing harm by imposing punishment implies that the corrective burden should be capped by its place in a rank ordering of crime types by severity.¹⁸ The corrective burden for more serious crimes should be greater than the burden imposed for lesser crimes. The penalty for murder, for example, would be more severe than the penalty for robbery, and that penalty, in turn, would be

more severe than the penalty for shoplifting. This is because imposing a sentence expresses our relative judgment of the severity of the crime committed and the urgency of redressing it. Consistency and fairness in sentencing would be promoted by distributing the burden of redress associated with a certain type of crime (more or less) evenly across the class of offenders of that crime type. All offenders of the same crime type would be sentenced within a certain range.

In focusing on relevant crime types, legal criteria abstract and generalize from the moral vices and blameworthiness of particular individuals in order to set a public standard. A focus on generalizable action-types fits with an understanding of criminal law as voicing reasoned and morally justifiable standards to guide behavior, generally speaking, and to redress the harms that crime causes. The relevant connection with morality, I have suggested, lies in the domain of determining that an act-type ought to be criminalized and in evaluating the relative severity of crime-types (and possibly, in the sentencing phase, the relative severity of examples of that crime type). It does not lie in the domain of forging a connection between criminal punishment and individual moral desert. We can avoid judgments of individual desert and skeptical worries about individual blameworthiness that may arise in particular cases. I have speculated that this would close off an avenue to overpunishment.

Punishment, so understood, is less threatening to the legitimacy of criminal justice institutions than is a retributivist rationale. On a redress rationale, punishment applies when and only when it is necessary for effective protection of basic rights and liberties. Corrective justice is compatible with compassion for offenders and with our obligations to address the social causes of their crimes. Demonstrating compassion and humanity, and facilitating the social reintegration of ex-felons, are important measures to quiet the retributive sentiments.

V

My redress proposal is revisionist in recommending that criminal sentencing should not be guided by the moral condemnation of offenders, nor is its function to express blame. Instead its focus should be on the seriousness of crimes as violations or threats to the rights of victims and potential victims or to some other dimension of social good. Harm, so construed, morally requires redress. Instead of substantiating an offender's moral desert, we need only rely on the weaker nonretributive notion that it is more appropriate that offenders suffer the burden of redressing harms they have wrongfully caused than that those whose rights were violated should suffer without redress. This expresses a conception of corrective justice and, I have argued, the duty it generates is collective.

My approach targets attempts to segregate questions of distributive and corrective justice. Attempts to abstract questions of distributive justice from the "non-ideal" problem of criminality can lead us to miss how questions of responsibility

relate to the content of distributive justice. A broad notion of social justice can and should incorporate and integrate distributive and corrective concerns. This notion of social justice proposes solutions to social problems and individual needs, solutions that are sensitive to how those problems and needs came about as well as who is obligated to respond.

In sum, when we admit collective responsibility for the conditions of individual choice, that is, for social justice, this should deepen our sense that social injustice is an intolerable context for distributing punishment according to individual desert. The legitimacy of the state's power to stigmatize offenders as deserving the hard treatment and social exclusion they experience is compromised by social inequality—even when the criminal behavior in question is morally wrong and warrants a public safety response. Defenders of retributive justice worry that unless we affirm the retributive ideal we will neglect individual responsibility altogether in formulating criteria of criminal liability and we will have no legitimate grounds for incarcerating offenders. These conclusions do not follow. It is legitimate for us to protect ourselves from serious wrongdoing, even under conditions of injustice. Protective measures against serious wrongdoers represent a justifiable defense of individual rights and collective interests, a purpose whose justification does not require the retributive principle.

I have proposed that we expand the notion of distributive justice to consider its connection to matters of criminal justice and that we view these connected realms of justice as belonging to a broader notion of social justice. When structured by attention to the moral importance of individual rights, equality, and inclusion, distributive justice and criminal justice are related aspects of social justice.

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NOTES

1. See John Rawls, *A Theory of Justice*, 2nd ed. (Cambridge, MA: Harvard University Press, 1999), 273–77, and John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Harvard University Press, 2001), 72–74, 77–79.

2. Douglas Husak, "Holistic Retributivism," *California Law Review* 88 (May 2000): 82.
3. Mitchell N. Berman, "Punishment and Justification," *Ethics* 18 (January 2008): 269.
4. Herbert Fingarette, "Punishment and Suffering," *Proceedings and Addresses of the American Philosophical Association* 50 (August 1977): 499.
5. Samuel Scheffler, "Justice and Desert in Liberal Theory," *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), 191.
6. Or, at least, it depends on overlapping intentions. See, for example, Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000), especially ch. 3. See also Margaret Gilbert, *Sociality and Responsibility* (Lanham, MD: Rowman and Littlefield, 2000), especially ch. 2.
7. The first two are discussed in Erin Kelly, "Criminal Justice without Retribution," *Journal of Philosophy* 106 (2009): 451–58.
8. Lawrence D. Bobo, "Crime, Urban Poverty, and Social Science," *Du Bois Review* 6 (2009): 275–77. See also Todd Clear, *Imprisoning Communities: How Mass Incarceration Makes Urban Communities Worse* (New York: Oxford University Press, 2007).
9. The Canadian courts and government have been grappling with the significance to criminal justice of patterns of racial discrimination. In the decision *R v. Ipeelee*, the Supreme Court of Canada's chief justice wrote, "When sentencing an Aboriginal offender, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples." *R v. Ipeelee*, 2012 SCC 13 (2012) 1 S.C.E. 433.

Similar issues were considered in an Ontario Court of Appeals case, *R v. Borde*, in which the appellant submitted that the sentence should be reduced because of "systematic and background factors." The Court's summary of evidence states that:

The appellant filed a number of reports prepared by various groups concerning systemic racism in Canada. These various reports chronicle a history of poverty; discrimination in education, the media, employment and housing; and overrepresentation in the criminal justice system and in prisons. Common among these reports is the assertion that aside from the experiences of Aboriginal peoples, there is no other community in Canada that has faced and continues to face this combination of factors.

Among the reports filed by the appellant is the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995). This commission was established in 1992 to inquire into and make recommendations about the extent to which criminal justice practice, procedures, and policies in Ontario reflect systemic racism toward racial minorities, especially, black communities. One clear finding of the commission is that there has been a dramatic increase in prison admissions for black offenders in Ontario in recent years, especially for drug offenses. *R v. Borde*, Court of Appeal for Ontario C38189 (2003).

The judge decided that, given the serious nature of the crimes committed, the systematic and background factors should not affect the sentence. At the same time, the judge affirmed that, "Systematic racism and background factors faced by black youths in Toronto are important matters and in another case I believe that they could affect the sentence."

I am grateful to Monique Deveaux for these references.

10. See, for example, detailed discussion of this inequality in Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Color Blindness*, intro. Cornel West (New York: New Press, 2012).
11. For discussion of a legitimacy crisis in the U.S. criminal justice system, see Lawrence D. Bobo and Victor Thompson, "Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System," *Social Research* 73 (Summer 2006): 445–72; and Lawrence D. Bobo and Victor Thompson, "Racialized Mass Incarceration: Poverty, Prejudice, and Punishment," in *Doing*

Race: 21 Essays for the 21st Century, ed. Hazel R. Markus and Paula Moya (New York: Norton, 2010), 322–55.

12. The view I develop bears an affinity to the literature on restorative justice. See, for example, Gerry Johnstone, ed., *A Restorative Justice Reader*, 2nd ed. (Devon: Willan Publishing, 2013); Lode Walgrave, *Restorative Justice and the Law* (Devon: Willan Publishing, 2002); Margaret Urban Walker, *Moral Repair: Restoring Moral Relations after Wrongdoing* (Cambridge: Cambridge University Press, 2006); and Erin I. Kelly, “Reparative Justice,” in *Accountability for Collective Wrongdoing*, ed. Tracy Isaacs and Richard Vernon (Cambridge: Cambridge University Press, 2011). See also A. Von Hirsh, A. Ashworth, and C. A. J. Shearing, “Restorative Justice: A ‘Making Amends’ Model?” in *Proportionate Sentencing*, ed. Andrew von Hirsh and Andrew Ashworth (Oxford: Oxford University Press, 2005), 110–30; and R. A. Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001), chs. 3, 4–6.
13. For the idea of a burden-shifting principle of distributive justice, I am indebted to Daniel Farrell. See Daniel M. Farrell, “The Justification of General Deterrence,” *Philosophical Review* 94 (1985): 367–94.
14. See Jules Coleman, “A Mixed Conception of Corrective Justice,” *Iowa Law Review* 77 (1991–1992): 427–44; Stephen R. Perry, “The Moral Foundations of Tort Law,” *Iowa Law Review* 77 (1992): 449–514; and John C. P. Goldberg and Benjamin C. Zipursky, “Rights and Responsibility in the Law of Torts,” in *Rights and Private Law*, ed. Donal Nolan and Andrew Robertson (Oxford: Hart Publishing, 2012).
15. For discussion of the distinction between legal findings of subjective fault and moral judgments of desert, see my “Culpability and Fault in Criminal Justice,” unpublished manuscript.
16. Victor Tadros also relies on a notion of redress in developing a non-retributivist account of punishment. However, he conceives of the duty of redress as falling on individual offenders, while I am arguing that the duty is collective. See Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), especially ch. 12.
17. For doubts about the wrongness of some property crimes under conditions of social injustice, see Tommie Shelby, “Justice, Deviance, and the Dark Ghetto,” *Philosophy and Public Affairs* 35 (2007): 126–60.
18. For discussion of the ideas in this paragraph, see my “Criminal Justice without Retribution,” 458–59.

