

Tulsa Law Review

Volume 53 | Number 3

Spring 2018

Two Theories of Deterrent Punishment

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Recommended Citation

Jacob Bronsther, *Two Theories of Deterrent Punishment*, 53 Tulsa L. Rev. 461 (2018).

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TWO THEORIES OF DETERRENT PUNISHMENT

Jacob Bronsther*

INTRODUCTION	462
I. UTILITARIAN AND RETRIBUTIVIST RESPONSES	464
II. A SYSTEM OF PROTECTIONS	469
A. The Function of the Criminal Law	469
B. A Distinctive View	471
III. CRIMINALITY AND LEGAL RELIANCE	473
A. The Method of the Criminal Law	473
B. Criminality	474
IV. TWO PRINCIPLES OF PERMISSIBLE USING	476
A. Corrective Justice Means Principle	477
B. Defensive Means Principle	477
C. Corrective Justice Theory of Punishment	478
D. Social Defense Theory of Punishment	478
V. TWO OBJECTIONS	480
A. What About the Act Requirement?	480
B. Where's the Victim?	484
VI. THE DUTY TO RECTIFY AND THE CRIMINAL LAW	487
A. Explication	487
B. Critique and Comparison	490
VII. EMPIRICAL FOUNDATIONS	492
CONCLUSION: SENTENCING IMPLICATIONS	494

* PhD Candidate, Department of Law, London School of Economics and Political Science. For incisive comments on multiple drafts of this Article, I would like to sincerely thank Nicola Lacey, Peter Ramsay, and Patrick Tomlin. I am also extremely grateful for comments from Antje du Bois-Pedain, Antony Duff, Lindsay Farmer, Kimberly Kessler Ferzan, Stuart Green, Youngjae Lee, and participants at presentations at the Centre for Penal Theory and Penal Ethics at the University of Cambridge, the Gerald Gordon Seminar on Criminal Law at the University of Glasgow, the Society of Legal Scholars Graduate Conference at the University of Oxford, and a doctoral research seminar at the LSE Law Department. Finally, I am indebted to the editors of the *Tulsa Law Review* for their careful work.

INTRODUCTION

This Article inquires into the justification of state punishment. In developing this question it relies upon two premises. The first premise is that, to justify its extreme institutional costs, state punishment must deter crime to some sufficient degree.¹ The second premise is a moral principle. It is a variation of the prohibition on using people as a mere means to the greater good²: We must not sacrifice individuals as a means of mitigating harms or threats for which they have no responsibility. This “non-sacrifice principle,” in one version or another, founds the liberal legal order and its conception of the individual as an inviolable bearer of rights.³ The challenge—I think the central challenge of criminal law theory—is to explain how we can accept both premises and justify state punishment. For deterrent punishment seems to violate the non-sacrifice principle rather straightforwardly, as the state inflicts suffering upon an offender as a prudential warning to would-be future offenders, for whom the offender has no responsibility. I call this the “Means Problem.” Why, if at all, is the state entitled to use offenders as a means of bringing about general deterrence?

1. See Douglas Husak, *Holistic Retributivism*, 88 CALIF. L. REV. 991, 996 (2000) (“Retributivists must show not only that giving culpable wrongdoers what they deserve is intrinsically valuable, but also that it is sufficiently valuable to offset what I will refer to as the drawbacks of punishment. . . . The first such drawback is the astronomical expense of our system of criminal justice.”); VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 88–110 (2011) (arguing that while it is permissible for the state to harm offenders in order to encourage them to recognize that what they have done is wrong, only the project of general deterrence could justify the creation of costly state institutions); Michael T. Cahill, *Punishment Pluralism*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 25, 39 (Mark D. White ed., 2011) (“Punishment is not free; it costs money. Whether to punish, and how, and how much, are all questions that might be influenced by the financial cost of punishing. The adjudicative system that determines punishment, and the correctional system that imposes it, create direct costs and also opportunity costs, as time and money are dedicated to criminal justice rather than other things.”); ANDREW VON HIRSCH, *FAIRNESS, VERBRECHEN UND STRAFE: STRAFRECHTSTHEORETISCHE ABHANDLUNGEN* 42 (2005) (denying the need to punish if acts of violence and theft are rare); Claus Roxin, *Prevention, Censure, and Responsibility: The Recent Debate on the Purposes of Punishment*, in *LIBERAL CRIMINAL THEORY: ESSAYS FOR ANDREAS VON HIRSCH* 26 (AP Simester, Antje du Bois-Pedain & Ulfrid Neumann eds., Antje du Bois-Pedain trans., 2014) (arguing that “the protective function of the state” is “a basic precondition for the justified imposition of any penal sanction”). Even Michael Moore, who denies that crime prevention is necessary to justify the costs of state punishment, accepts that it is nevertheless an important reason in its favor: “[I]n any accounting about setting up institutions to achieve justice, against enforcement and other costs we must balance any benefits. One obvious benefit punishment gives is crime prevention, through deterrence, education, and incapacitation.” MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF CRIMINAL LAW* 151 (1997).

2. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 4:429 (1785), reprinted in *PRACTICAL PHILOSOPHY* 37, 80 (Mary J. Gregor ed. & trans., 1996) (“So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”).

3. See JOHN RAWLS, *A THEORY OF JUSTICE* 3–4 (1971) (“Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others.”); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 32–33 (1974) (“Why not . . . hold that some persons have to bear some costs that benefit other persons more, for the sake of overall social good? But there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up.”); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (1977) (“Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.”).

In responding to the Means Problem, this Article conceives of the criminal law as a system of protections—against murder, rape, assault, theft, drunk driving, etc.—upon which all citizens rely for their assured liberty. This, I argue, is the *function* of the criminal law. The maintenance of a relatively cooperative, non-violent civil society, and the confident planning and execution of an individual life within such a society, depends upon reliable criminal law protections. How these protections work, however, is perhaps counterintuitive. They rest, ultimately, not on police intervention, but on people *self-applying* criminal legal norms. This, I argue, is the *method* of the criminal law. To what degree can we rely upon the legal protection against, say, car theft? It depends on how much intent there is within the jurisdiction to steal cars. That is, when I park my car, I am not relying upon the police to protect it like personal guards, but rather upon other people within the jurisdiction to self-apply the rule against stealing cars.

Given this conception of the criminal law's function and method, we can more precisely understand the nature of criminal wrongdoing. When an individual offender fails to self-apply the criminal law, then, *in combination with other offenders*, he contributes to a wider social threat. This is "criminality." The more criminality there is within a jurisdiction, whether in a given moment or when considered over time, the less worth the criminal law has as a system of protections and as a guide to the possible incursions of others, and the less assured is our liberty. Criminality chills the exercise of our rights, forces us to take expensive precautions, and subjects us to unreasonable risks of harm. Deterrent punishment, which aims to decrease the amount of criminality in society moving forward and to reinforce the reliability of the criminal law's protections, is thereby permissible—that is, consistent with the non-sacrifice principle—in two possible ways.

First, in accordance with what I call *the corrective justice theory of punishment*, we can use an offender via general deterrence as a means of repairing the damage to our assured liberty caused by his past criminality contributions. He increased the level of criminality in the past to some degree, and the way to repair that, as a matter of corrective justice, is to use him to decrease the level of criminality in the future. Over time, ideally, it would be as if he had never contributed to criminality at all. In this way, the state would not "sacrifice" him to mitigate a problem for which he lacks responsibility, but rather force him to repair his own wrongdoing.

The corrective justice theory of punishment is at least partly backward looking, given its concern with an offender's past criminality contributions. It is the primary theory of punishment presented here, since it aims to justify the punishment of all offenders. By comparison, the second theory this Article introduces—*the social defense theory of punishment*—is entirely forward looking, and would provide an *additional* reason of punishment for some but not all offenders. It applies to those offenders whose commitment to offending is *ongoing*, that is, those offenders whom we still cannot reasonably rely upon to uphold the law. Such an offender would have partial responsibility for the ongoing, present threat of criminality, and his deterrent punishment could be justified on grounds of collective self-defense. Here again the state would not be "sacrificing" him to mitigate a problem for which he lacks responsibility.

Part I discusses the inability of the two dominant schools of criminal law theory—utilitarianism and retributivism—to resolve the Means Problem. Part II introduces and

defends the conception of the criminal law as a system of protections, contrasting it with retributivist views and Joshua Kleinfeld's "reconstructivist" theory. Part III explains how this system depends on people self-applying criminal legal norms and how offenders create the threat of criminality as a byproduct of their unreliability with regard to upholding the criminal law. The analogy is to factories contributing to smog and global warming as a byproduct of their pollution. Part IV introduces two moral principles to derive the corrective justice and social defense theories of punishment from this framework. Part V considers two objections, discussing the place of the act requirement and the role of the victim within the two theories. The offender is not punished on either view for the criminal act, in and of itself. The completed act—just like an attempt or a conspiracy—is rather *evidence* of the offender's prior and possibly ongoing criminal commitments, and thus of his prior and possibly ongoing criminality contributions. As to victims, I argue that while they do not play a direct or necessary role in justifying state punishment—given that the criminal wrong is to contribute to a threat that impacts everybody in the jurisdiction negatively—the state may have liability as a co-defendant to compensate victims for their civil damages. Part VI contrasts these views with Victor Tadros's "duty" theory of punishment, a theory which also aims to secure a non-consequentialist foundation for the pursuit of general deterrence. Part VII considers the empirical assumption upon which this justification of state punishment rests: social peace and cooperation in modern society depend on effective threats of criminal punishment. Finally, the conclusion discusses the sentencing implications of the two theories. I argue that they would license a mild system of punishment by comparison to the current federal and state sentencing schemes, given the tenuous relationship between punishment severity and crime deterrence.

I. UTILITARIAN AND RETRIBUTIVIST RESPONSES

Utilitarian and retributivist theories of punishment cannot provide satisfactory answers to the Means Problem. With regard to utilitarian theories, this conclusion is easy to establish. On the utilitarian view, punishment is an "evil," as Jeremy Bentham writes, insofar as it causes suffering, and its justification depends on, and only on, whether it prevents "greater evils."⁴ One's responsibility for those "greater evils" is not, in and of itself, a relevant moral consideration, and utilitarians—unlike retributivists—have a famously hard time explaining what is wrong exactly with "punishing" an innocent person if doing so would happen to prevent crime and maximize happiness (or whatever the utilitarian in question wants to maximize).⁵ If we accept the non-sacrifice principle—

4. JEREMY BENTHAM, THEORY OF LEGISLATION 360 (C.K. Ogden ed., Harcourt Brace Co. 1931) (1871).

5. See Saul Smilansky, *Utilitarianism and the 'Punishment' of the Innocent: The General Problem*, 50 ANALYSIS 256, 257 (1990) (arguing that the question of punishing the innocent is not merely philosophical, because "in the creation and daily application of the criminal law we are constantly facing a general situation in which utilitarians would be obliged to promote the 'punishment' of the innocent"); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (arguing that a form of "rule utilitarianism" could save utilitarianism from punishing the innocent). But see J. Angelo Corlett, *Making Sense of Retributivism*, 76 PHILOSOPHY 77 (2001) (criticizing Rawls). I place the word "punishing" in quotes here because, according to some theorists, only the *non-innocent* can be punished, as an analytical matter internal to the concept of punishment. On this view, the concept of punishment refers only to a particular response to *wrongdoing*, such that one who has committed no wrong cannot be punished. Rawls, for instance, refers to the infliction of penal harm on the innocent not as punishment, but as "telishment." Rawls, *supra*, at 11. See also Patrick Tomlin, *Innocence Lost: A Problem for*

whereby we refuse to use people to mitigate harms or threats for which they have no responsibility—then our theory of the criminal law and state punishment cannot be utilitarian.

“Traditional” retributivists, meanwhile, who see the good of punishment as analytically connected to an offender’s suffering, would argue that they are exempt from the Means Problem.⁶ They would argue that to cause an offender to suffer in proportion to his wrongdoing is not to use him as a means toward any end; it is to generate the intrinsic good of moral desert. Traditional retributivists understand this desert claim in one of two ways. First, according to “strict” retributivists like Michael Moore (and maybe Kant) it is grounded in the unadorned conviction that wrongdoers deserve to suffer.⁷ Second, “fair play” retributivists like Herbert Morris, Jeffrie Murphy, and Richard Dagger understand this desert claim to derive from a commitment to fairness.⁸ If we assume that an offender has benefitted from everyone else’s restraint in following the law—not always a safe assumption, Murphy argues⁹—then he has gained an unfair advantage by breaking the law and failing to restrain himself in turn; the harm or suffering of punishment is thus deserved as a means of stripping away the offender’s unfair gain. Retributivists of either stripe would argue that if crime deterrence happens to result from retributivist punishment, the state has not thereby used an offender impermissibly for the purpose of achieving that result. Any social benefit that results from giving—and intending to give—an offender what he deserves is a “happy surplus,” as Michael Moore writes.¹⁰ In this way, they would conclude, the state can kill two birds with one stone, generating sufficient deterrence to justify maintaining the institution of punishment as a mere byproduct of giving offenders their just deserts.¹¹

But even if offenders deserve to suffer in accordance with traditional retributivism,

Punishment as Duty, 37 LAW & PHIL. 225, 229 (2017).

6. While I distinguish between “traditional” and “censuring” retributivists, in considering them as part of the same tradition (and in defining retributivism *simpliciter*), I follow Mark Michael, who writes, “For a utilitarian, the event that justifies punishment occurs subsequent to the punishment, whereas for the retributivist the punishment and its justifying event/state of affairs begin simultaneously.” Mark A. Michael, *Utilitarianism and Retributivism: What’s the Difference?* 29 AM. PHIL. Q. 173, 175 (1992). Retributivists, according to Michael, see the justifying good of punishment (say, the intrinsic good of deserved suffering) as being connected analytically to punishment itself. For utilitarians, by comparison, the relevant good (say, crime deterrence) is “epiphenomenal” to punishment. *Id.* at 178. Michael’s theory thus entails that “negative” retributivists, like Anthony Quinton, are not genuine retributivists. Negative retributivists believe that wrongdoing makes offenders *liable* to punishment, but that other positive reasons or goods, like crime deterrence, justify the actual infliction of punishment; the justifying good that punishment creates on this view is thereby epiphenomenal to punishment itself. See Anthony Quinton, *On Punishment*, 14 ANALYSIS 133 (1954).

7. See MOORE, *supra* note 1; Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (Ferdinand Shoeman ed., 1987) (arguing that criminal punishment, like a person’s right to equal treatment, is justified “because, and only because” it is morally deserved).

8. See Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968); Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973); Richard Dagger, *Playing Fair with Punishment*, 103 ETHICS 473 (1993). See also GEORGE SHER, DESERT 69–90 (1987).

9. Murphy, *supra* note 8, at 232–43.

10. Moore, *supra* note 7, at 179–80.

11. Moore uses the “two birds, one stone” metaphor in this general way to refer to the process of bringing about deterrence as a byproduct of securing retribution (though he would deny that deterrence is necessary to justify state punishment). MOORE, *supra* note 1, at 28.

do they deserve to suffer to a degree and in a manner that would generate a sufficient amount of general deterrence as a byproduct? Do traditional retributivists hit the second bird (of sufficient crime deterrence)? There are two basic lines to this objection. First, consider one influential ideal of traditional retributivist sentencing: the state ought to injure an offender to the same degree that the offender injured his victim.¹² In the case of minor offenses, this sentencing logic would seem to entail sentences that are too lenient for the purpose of deterrence. Tadros writes:

Consider theft of a compact disc. In this case, it is surely permissible to impose on the thief a greater magnitude of harm than he has culpably caused. The idea that taking one of the thief's compact discs away would be sufficient punishment in this case is unappealing. There is an obvious instrumentalist rationale for this conclusion—given the low rate of detection of theft, such a modest punishment would result in a great deal of theft.¹³

The principle of an eye-for-an-eye does not entail an eye-for-a-compact disc, but a compact disc-for-a-compact disc, and, as such, we have good reason to doubt the principle's effectiveness as a form of regulation for minor offenses.¹⁴

The second line of the objection is, I think, more fundamental. If we assume that effective general deterrence requires that individual cases of punishment be a matter of public knowledge, it is not clear that traditional retributivists can justify that practice, given offenders' right to privacy. The traditional retributivist concern is to deliver a deserved amount of suffering to a wrongdoer, with no direct concern for the interests of the wider society. It is not as if a traditional retributivist state could generate an offender's allotment of retributive harm in any way it pleases, with no concern at all for his pre-existing rights. What if forcing offenders to work as slaves in fields, or to serve as medical test subjects, was the most efficient way to "spend" the suffering the state was entitled to inflict upon them? It would not suffice to say, as a "limiting retributivist" might want to, that the state could "pay" for the extra humiliation and degradation by punishing for a shorter period of time, so that the offender ultimately experiences the same amount of harm.¹⁵ To violate

12. For sophisticated defenses of this sentencing ideal (*lex talionis*), see Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25 (1992); Jeffrey Reiman, *Justice, Civilization, and the Death Penalty: Answering Van den Haag*, 14 PHIL. & PUB. AFF. 115 (1985); Morris Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 1 OXFORD J. LEG. STUD. 57 (2008).

13. TADROS, *supra* note 1, at 345.

14. There are problems, of course, with the *lex talionis* ideal beyond its inability to generate sufficient deterrence for minor offenses. With serious offenses, for instance, it can demand sentences that are unduly harsh or degrading, such as the rape of a rapist. And, with regulatory offenses, such as driving violations, it seems to offer no sentencing guidance at all. As Blackstone writes: "[T]here are very many crimes, that will in no shape admit of these [matching] penalties, without manifest absurdity and wickedness. Theft cannot be punished with theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like."4 WILLIAM BLACKSTONE, COMMENTARIES *13 (1769).

15. "Limiting" retributivists, like Norval Morris and Richard Frase, believe (a) that while retributive desert may be a sufficient reason to punish, our conclusions about how much harm a particular offense warrants are imprecise, with vague upper and lower limits, such that any punishment within that range would be retributively legitimate and (b) that consequentialist considerations should determine the choice of punishment within that range. See NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 182–87, 196–200 (1982); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005). Limiting retributivists appeal to what I call the "while we're here" argument: "while we're here exacting retribution," they argue implicitly, "we might as well maximize other social goods." The "two birds" argument is still doing the heavy lifting, but limiting retributivists aim to move

an offender's most basic privacy rights, which protect his interest in controlling how he presents himself to others, by publicizing his wrongdoing and punishment would seem to be similarly unjustified, *unless the rationale for punishment itself demanded public punishment*.¹⁶ Unless, that is, what he "owes" is to the community and inherently requires a violation of his privacy. Thus, a traditional retributivist state may not be able to justify the practice of publicizing an offender's punishment, which we are assuming is necessary to bringing about a sufficient level of general deterrence.

There are at least two replies to consider. First, one might reply that, even in a traditional retributivist state, a concern with having publicly accountable trials would override offenders' privacy interests.¹⁷ Nonetheless, it seems that a genuine traditional retributivist should view public trials and punishments as sub-optimal, given the privacy interests of offenders and innocent defendants. And she should seek out creative institutional solutions that would enable trials and punishments to stay private, at least when so desired by defendants and offenders, while ensuring a legitimate criminal process. Second, one might reply that people could be sufficiently deterred, even without public trials and punishments, due to a more abstract or general awareness of the system of punishment.¹⁸ Perhaps. That would seem to be a legitimate—and uncertain—empirical question. Consider, for instance, the drumbeat of securities fraud prosecutions in recent years in the Southern District of New York.¹⁹ Of those in a position to commit securities fraud, would their general awareness of federal securities laws and federal prosecutors sufficiently replace the deterrent impact of these very public prosecutions?

I will not pursue that question or this broader argument any further, for the central weakness of the traditional retributivists' "two birds" argument for our purposes is much more straightforward. It requires accepting the premise that the suffering of offenders, *regardless of the severity of their offense*, is an intrinsic good, to be realized even if their punishment occurred in total secrecy, and thus had no impact on the level of crime, or even if it were somehow criminogenic. It is an analytic truth that when an intrinsic good is realized, all else equal, the world is a better place. To say nothing of regulatory offenses like speeding, would the world be a better place if, say, car thieves were made to suffer to some degree in total secrecy, with no impact on the crime level? At an absolute minimum, people's convictions differ on this question, and we should be very hesitant to hang the legitimacy of the law against car theft upon answering it in the affirmative—or the legitimacy of every other criminal law upon affirmatively answering a parallel question.

The "censuring" retributivism of Antony Duff and Andrew von Hirsch, for different

beyond it by foregrounding deterrence as an important sentencing consideration, so long as its pursuit remains within the bounds of desert.

16. On the right to privacy as protecting one's interest in controlling his presentation to others, see Andrei Marmor, *What Is the Right to Privacy?*, 43 PHIL. & PUB. AFF. 3 (2015); James Rachels, *Why Privacy Is Important*, 4 PHIL. & PUB. AFF. 323 (1975); Adam Moore, *Privacy: Its Meaning and Value*, 40 AM. PHIL. Q. 215 (2003).

17. Thanks to Nicola Lacey for raising this objection.

18. Thanks to Kimberly Kessler Ferzan and Patrick Tomlin for raising this objection.

19. See Jeffrey Toobin, *The Showman: How U.S. Attorney Preet Bharara Struck Fear into Wall Street and Albany*, NEW YORKER (May 9, 2016), <https://www.newyorker.com/magazine/2016/05/09/the-man-who-terrifies-wall-street>; *Preet Bharara's Key Insider Trading Cases*, N.Y. TIMES: DEALBOOK (Oct. 6, 2015), <https://www.nytimes.com/interactive/2014/07/09/business/dealbook/09insider-timeline.html>.

reasons than the traditional retributivists, also fails to provide a safe harbor from the Means Problem.²⁰ By violating “public,” communal values, on this view, offenders deserve the community’s censure. This censure aims at the wrongdoer’s repentance, reformation, and reintegration into the community—a project internal to all censuring, Duff argues.²¹ Duff, though, believes that deterrence is an inappropriate penal aim at any level. To address citizens “in the coercive language of deterrence,” he writes, “is to cease to address them as members of the normative community.”²² Penal hard treatment is “the means by which the offender can make apologetic reparation to the victim,” and nothing else.²³ It is a necessary part of the communication between the public and the offender, Duff argues, and not a method of scaring or threatening would-be future offenders. As a response to the Means Problem, Duff would thus be resorting to a version of the “two birds” argument. By aiming at the first bird of censure, *which inherently requires penal hard treatment*, we hit the second bird of crime prevention.

Von Hirsch, however, is more straightforward than Duff about the need to prevent crime and about the limits of delivering deserved censure as a means of achieving that aim. He argues, I think rightly, that censure need not take the form of hard treatment, and could be communicated, for instance, by the mere fact of public conviction.²⁴ Von Hirsch views hard treatment not as an essential component of censure, but as a supplemental, prudential reason a legal system offers to citizens to desist from crime, offered in addition to its moral arguments.²⁵ Von Hirsch attempts to mask the prudential reason in various ways, in particular via the argument that (a) penal hard treatment is a means of communicating censure (even if not an inherently necessary means), (b) the censure deserved for a given offense, in accordance with “ordinal” proportionality, depends on the amount delivered for other offenses, such that (c) we can incorporate hard treatment into our system, while still giving offenders the censure they deserve, by giving more hard treatment—that is, more censure—to those who commit worse offenses.²⁶ He side-steps the “cardinal” proportionality issue, though, and fails to explain why, even if what offenders deserve is relative to one another, the state is entitled to raise the entire scale of sentences upwards for the purpose of deterrence. That is, he fails to explain why the state is entitled to use offenders and their pain as a tool for mitigating future crime.²⁷

20. See R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001); ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993); John Tasioulas, *Punishment and Repentance*, 81 PHILOSOPHY 279 (2006).

21. DUFF, *supra* note 20, at 80–82, 106–12.

22. *Id.* at 83.

23. *Id.* at 98.

24. VON HIRSCH, *supra* note 20, at 9–14.

25. *Id.*

26. *Id.* at 15–19, 29–70.

27. Andrew von Hirsch and Andrew Ashworth, in outlining their joint version of censuring retributivism, argue that society should set the punishment scale as low as possible, consistent with its crime prevention needs, but never so high that punishment loses its status as moral communication. Within these bounds, they argue, ordinal proportionality ought to rule. ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 141–43 (2005). They fail to address the primary worry here about why the state is entitled to scale up sentences to any degree, and thereby use offenders for the purpose of crime prevention. But there is the separate question of whether scaling up is consistent with their aim of delivering to offenders a deserved amount of censure. Intuitively, a punishment’s cardinal severity is highly determinative of the level of censure communicated. It cannot only be a matter of ordinal severity. And it seems, then, that

The framework presented below aims to secure the benefits of both utilitarianism and retributivism, but without their respective costs, and in so doing exhibit what Patrick Tomlin calls “constrained instrumentalism.”²⁸ Like a utilitarian theory, it conceives of punishment as an instrumental “evil,” rather than an intrinsic good, to be used for the direct purpose of crime reduction but, like a retributivist theory, it licenses punishment only as a proportionate response to someone’s culpable choices, consistent with the liberal conception of people as non-sacrificeable ends in themselves and a principled refusal to punish the innocent.

II. A SYSTEM OF PROTECTIONS

A. *The Function of the Criminal Law*

In responding to the Means Problem, as indicated above, this Article conceives of the criminal law as a system of protections. The criminal law aims to protect us from, say, the “specific crimes” listed in Part II of the Model Penal Code: homicide, assault, reckless endangering, terroristic threats, kidnapping, false imprisonment, rape, arson, burglary, theft, forgery, deceptive business practices, bribery, corruption, perjury, riot, public drunkenness, and so forth.²⁹ We rely upon these protections in our interactions with other people and, crucially, in planning such interactions. Beyond our safety, we also rely upon them to secure our privacy away from others in, say, our homes and cars. In this way, our *assured* liberty, understood broadly in accordance with neo-republican theorists, depends on the reliability of the criminal law.³⁰ People with assured liberty, as Philip Pettit writes, are “possessed, not just of non-interference by arbitrary powers, but of a secure or resilient

consistent with their concern with delivering a proportionate amount of censure, they cannot ignore cardinal proportionality, and cannot be so strategic in anchoring the punishment scale. On the complexities and limitations of the retributivist ideal of the proportional penal sentence, see Nicola Lacey & Hanna Pickard, *The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems*, 78 MOD. L. REV. 216 (2015) (arguing that the proportionality ideal is a “chimera” and incapable, as a purely ideational or philosophical matter, of determining sentence length).

28. Tomlin, *supra* note 5, at 226.

29. MODEL PENAL CODE §§ 210–251 (AM. LAW INST. 1962) [hereinafter MPC].

30. See PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997) [hereinafter PETTIT, REPUBLICANISM]; QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998); Philip Pettit, *Freedom as Antipower*, 106 ETHICS 576 (1996); JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990). This Article travels only so far with republican theorists. While it accepts—and aims to clarify—the republican ideal of an assured and reliable *civic* liberty, it questions the republican conception of liberty itself, of what, exactly, is meant to be assured in society. Republicans understand liberty to be the state of “non-domination,” whereby other people lack the capacity to interfere with your life in a discretionary or arbitrary manner. See PETTIT, REPUBLICANISM, *supra*, at 51–79. “[F]ree persons,” Pettit writes, “do not depend on anyone’s grace or favour for being able to choose their mode of life.” Philip Pettit, *Criminalization in Republican Theory*, in CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW 132, 138 (R. A. Duff et. al. eds., 2014). But, as I will discuss below, an effective criminal law depends on the *self-application* of criminal legal norms by people within the jurisdiction. As such, there is no escaping dependence on others’ “grace or favour,” at least to some degree, given that they could choose not to self-apply the criminal law. *Id.* The assured liberty ideal, in sum, is not of the perfect absence of discretionary power in society, but of the confident reliance on people to exercise such power reasonably and in accordance with promulgated rules. See Thomas W. Simpson, *The Impossibility of Republican Freedom*, 45 PHIL. & PUB. AFF. 27 (2017) (arguing that “freedom as non-domination” is unachievable, because either the state dominates the citizens or the citizens retain the power to dominate each other).

variety of such non-interference.”³¹ To be sure, regulatory “violations” like speeding form part of this narrative.³² By promulgating such offenses, the state aims to protect people from dangerous drivers, so that they can drive on public roads with a relative degree of safety and reasonably rely upon that safety in planning their days and lives.

An effective criminal law, on this view, is nothing less than the fundament of the modern social world. It is central to the “King’s Peace” and the existence of society itself, insofar as the reasonable reliability of at least its major provisions renders Hobbesian, preemptive violence irrational.³³ We are bathed in these most basic criminal law protections when we, say, walk in a busy public park with relative confidence, or when we sleep soundly in our beds. The criminal law is central to a *well-functioning* society, too, by enabling the possibility of relatively assured mutually beneficial cooperation.³⁴ I cooperate with people in the creation of a marketable product, for instance, only if I am relatively secure in the knowledge that neither they nor others could steal it with impunity. Of course, other forms of law, like contract law, and non-legal social norms,³⁵ like the practice of being “neighborly” with those who live nearby, enable cooperation as well. I would venture, though, following Hobbes, that these more refined means of civilization depend for their possibility on a baseline of relatively effective criminal law. I consider the empirical foundations of this view in Part VII.

This conception of the criminal law is connected to Nicola Lacey’s communitarian theory, where we punish not for crude moralistic or utilitarian reasons, but for a particular function, to preserve, as Lacey writes, “a framework of common values within which human beings can develop and flourish.”³⁶ That is, we punish not to give wrongdoers a

31. PETTIT, REPUBLICANISM, *supra* note 30, at 69.

32. See MPC, *supra* note 29, § 1.05 (providing that an offense is a noncriminal “violation” if no sentence other than a fine or other civil penalty is authorized upon conviction). The view presented here would not make such a hard distinction between “noncriminal” violations and truly “criminal” offenses, understanding them both to be part of the same regulatory project.

33. See THOMAS HOBBS, LEVIATHAN 86–90 (Richard Tuck ed., 1996) (1651) (arguing that the state of nature is marked by preemptive violence, a “warre of every man against every man”); Alice Ristroph, *Hobbes on “Diffidence” and the Criminal Law*, in FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 23, 23 (Markus D. Dubber ed., 2014) (explaining that Hobbes understood the formation of the criminal law to be a response to “diffidence,” the anxiety that people have about their security and standing in relation to each other).

34. See LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER 41, 37–60 (2016) (arguing that the function of the criminal law is to secure “civil order,” which is a “particular kind of social order” that involves the “existence of legal institutions . . . as an apparatus of rule which can regulate social relations and settle disputes by adjudicating between norms”).

35. See generally ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996).

36. NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 169–201 (1988). See also JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 261 (2d ed. 2011) (“The ‘goal’ of the familiar modern systems of criminal law can only be described as a certain form or quality of communal life, in which the demands of the common good indeed are unambiguously and insistently preferred to selfish indifference or individualistic demands for licence but also are recognized as including the good of individual autonomy, so that in this mode of association no one is made to live his life for the benefit or convenience of others, and each is enabled to conduct his own life (to constitute himself over his span of time) with a clear knowledge and foreknowledge of the appropriate common way and of the cost of deviation from it.”); HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 10 (1979) (“The criminal law . . . establishes rules of conduct whose observance allows us to enjoy life in society, and in addition provides punishment for violation of these rules, for the rules would not be taken seriously enough by enough people to be generally effective if they could be broken with impunity.”).

deserved allotment of suffering or merely to reduce the aggregate level of harm or pain, but to enable and protect a community—a community of strangers living in society—and the system of rules that offers these strangers the possibility of assured liberty and thereby of human flourishing. In this way, an effective criminal law is partly constitutive of the Rule of Law ideal. Respect for the Rule of Law is a virtue of *societies*, not merely of *governments*, as Rule of Law theorists tend to suggest. The Rule of Law demands fidelity to law by the government, of course, but also by the citizenry. More substantive conceptions of the Rule of Law, which dovetail with the neo-republican conception of assured liberty, maintain that the Rule of Law has value because it provides individuals with a secure place to stand within society, and secure pathways in which to move. We can appreciate how, on such a view, knowing when and where *other citizens* may be waiting to strike, in addition to knowing when and where the state itself may be waiting, is of paramount importance.³⁷

B. A Distinctive View

This interpretation of the criminal law’s function—as a system of protections upon which a cooperative civil society and the assured liberty of each citizen depends—is relatively provocative and distinctive within contemporary criminal law theory (I think surprisingly). Let us compare it with the retributivist and “reconstructivist” conceptions of the criminal law’s function. The aim is to demonstrate the distinctiveness of this view, but also to critique these theories indirectly, by establishing their inability to account for what is, I hope, an intuitive and attractive understanding of the criminal law’s function.

My discussion of retributivism here will be brief. What is the function of the criminal law on the retributivist view? Rather than a system of protections, retributivists would understand the criminal law to be *a public schedule of interpersonal wrongs*, the commission of which demands the imposition of suffering or censure, as discussed above. The retributivist narrative is of the state punishing a wrongdoer for creating a victim. The reliance interest of non-victims on the criminal law plays no role in the story, or at least no direct role. A retributivist criminal law is, in these ways, an essentially moral rather than political project, and it lacks the resources to articulate the idea that an effective criminal law is constitutive of the Rule of Law and a source of assured liberty for all people within the jurisdiction.³⁸

Let us now consider Joshua Kleinfeld’s “reconstructivist” theory of the criminal law, which he believes captures the perspectives of a disparate group of historical and contemporary authors, in particular Hegel and Durkheim.³⁹ The function of the criminal law on this view is to maintain society’s “embodied ethical life,” upon which its solidarity depends.

37. On the distinction between “formal” and “substantive” conceptions of the Rule of Law, see Paul P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 21 PUB. L. 467 (1997); JEREMY WALDRON, *THE RULE OF LAW AND THE MEASURE OF PROPERTY* (2012).

38. On the distinction between “moral” and “political” theories of punishment, see Peter Ramsay, *Imprisonment and Political Equality* (LSE Legal Studies, Working Paper No. 8/2015); COREY BRETTSCHEIDER, *DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT* 96–113 (2007).

39. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016).

Ethical life is broad: it is not just a set of moral imperatives (thou-shalts and thou-shalt-nots) but also rights, values, teleologically structured social institutions and practices, conceptions of good and bad character and good and bad lives, normatively laden social roles and social structures, evaluative understandings and outlooks, and more.⁴⁰

It is an especially Hegelian vision of society as a dense network of norms. On this view, social practices and institutions—and individual actions, as well—are something like what laws are for Ronald Dworkin; what they are, all the way down, is in part the principles and values that justify them.⁴¹ A crime, then, represents a rejection of society's norms. A murder is not just a killing, but also an expressive denial of the norm, say, that people have a certain priceless worth. And the function of punishment, Kleinfeld argues, is to expressively reaffirm the values that a crime has rejected. Punishment thus ensures that the value in question is “real” and “embodied,” rather than merely abstract and notional. “The state in the criminal context,” Kleinfeld concludes, “should be the embodiment and protector of society's lived moral culture—its way of life.”⁴²

Kleinfeld views his project as, in part, a sociological inquiry. And if he is right about the criminal law's function as a sociological matter, then a jurisdiction's criminal law should be nothing less than the negative image of its entire normative universe. An alien anthropologist should be able to understand the American (or French or Spanish) “embodied ethical life” or “way of life” by reverse engineering its criminal law. But of all the norms that guide social interactions in modern society, it seems that the criminal law guarantees the “reality” of only a small fraction. When reporting back to its esteemed colleagues on the culture of “the Americans,” the alien anthropologist, with only the Model Penal Code to show for its journey, would state that they are a people that believe it is wrong to kill, to steal, to rape, to move about in public spaces recklessly, and so forth, recounting all the crimes listed in Part II. Its colleagues might then reply: “Yes, yes, we understand that they live in relative peace—that they are relatively civilized. But tell us about their *culture*, about their lived normative universe. You are an anthropologist, after all. All you have to show us is their criminal code?”

As Vincent Chiao notes, Durkheim claimed in *The Division of Labor in Society* that punishment was a privileged means of maintaining societies with “mechanical” solidarity, which are characterized by the similarities and undifferentiated social roles of their members.⁴³ But it did not play such a fundamental role, Durkheim continued, in societies with “organic” solidarity, which exhibit complex forms of cooperation enabled by the differences of their members. In the latter forms of society, like contemporary America, Durkheim understood that citizens generate solidarity and a shared normative order not only, or even primarily, through the criminal law, but as a result of an interdependent civil society. For instance, the (defeasible) norm against insubordination to one's boss, while surely part of the American “embodied ethical life,” is not enforced through the criminal

40. *Id.* at 1490.

41. See RONALD DWORKIN, *LAW'S EMPIRE* (1986).

42. Kleinfeld, *supra* note 39, at 1555.

43. Vincent Chiao, *A Response to Professor Kleinfeld's Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. F. 258, 264–65 (2016); EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 31–87 (W.D. Halls trans., 1984) (1893).

law, but rather through the mechanisms of a capitalist civil society; if you are insubordinate you may get fired and lose your income. Kleinfeld the sociologist would have difficulty explaining this outcome. And Kleinfeld the philosopher would have difficulty explaining why the criminal law ought not to expand to enforce this norm, and all other norms in our “collective consciousness.”⁴⁴

The point of this section, once more, has not been to engage with the merits of retributivism or reconstructivism directly.⁴⁵ Beyond demonstrating the relative distinctiveness of the conception of the criminal law as a system of protections upon which a cooperative civil society and the assured liberty of each citizen depends, the aim has been to critique these two views indirectly, by demonstrating their inability to articulate and justify this understanding of the criminal law’s function. Retributivists, viewing the criminal law as a public schedule of interpersonal moral wrongs, prove far too little, while reconstructivists, viewing the criminal law as the enforcer of a society’s entire normative universe, prove far too much.

III. CRIMINALITY AND LEGAL RELIANCE

A. *The Method of the Criminal Law*

Moving forward, what we want from the criminal law is a system of protections that we can reasonably rely upon in the planning and execution of our lives, but we want to secure this system consistent with a commitment to human inviolability, that is, consistent with a refusal to sacrifice people as a means of mitigating harms or threats for which they lack responsibility. The linchpin of this project is an understanding of how, exactly, the criminal law works—how it operates to provide protection and secure our reasonable reliance. The criminal law, as a distinctly legal form of protection, depends upon the normative capacities of people within the jurisdiction. This is the *method* of the criminal law, as indicated above. As opposed to the brutish and unpredictable coercion of non-legal modes of governance, legal systems ask citizens to grasp prospective rules and standards and regulate their own conduct accordingly. As Jeremy Waldron writes:

Self-application is an extraordinarily important feature of the way legal systems operate. They work by using, rather than short-circuiting, the agency of ordinary human individuals. They count on people’s capacities for practical understanding, for self-control, for self-monitoring and modulation of their own behaviour in relation to norms that they can grasp and understand.⁴⁶

Legal systems, in this manner, are more efficient and powerful means of governance than non-legal systems.⁴⁷ When it comes to the latter, the state must be more involved; when you get citizens to do things at the barrel of a gun, you need to actually be there, with a gun. When it comes to law, the state can simply promulgate a rule, which citizens

44. Kleinfeld, *supra* note 39, at 1493 (explaining that his conception of “embodied ethical life” parallels Durkheim’s notion of a society’s “collective consciousness”).

45. I consider reconstructivism further below. See *infra* note 66.

46. Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L. J. 200, 206 (2012).

47. See JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210 (2d ed. 2009).

are then expected to perceive and self-apply. Thus, when someone relies upon a legal protection, she is relying, in large part, upon the self-application of the relevant norm by other people in the jurisdiction. More than guarantee that the state will be there, positively intervening to prevent people from doing *X* or *Y*, the criminal law guarantees, or rather aims to guarantee, that people will uphold the legal rules that prohibit *X* or *Y*. When I rely upon the criminal laws against car theft or murder, as indicated above, I am not relying upon the police to wait by my car or my person, like personal guards, but rather upon people self-applying the legal norms against stealing cars and murdering people. If the threat of punishment generates much of our reliance upon the law's protections—that is, if people self-apply legal norms for prudential rather than moral reasons, out of fear of the criminal sanction—it does not ruin this story; indeed, that is the very purpose of punishment on this view, as I will explain.

B. *Criminality*

With this framework in mind—of the criminal law as a system of protections that depends for its effectiveness on people self-applying legal norms—we can begin to understand the antagonistic relationship between the objective threat of crime and the function of the criminal law to provide people with a map of when and where they can be safe from the incursions of others. Crime, considered as a general phenomenon within a jurisdiction, diminishes the reliability of this map. Can I rely upon the protection against car theft? In considering this question, I need to know the prevalence of car theft within the jurisdiction. Or, more specifically—and here is the point—I need to know how much ongoing intent there is within the jurisdiction to steal cars. The greater the aggregate intent, the less reasonably I can rely upon the protection. If Alice intends to steal a car, then, in combination with others intending to steal cars, she weakens the reliability of the legal protection against car theft upon which citizens are meant to rely. She contributes to a social threat that makes buying, leasing, and using cars more expensive and perilous.

We want to know, then, how many people are failing to self-apply each criminal law, and to what degree. What this means will depend on the *mens rea* of the offense. A failure to self-apply a criminal law with intent *mens rea*, like the law against car theft, involves having a *settled intention* to commit the prohibited act. A failure to self-apply such a law can come in degrees when considered over time, as between someone who has a settled intention to steal a car only one time and a professional car thief who has such an intention repeatedly; they have both failed to self-apply the law, but the latter to a greater degree. A failure to self-apply a criminal law with recklessness or negligence *mens rea*, meanwhile, involves having a *settled willingness* to act in a manner that the law deems overly risky or careless.⁴⁸ Consider, for instance, a person who has few qualms about driving recklessly, and who occasionally drives at very high speeds through school zones,

48. This assumes that the norm was non-coercive and genuinely legal, following Lon Fuller's theory of law, such that self-application was possible. This would require at least a due diligence defense for negligence offenses, but I will not engage with those issues here. See LON L. FULLER, *THE MORALITY OF LAW* 101 (rev. ed. 1969) (arguing that purported legal rules count as genuine law only if they cohere with the "principles of legality": generality, publicity, prospectivity, intelligibility, consistency, feasibility, constancy through time, and congruence between the rules as announced and as enforced).

among other reckless driving acts. He does not intend to hurt anybody with his car, but he is willing to bring into the world an unreasonably high risk of that outcome. In this way, he would be failing to self-apply the legal norm against reckless driving—though to a lesser degree than someone who has absolutely no qualms about driving recklessly, and who routinely drives at very high speeds through school zones.⁴⁹

Why must the intention or willingness to offend be “settled”? The point is that an offender is *normatively committed* to performing the prohibited act in the normal course of future events.⁵⁰ An offender could change his mind and “unsettle” his commitment, to be sure, but that does not alter the fact that until this happens he is, to some degree, *coming for us* (and thereby contributing to the objective threat of crime). How does the impulsive offender fit into this story?⁵¹ First, he does so as soon as he has a settled intention or willingness to perform a prohibited act, even if, due to his impulsivity, it will occur only thirty seconds into the future. The threat of crime will vary over time, of course, and his surprising act could mean, perhaps, that we have underestimated the threat level for that time and place; in such cases, less than chilling the exercise of our rights or forcing us to take expensive precautions, the threat of crime exposes us to unreasonable risks of harm. In short, a “settled commitment” to break the law need not be the enduring and regular commitment of the professional criminal. An intention or willingness to break a law only one time, whether formed impulsively or otherwise, would suffice. Second, we might understand someone’s unchecked and aggressive impulsivity to constitute a settled willingness to act recklessly in a diffuse criminal fashion, such that we can depend on him to perform a range of criminal acts in the normal course of future events.⁵²

Let us say that someone with a settled intention or willingness to perform a criminal act is *unreasonably unreliable* with regard to the self-application of the associated criminal law (with the understanding that there are varying degrees of unreliability). Let us say, furthermore, that to be unreliable in this way is to contribute to society’s level of *criminality*. At least two distinctions are key to understanding this concept of criminality. First, we can distinguish between the *synchronic* criminality level (in a specific moment) and the *diachronic* criminality level (over time). The former relates particularly to the question: What is the threat of crime that we are facing right now? The latter, meanwhile, relates particularly to the question: What is the average threat of crime that we face, moving forward, as we plan our lives? Second, we can distinguish between “general” and “specific” criminality. We tend to focus on the level of “general criminality,” since we tend to rely on the criminal law as a whole as a general provider of effective protections. When we walk down the street, for example, we are relying on homicide offenses, non-fatal offenses against the person, driving offenses, and so forth. It is in this sense that we refer to the criminal law as a *system* of protections. But sometimes we are concerned with the “specific criminality” level of a particular offense, say, of car theft when purchasing

49. Thanks to Peter Ramsay for helpful discussion on this point.

50. By normal course of future events, I mean assuming that nothing entirely unexpected occurs, like an asteroid strike or the offender’s untimely death.

51. Thanks to Nicola Lacey and Patrick Tomlin for pressing me to clarify this point.

52. There are difficult evidential issues, of course, with such a conclusion. How could we know that someone was impulsive in this manner? How could we know, indeed, that anybody was “normatively committed” to offending? I discuss such matters *infra* Part V in relation to the place of the “act requirement” within this view.

car theft insurance or parking our car. Regardless, the “general criminality” level is just composed of the “specific criminality” levels for each offense.

One’s criminality contribution will vary with the *mens rea* level of the offense. One may be reasonably reliable, for instance, with regard to self-applying the norm against intentional killing, but not the norm against reckless killing, or the norm against grossly negligent killing. If we seek assurance against other people killing us, each homicide offense addresses a separate component of that aim. We want assurance against people who would kill us purposefully, as well as those who would kill us as a result of their conscious risk-taking or their extreme carelessness. And to be unreliable with regard to the law against intentional killing is to make a different and generally more severe criminality contribution than to be unreliable with regard to the laws against reckless killing or grossly negligent killing. It would be possible, though, for someone to be so wildly reckless with regard to the possibility of causing others’ deaths that his criminality contributions would be even greater than those of an intentional killer. All of these issues will be relevant for sentencing, as I discuss in the conclusion.

On this view, in sum, criminality is the joint product of people in society who are failing to self-apply criminal legal norms, in the specific sense of having a settled intention or willingness to offend. The greater the amount of criminality in society, whether in a given moment or when considered over time, the less worth the criminal law has as a system of protections and as a guide to the possible incursions of other people, and thus the less assured is our liberty (and the more difficult it is to flourish). But how, one might object, could we understand criminality to be the joint product of offenders, such that we could hold them responsible for its impact? It is not as if a car thief wishes to diminish the reliability of the law against car theft; all he wants to do, let us assume, is make money. To say that criminality is the joint product of offenders, however, is not to argue that criminality is a purposeful joint product akin to organized crime. The better analogy is to pollution. Polluters are not working together purposefully to create a societal threat, but each of them, as a *byproduct* of their actions, contributes to the social harm of smog or global warming, and we can hold them responsible for their proportional contributions, morally if not legally.⁵³ Likewise, offenders contribute to the wider social threat of criminality as a foreseeable, necessary, and causally “close” byproduct of their unreliability with regard to upholding the criminal law, and we can hold them responsible for their proportional contributions to this social threat (both morally and legally). We can take the metaphor one step further, indeed, and understand criminality to represent a form of *socio-legal pollution*.

IV. TWO PRINCIPLES OF PERMISSIBLE USING

This conception of the criminal law and of criminality allows us to resolve the Means

53. A. P. Simester and Andrew von Hirsch refer to pollution as a “conjunctive” harm, the prevention of which involves proscribing an act that is “a token of the type of conduct that cumulatively does the harm.” A. P. SIMESTER & ANDREW VON HIRSCH, *CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION* 85 (2011). Criminality is such a “conjunctive” harm, with the intention or willingness to offend being the relevant “token.” On the parallel notion of “cumulative” harms, see Andrew von Hirsch, *Extending the Harm Principle: ‘Remote’ Harms and Fair Imputation*, in *HARM AND CULPABILITY* 259, 263 (A. P. Simester & A. T. H. Smith eds., 1996).

Problem, if we appeal to either of two moral principles. These are principles that provide exceptions to the general prohibition on using people as a means to the greater good. In other words, to use someone as a means consistent with either principle is not to use him to mitigate a harm or threat for which he lacks responsibility.

A. *Corrective Justice Means Principle*

The principle of “corrective justice” provides that an individual has a duty to rectify the losses or damage caused by his wrongful conduct, and that he can permissibly be forced to fulfill this duty.⁵⁴ The classic statement is found in Aristotle’s discussion of justice in Book V of the *Nicomachean Ethics*.⁵⁵ An individual can be used as a means permissibly, according to the Corrective Justice Means Principle, to restore the ex-ante status quo that he disturbed. To use him in this manner would be consistent with a commitment to human inviolability, since he would not be sacrificed to mitigate a problem for which he lacks responsibility. He would be used, rather, to repair his own wrongdoing. This principle, of course, grounds one of the central theories of tort law.⁵⁶

B. *Defensive Means Principle*

The second principle, the Defensive Means Principle, is derived from the right to self-defense. In the paradigmatic form of self-defense, where an aggressor attacks a victim physically and the victim responds in kind, the victim is not using the aggressor as a means of mitigating or preventing a threat, since the aggressor himself is the threat.⁵⁷ We could imagine self-defense situations that were otherwise. If two people are attacking me, for instance, I could grab one of them and use him as a shield, as a means of blocking the other’s blow. It is permissible, in this way, for victims or would-be victims of an ongoing threat to use an aggressor as a proportional means of mitigating or preventing that threat. It reflects Tadros’s view that “there is a permission manipulatively to harm a person who is culpable and responsible for creating a threat of serious harm to avert that threat.”⁵⁸

The Corrective Justice and Defensive Means Principles are not radically distinct.⁵⁹

54. See Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 15 (1995); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349–51 (2002). See also TADROS, *supra* note 1, at 131–32 (introducing the concept of an “enforceable duty,” a duty that one can permissibly be forced to uphold). For further discussion of “enforceable duties,” see *infra* notes 89 and 96.

55. ARISTOTLE, *NICOMACHEAN ETHICS* 87–89 (Roger Crisp ed. & trans., 2000).

56. See, e.g., ERNEST J. WEINRIB, *CORRECTIVE JUSTICE* (2012); Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421; JULES L. COLEMAN, *RISKS AND WRONGS* (1992); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); Scott Herskovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107 (2011).

57. See TADROS, *supra* note 1, at 245.

58. *Id.* at 189. On the distinction between harming someone as a means versus harming someone to eliminate a threat, see Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334 (1989); JEFF MCMAHAN, *KILLING IN WAR* 155–202 (reprint ed. 2011); Helen Frowe, *Equating Innocent Threats and Bystanders*, 25 J. APPLIED PHIL. 277 (2008); Jonathan Quong, *Killing in Self-Defense*, 119 ETHICS 507 (2009).

59. See Victor Tadros, *Causation, Culpability, and Liability*, in *THE ETHICS OF SELF DEFENSE* 110, 118 (Christian Coons & Michael Weber eds., 2016) (“Why should the permission to harm a person to prevent a threat being realized be grounded in very different considerations to the permission to harm a person to ensure that the person harmed is compensated? Given the close relationship between negating harm and compensating a person for harm, it would be surprising if very different considerations determined these two realms of the ethics of

They both involve forcing people to fulfill *a duty to repair their wrongdoing*, broadly conceived. Forcing someone to rectify his past wrongdoing, consistent with the former principle, undoubtedly involves forcing him to fulfill such a duty of repair. Forcing someone to mitigate an ongoing wrong, consistent with the latter principle, seems to as well, given that mitigating an ongoing wrong is a form of repairing that wrong. With this, we can bring the various threads of the argument together to resolve the Means Problem. By appealing to either of these two principles, in the context of the conceptions of the criminal law and criminality detailed above, we can generate two theories of permissible deterrent punishment. While the theories have somewhat distinct grounding reasons, and require distinct forms of evidence to secure convictions, they are united in that, broadly, they both involve forcing people to repair their criminality contributions.⁶⁰

C. *Corrective Justice Theory of Punishment*

There are four basic steps to the corrective justice theory of punishment. First, an offender contributed in the past to the society's level of criminality via his settled intention or willingness to flout the criminal law. He contributed, that is, to a social threat in the past that limited the assured liberty of people within the jurisdiction. Second, the purpose of deterrent punishment is to reduce the level of criminality in society. Deterrence is not targeted toward specific offenders, but rather toward the general threat of crime faced by citizens. The third step is an appeal to the Corrective Justice Means Principle. And, thus, fourth: Deterrent punishment is permissible in proportion to an offender's past criminality contributions. We are using him as a means of repairing—by way of general deterrence—the damage to our assured liberty caused by his own criminality contributions. He is not, as in the standard conception of deterrent punishment, sacrificed to scare off would-be future offenders, for whom he has no responsibility. He has increased the level of criminality in the past, and so the way to repair that, as a matter of corrective justice, is to use him to decrease the level of criminality in the future. Over time, ideally—as mentioned at the outset—it would be as if he had never contributed to criminality at all. I will consider how this relates to Victor Tadros's morphologically similar “duty theory” in Part V below.

D. *Social Defense Theory of Punishment*

The corrective justice theory is at least partly backward looking, as stated above, given its concern with offenders' past criminality contributions. It is the primary theory of punishment presented here, since it aims to justify the punishment of all offenders. The social defense theory of punishment, by comparison, is entirely forward looking, and would provide an *additional* punishment reason for some but not all offenders. It applies to those offenders whose normative commitment to offending is ongoing—that is, those offenders whom we still cannot reasonably rely upon to uphold the law. For those

harm.”). *But see* Jonathan Quong, *Liability to Defensive Harm*, 40 PHIL. & PUB. AFF. 45, 45 (2012) (“Liability to defensive harm is only one type of liability, however, and we must not assume that things true of liability to defensive harm are necessarily true for other types of liability. Other kinds of liability—for example, the liability to pay taxes, pay damages, or suffer punishment—may have very different normative bases.”).

60. In this way, we might conceive of the theories as two sub-theories of the same unified theory of deterrent punishment.

offenders, we can appeal to the Defensive Means Principle to justify additional deterrent punishment. We would be using an offender as a means, yes, but for the purpose of mitigating the *ongoing threat* of criminality for which he has partial responsibility. He would not merely be sacrificed for the greater good, to mitigate a problem for which he lacks responsibility. Instead, we would be using him as a means of defending ourselves against a current social threat that impacts us all and for which he shares partial responsibility. Below I discuss the evidential challenges of this view—of establishing with sufficient confidence that we cannot reasonably rely on someone to uphold the criminal law moving forward.

We can appeal to the social defense theory of punishment to explain the intuition (and sentencing policy) that a recidivist offender may in some cases deserve more punishment than a first-time offender or someone who is demonstrably apologetic and reformed.⁶¹ His recidivism could be evidence that he maintains his criminal normative commitments as an ongoing matter. If this evidence were sufficiently strong—a big if, as I discuss below—then we could conclude that he has a duty to mitigate the current threat of criminality, consistent with the social defense theory. Meanwhile, first-time and reformed offenders, while lacking this duty of mitigation, would still have a duty of rectification consistent with the corrective justice principle.

Let us consider an immediate issue: Why use an offender for the specific purpose of general deterrence on the social defense view? If all we want is, essentially, for him to erase his contributions to the ongoing threat of criminality, why not simply incapacitate him? We should be wary, though, of assuming that incapacitation represents a perfectly neat application of the social defense theory for two reasons. First, incapacitation may simply shunt the costs of an offender's unreliability with regard to the criminal law from the wider public onto other imprisoned offenders. There is no reason to believe that offenders lose their right to the criminal law's protections inside prison. And we would not think, in parallel, that confining someone to a particular zip code outside of prison would somehow perfectly erase his ongoing criminality contributions. As such, the offender's duty to mitigate the threat of criminality would often remain unfulfilled unless his imprisonment acted to deter other offenders. And if it did not deter others, as an empirical matter, then his imprisonment would represent a wanton and illegitimate injury on the social defense view. Perhaps, though, we could structure prison in such a way that an offender did not represent any risk to other prisoners, akin to a quarantine situation. Except for the most dangerous and violent offenders, however, this would likely be a disproportionate and inefficient means of forcing an offender to fulfill his duty of mitigation; I discuss this issue further in the conclusion. Second, and related to this last point, we should be hesitant to assume that prison is always the preferred method of punishment. Imposing a fine or a term of community service may, all things considered, be a more efficient and humane method of reducing the level of criminality in society, even if that means that an offender remains free and potentially unreformed in society.⁶²

61. See U.S. SENTENCING GUIDELINES MANUAL § 4A1.1, at 392 (U.S. SENTENCING COMM'N 2016); Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303 (1997) (surveying the history and purposes of recidivist enhancements).

62. See, e.g., Alexander C. Wagenaar et al., *General Deterrence Effects of U.S. Statutory DUI Fine and Jail*

Given that this is not a retributivist view, we must prefer those methods of punishment that enable an offender to fulfill his duty with the smallest degree of injury in the process.

V. TWO OBJECTIONS

To flesh out the corrective justice and social defense views, I will consider two objections.

A. *What About the Act Requirement?*

The first objection asks: If we punish (a) to rectify prior contributions to criminality and (b) to diminish the ongoing threat of criminality, why wait for an offender to commit a criminal act, consistent with the “act requirement”? Why not punish people for merely seeming “dangerous,” an outcome that Peter Ramsay worries our system is increasingly headed toward?⁶³ If someone seems dangerous is he not contributing to criminality? Or, put differently, why not lock up everybody who actuarial statistics indicates is “likely” or “very likely” to offend, and thereby dramatically decrease criminality and increase legal assurance?

Self-defense principles undergird the conception of the criminal law as a system of protections, and of criminality as an attack on the people who rely on those protections. There are internal limits to these principles that can prevent such abuses. Within the realm of interpersonal self-defense, for instance, there is no right to attack any person that *may* pose a threat to you (for example, any person that *may* punch you). To activate traditional self-defensive logic, there must be an ongoing attack against you. Within the socio-legal realm, in the context of the two theories, the ongoing attack against people within the jurisdiction just is criminality, which is composed of offenders’ settled commitments to flout criminal legal norms, as discussed above. To hang out in the “wrong crowd,” say, to be friendly with drug dealers, is not in and of itself to have any such commitment. One could be friendly with drug dealers and then be entirely reliable with regard to the self-application of the criminal law, such that he was not in any way liable to punishment.

But what about preemptive defense? If there is a right to preemptive *self*-defense, it applies only where the aggressor exhibits a settled intention to attack (for example, a person has raised his fist to punch me). Given (a) that the “attack” in the context of criminality is the settled intention to violate a law with intent *mens rea* or a settled willingness to violate a law with recklessness or negligence *mens rea*, then (b) preemptive *social* defense could only apply where someone had a settled intention to have a settled intention to offend, or a settled intention to have a settled willingness to offend. Both are

Penalties: Long-Term Follow-Up in 32 States, 39 ACCIDENT ANALYSIS & PREVENTION 982 (2007) (comparing from 1976–2002 the DUI rates in twenty-six states that implemented a mandatory minimum fine for first time DUI offenders with eighteen states that implemented a mandatory minimum jail penalty for such offenders and concluding that the pattern suggested a greater deterrent effect from the mandatory fines than the mandatory jail sentences); OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? (2015) (concluding that the effectiveness of increasing rates of incarceration as a crime control tactic in America has been limited since 1990 and non-existent since 2000).

63. See Peter Ramsay, *Preparation Offences, Security Interests, Political Freedom*, in THE STRUCTURES OF CRIMINAL LAW 203 (R. A. Duff et al. eds., 2012); PETER RAMSAY, THE INSECURITY STATE: VULNERABLE AUTONOMY AND THE RIGHT TO SECURITY IN THE CRIMINAL LAW (2012).

meaningless formulations that collapse into having the settled intention to offend, bringing us back to square one. Preemptive social defense for the purpose of diminishing criminality is thus incoherent. One either has a settled commitment to flout a criminal law, or not.

The legal assurance promised by the two theories is thus primarily objective rather than subjective.⁶⁴ It is a matter of reducing the actual risk of crime in the future, not simply reducing people's perceptions of the risk of crime. The reason to punish is to create reliable legal protections—that is, to have criminal legal norms that people in society are in fact upholding and self-applying, so that citizens can confidently plan and successfully execute their lives. Objective legal assurance increases along with the objective reliability of legal protections. Subjective legal assurance, one's personal feeling of the law's reliability, is an important, but ultimately derivative concern; subjective assurance should, of course, increase along with objective assurance, but this is not always the case.⁶⁵ If we knew, then, that someone was flirting with the possibility of, say, grievously assaulting someone, then while this may worry us and diminish our subjective sense of security, it is not until he actually holds a settled intention to commit the act that he is, as indicated above, *coming for us*. And it is only then that he has contributed to criminality and diminished our objective assurance, making himself liable to our collective rights to corrective justice and self-defense.

In the other direction, there could be a situation in which we have an unjustified level of subjective assurance. We might blithely assume, say, that the specific criminality level for car theft was vanishingly low, while in fact the jurisdiction was filled with people intending to steal cars. If we then left our car doors unlocked or failed to purchase car theft insurance, our subjective assurance would be *unreasonable*. We would be relying on the criminal law's protections unreasonably, and thereby taking unreasonable risks. It is in this manner that criminality does not merely chill the exercise of our rights or force us to take expensive precautions; when we underestimate its current or future level, it also exposes us to unreasonable risks of harm. Along these lines, if one conceals his criminal intentions from public knowledge by being a very professional and secretive criminal—or by being an impulsive and surprising one-time criminal—he has still contributed to criminality.⁶⁶

64. On the related distinction between objective and subjective "security," see Ramsay, *supra* note 63; LUCIA ZEDNER, *SECURITY* 14–19 (2009); IAN LOADER & NEIL WALKER, *CIVILIZING SECURITY* 155–61 (2007).

65. See John Gramlich, *Voters' Perceptions of Crime Continue to Conflict with Reality*, PEW RES. CTR. (Nov. 16, 2016), <http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality> (reporting that 57% of those who had voted or who planned to vote in the 2016 presidential election believed that crime had gotten worse since 2008, 27% believed it had stayed the same, and 15% believed it had gotten better, even though violent crime and property crime had fallen by 26% and 22%, respectively, between 2008 and 2015).

66. Thanks to Antony Duff for pressing me to address the example of the professional and secretive offender. Kleinfeld's reconstructivist theory, by comparison, cannot easily escape this challenge. Kleinfeld understands a crime to expressively reject a social norm, as discussed above, and a punishment to expressively deny that rejection. If the crime goes unpunished, he argues, then the social norm that it rejects will ultimately wither away. He writes that "crime not only offends the norms on which social solidarity is based but, *by showing that those norms can be violated*, saps them of authority." Kleinfeld, *supra* note 39, at 1506 (emphasis added). He appeals to Durkheim's example of the classroom to explain his position. "If students start cheating on their exams and see that teachers, who could do something about it, turn a blind eye, the norm against cheating will dissolve and dissolve quickly—and likewise if citizens are known to frequently cheat on their taxes or spouses on one another." *Id.* In this way, he writes that crimes "endanger—genuinely endanger—ethical life." *Id.* But it is not the crime itself that would endanger the norm, but (a) the *public* flouting of the norm followed by (b) the non-

We want people to exercise their liberties confidently, but not unreasonably or foolishly. Subjective assurance, in and of itself, is thus not our ultimate aim. The criminal law, in sum, aims for objective assurance over time, and then for the subjective assurance level to be appropriate given the degree to which it achieves that primary goal.

There are now some bullets to bite. First, is the act of offending on this view *merely evidence* that one had or has a settled intention or willingness to commit a prohibited act? As it relates to the justification of deterrent punishment: Yes. Were liability dependent only upon the criminal act itself, as on traditional theories, our understanding of criminality and our response to the Means Problem would dissolve. This is a central point. An act that occurred in the past could not, *in and of itself*, contribute to an ongoing social threat. Erin Kelly argues, for instance, that beyond the harm borne by the victim, we could hold an offender partially responsible for people's "fear" of offenses of the type he committed.⁶⁷ John Braithwaite and Philip Pettit make a similar point.⁶⁸ They argue that an offender's primary wrong is to diminish or destroy his victim's "dominion," the state of being free from others' arbitrary interference. The offender also commits a wrong against society as a whole, they argue, by diminishing the "reassurance" of non-victims regarding the security of their own dominion.⁶⁹ But the "fear" or lack of "reassurance" would be in relation to the risk of *future* offenses—of, say, future robberies—and the offender's *past* robbery, which is what Kelly, Braithwaite, and Pettit want to hold him responsible for, could not, in and of itself, contribute to that future risk. It may, in combination with other such robberies, indicate to the population an ongoing risk of future robberies. But merely to indicate the existence of an ongoing risk—as a reporter might—is surely not to be responsible for that risk. Only if we see the act as *evidence* of an offender's past and perhaps ongoing normative commitments, and understand the objective risk of crime (criminality) to be composed of such commitments, could we aim to hold him proportionally responsible for the impact of that risk on people's legal assurance.

But does this mean that if we knew that a citizen had a settled intention or willingness to offend, but he had not yet taken any steps in the real world to achieve this aim, that we could punish him as a means of mitigating criminality? Yes—but with the understanding that we would never, even if it decreased criminality to zero, grant the state authority to look into our minds like this; to do so would increase our objective assurance against other citizens, but profoundly decrease it vis-à-vis the state itself. Whether to protect ourselves against the state, in particular against broad, discretionary, and intrusive powers of investigation, or against offenders, is the question at the center of controversial police practices like "stop-and-frisk." There is, in this way, a seemingly irresolvable conflict within the Rule of Law ideal introduced above, wherein we seek assurance against both

punishment of that public flouting. If the flouting were to happen entirely in secret then the reconstructivist penal logic would fail to apply, it seems, or at least would apply with far less stringency than if the offender happened to get caught in public. For the secret flouting of a norm, even if unpunished, would not impact the norm's public standing. For related discussion, see *infra* note 95.

67. Erin I. Kelly, *Criminal Justice Without Retribution*, 106 J. PHIL. 440, 457 (2009).

68. Philip Pettit & John Braithwaite, *Not Just Deserts, Even in Sentencing*, 4 CURRENT ISSUES CRIM. JUST. 225, 230 (1993).

69. *Id.* ("If I see that crimes are committed against others—especially when the victims of crime do not have their complaints taken seriously or redressed—then the basis for believing that I enjoy resilient non-interference is undermined. My dominion is endangered.").

crime and an intrusive state. Regardless, through its concern with assurance against the state, the two theories have the internal resources to forestall an overbearing, illiberal system. The conclusion, then, is that we absolutely need an act requirement, given our need for proof of offenders' normative commitments, when coupled with our concern for assurance against the state. The act requirement would, however, involve some costs in terms of principle, by granting immunity to those with settled but yet unrevealed commitments to offending. Is this not, though, accepting thought crime or perhaps character liability, at least in principle?⁷⁰ Yes, but with the understanding that the criminalized thought or character "flaw" is a very particular one connected essentially to action, namely, the settled intention or willingness to commit a prohibited criminal act.⁷¹

To be clear, the commission of a prohibited criminal act would serve different evidential purposes within the two theories. Within the corrective justice theory, the criminal act would serve as dispositive proof that one contributed to criminality in the past; the act is dispositive evidence that he was normatively committed to offending—that he had a settled intention or willingness to offend.⁷² Within the social defense theory, the act would represent evidence, but not necessarily dispositive evidence, that one maintains his criminal commitments as an ongoing matter. Perhaps the offender has changed his perspective on the authority of the law in the interim. As stated above, that an offender has a history of offending would indeed represent evidence of his ongoing commitments.⁷³ What would qualify as *sufficient* evidence for that conclusion I will not engage with here; though, it must be emphasized that the legitimacy of social defensive punishment hangs on finding a satisfactory answer to that difficult question. We must be vigilant, generally, against the dangers of licensing punishment upon glib, armchair predictions of dangerousness, as A.E. Bottoms and Roger Brownsword seem to flirt with in justifying a system of "civil" preventive detention beyond an offender's "criminal" sentence.⁷⁴ For to punish someone who is not in fact contributing to criminality would violate our most basic liberal commitments—and his most basic rights—by sacrificing an innocent person for the greater good. Nonetheless, that the evidential question is difficult does not vitiate the underlying analysis regarding the liabilities and duties of those people whom we cannot reasonably rely upon to uphold the criminal law as an ongoing matter.

Finally, the corrective justice and social defense views can easily explain the practice of interpreting the act requirement flexibly enough to account for inchoate liability doctrines like attempt and conspiracy. This is an important point in their favor. With attempt liability, they would understand the offender taking "substantial" steps (or "more

70. For a critical history of "character" liability, see NICOLA LACEY, *IN SEARCH OF CRIMINAL RESPONSIBILITY: IDEAS, INTERESTS, AND INSTITUTIONS* (2016).

71. For related commentary on the act requirement, see Douglas Husak, *Does Criminal Liability Require an Act?*, in *PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE* 60 (Antony Duff ed., 1998) (arguing against the view that criminal liability is and ought to be imposed only for an act).

72. To be sure, if the evidence was of multiple criminal acts—say, multiple car thefts—none of which had been addressed before by the legal system, then that would be dispositive proof of a greater criminality contribution than evidence of a single theft. See *supra* pages 475–76 (discussing *diachronic* criminality).

73. For thoughtful discussion of the value of propensity evidence, see MIKE REDMAYNE, *CHARACTER IN THE CRIMINAL TRIAL* 111–43 (2016).

74. A.E. Bottoms and Roger Brownsword, *The Dangerousness Debate After the Floud Report*, 22 *BRIT. J. CRIMINOLOGY* 230 (1982).

than merely preparatory” steps) toward the commission of an offense to be proof of his settled intention to offend, and thus of his criminality contribution.⁷⁵ Likewise, with conspiracy liability, they would understand the agreement to offend, when combined with the overt act in furtherance of that agreement, to be proof of the parties’ settled intentions to offend.⁷⁶ The attempt and the conspiracy serve the exact same role as the completed act itself—as evidence of an offender’s normative commitments. Inchoate liability doctrines pose difficult interpretative challenges, by comparison, for retributivist theories, and also for Victor Tadros’s “duty” theory, which I discuss in the following section.⁷⁷

B. Where’s the Victim?

Unlike incomplete attempts or standalone conspiracies, when offenders have actually created victims, one might object to the negligible role such victims play on this view. Surely, the second objection goes, the reason to punish has to do with the offender’s responsibility for the harm borne by the victim. He has wronged the victim, it continues, and deserves to suffer or to be censured, accordingly, for that wrong. In reply to this objection, I am skeptical that retributivist and expressivist reasons do in fact address victims sufficiently.⁷⁸ If I have been assaulted, it may be important to me that the state recognizes that I have been wronged by punishing the offender. But I am still left with the damage of the assault, which may well be more detrimental to my interests and also to my self-respect than the offender’s non-punishment. To say that the civil system can address this component of the wrong seems inadequate, especially if the offender lacks the resources to provide sufficient compensation.

Here is a tentative solution: the state should bear some responsibility for any civil damages that may result from a crime, as a co-defendant of sorts. A crime occurs when someone violates a legal protection. By promulgating such a protection, as argued above, the state invites its citizens to rely upon its validity. When someone flouts the law, then, the victim has a civil claim against that person, yes, but maybe also against the state.⁷⁹ The claim might sound in (social) contract, with the victim’s own restraint and respect for the law given in consideration for the institution of reliable legal protections, and with the gravamen of the victim’s claim being the unreliability of the protection flouted by the offender. Or maybe it could be a form of promissory estoppel, whereby society has invited the victim to detrimentally rely upon the promise of protections. Or, following Alan Norrie, we might argue that the state bears responsibility for the social conditions that were

75. See MPC, *supra* note 29, § 5.01(1)(c) (outlining the “substantial step” standard for attempt liability in the U.S.); Criminal Attempts Act, 1981, c. 47 (Eng. & Wales) (codifying the “more than merely preparatory” standard for attempt liability in England and Wales).

76. See MPC, *supra* note 29, § 5.03 (outlining the requirements for conspiracy liability).

77. See Larry Alexander, *Can Self-Defense Justify Punishment?*, 32 LAW & PHIL. 159 (2013) (arguing that Tadros’s theory cannot justify punishment for inchoate offenses).

78. Cf. DUFF, *supra* note 20, at 28 (“[C]ensure of conduct declared to be wrong is owed to its victims, as manifesting that concern for them and for their wronged condition that the declaration itself expressed.”).

79. Pettit and Braithwaite mention the possibility of a public “restitution fund,” though not one motivated by the state’s own duty to the victim as a co-defendant. Pettit & Braithwaite, *supra* note 68, at 236–37 (“If restitution is possible, but not within the means of the offender, then it may be that extra help should be provided from a restitution fund, with the offender contributing only a part.”).

in part determinative of the offender's intention to offend.⁸⁰ If such an argument works, the state would have some responsibility to rectify a victim's losses, possibly to fill in the gaps left by an offender's lack of resources and, following Nicola Lacey and Hanna Pickard, possibly to provide non-pecuniary forms of compensation as well.⁸¹ The state, aware of its duty of repair, might even initiate the civil process on the victim's behalf, aiming to reach a negotiated settlement out of court. The general framework, then, is of the criminal system protecting the interest of society as a whole in diminishing criminality and maintaining a reliable system of criminal protections, and then of the civil system protecting the interests of individual crime victims, but with the government now involved in that project to some degree. Of course, the civil system on this view would cover non-criminal tortious actions, as well, but the state would not bear any liability in those cases.⁸²

Let us consider two objections to this proposal.⁸³ First, one might object, would not

80. See Alan Norrie, *Freewill, Determinism and Criminal Justice*, 3 LEGAL STUD. 60, 72 (1983) (quoting Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, reprinted in KARL MARX: SELECTED WRITINGS 300, 317 (David McLellan ed., 1977)) ("Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past.").

81. In a forthcoming piece, Nicola Lacey and Hanna Pickard insightfully call for two distinct institutional tracks for criminal justice, "with one track of the system designed to serve the interests and needs of victims, and one track of the system designed to determine criminal responsibility and convict and sentence offenders . . ." Nicola M. Lacey & Hanna Pickard, *A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility Without Blame*, 26 J. POL. PHIL. (forthcoming 2018) (manuscript at 26) (on file with author). They envision an entirely new institution dedicated to crime victims, one completely separate from the existing tort system. But incorporating state liability into the tort system would seem to be a more efficient institutional solution, providing a single forum for making victims whole. Accepting Lacey and Pickard's argument, furthermore, that making victims whole is often a symbolic and emotional process, *id.* at 12–16, 21–24, an augmented civil system could allow for non-pecuniary forms of compensation, such as an apology from the offender or access to state-sponsored therapy. Moreover, involvement of a court might aid in this expressive process, given its capacity for making public, authoritative pronouncements regarding the losses borne by victims and the responsibilities of the various parties. Regardless, even if Lacey and Pickard would reject the tort system as an appropriate forum for considering victims' non-pecuniary needs with due care, given its adversarial and potentially combative nature, they do envision some role for state liability for victims' pecuniary damages. And that process, at least, would have to be unified with the existing tort system, lest a victim receive double damages potentially from the offender and the state.

82. The corrective justice and social defense theories are meant to justify the practice of deterrent punishment, which as argued above, must represent the centerpiece of any legitimate institution of punishment. But the two theories need not, as a matter of logic, fill the entire field of punishment reasons and—for the sake of completeness—it should be noted that one could incorporate victim-centered penal reasons into the system of criminal justice demanded by the two theories. That is, the victim need not, as a matter of logic, exist only in the civil system on this view. One could consistently uphold corrective justice and social defensive reasons of punishment in addition to a "moderate" retributivism that considers delivering retributive harm or expressive censure a legitimate, though non-decisive penal rationale. Given that such retributive or expressive reasons are connected more closely to the wrong against the victim and the harm borne by the victim, one could perhaps add them to the two theories to partially address the "Where's the victim?" worry—possibly as a sentencing enhancement for especially heinous offenses. On "moderate" retributivism, see Mark S. Martins & Jacob Bronsther, *Stay the Hand of Justice? Evaluating Claims That War Crimes Trials Do More Harm Than Good*, 146 DAEDALUS 83 (2017); Jeffrie G. Murphy, *Retributivism and the State's Interest in Punishment*, in CRIMINAL JUSTICE: NOMOS XXVII, at 156 (J. Roland Pennock & John W. Chapman eds., 1985); Ramon M. Lemos, *A Defense of Retributivism*, 15 S.J. PHIL. 53, 62–63 (1977); Michael Philips, *The Justification of Punishment and the Justification of Political Authority*, 5 LAW & PHIL. 393, 401–10 (1986); LARRY ALEXANDER, KIMBERLY KESSLER FERZAN & STEPHEN MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 7–10 (2009); Alec Whalen, *Retributive Justice*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), <https://plato.stanford.edu/archives/win2016/entries/justice-retributive>.

83. Thanks to Kimberly Kessler Ferzan for raising these objections.

state liability for criminal damages be extraordinarily, prohibitively expensive? We can respond, simply, that if the state is indeed liable as a moral matter, the ultimate cost will depend not only on the amount of unfulfilled criminal damages, but also on competing demands for state resources. How high a priority state liability for criminal damages would be I will not discuss here. But to clarify the point of principle: If the state had an enormous set of resources that for some reason it could only spend on crime victims, the idea is that when the state paid the victims' unfulfilled damages, it would not do so merely out of a general duty of beneficence—a general duty to help people regardless of one's relationship to them—but at least partly out of a duty of repair.⁸⁴ And that conclusion, grounded on the idea that the state has to some degree failed a crime victim, strikes me as broadly intuitive and appropriate. However, one might object, secondly, that any level of state liability would create perverse incentives for the state, either to let offenders go unpunished or, conversely, to hyper-aggressively prevent the commission of offenses. To what degree, though, would the police, prosecutors, and judges ignore offenses, or prosecute offenders less vigorously, out of a concern that the state would have to pay damages to the offenders' victims? And to what degree would a democratic populace accept further police intrusion, looking only to that same fiscal concern (and assuming that the money spent on police prevention was indeed a good investment in terms of money saved on damages)? I am doubtful that either degree would be significant—to say nothing of the fact that they may to some degree cancel each other out, given that they work at cross-purposes—but they are legitimate empirical questions. Whether they prove fatal would depend on the actual cost of state liability for criminal damages, taking into account competing demands for resources, as well as complex questions of institutional design, culture, and accountability.⁸⁵

Jean Hampton, in her later work, wrote that crime represents “*an affront to the victim's value or dignity*,”⁸⁶ and that it warrants a response intended “to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.”⁸⁷ Though I am not endorsing this penal logic, it is an influential theory and it is worthwhile to point out that compensation from the state to crime victims might represent the expressive “event” in question. Hampton believed that her theory demanded—and only demanded—retributive punishment for the criminal wrongdoer. But it would seem that compensation from the state would act to vindicate the victim's value and restore her dignity, and in a less damaging and costly manner than penal hard treatment inflicted upon the offender.

84. On the meaning and practical implications of “beneficence,” see Liam B. Murphy, *The Demands of Beneficence*, 22 PHIL. & PUB. AFF. 267 (1993); Richard W. Miller, *Beneficence, Duty and Distance*, 32 PHIL. & PUB. AFF. 357 (2004).

85. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015) (arguing that U.S. police forces have historically been democratically unaccountable, “aloof from the ordinary processes of democratic governance,” and suggesting legislative and judicial means of reform).

86. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1666 (1992).

87. *Id.* at 1686.

VI. THE DUTY TO RECTIFY AND THE CRIMINAL LAW

These two theories of deterrent punishment, in particular the corrective justice view, share a number of features with Victor Tadros's "duty theory," as stated above. It will sharpen their presentation to clarify how they differ from his theory, and to explain why I believe that his theory ultimately fails. The duty theory is motivationally similar to the two theories, given that it foregrounds the Means Problem and, in searching for a response, attempts to move beyond traditional retributivist and utilitarian theories.⁸⁸ Through a complex array of interlocking arguments, Tadros aims to bring us in *The Ends of Harm* from the moral to the political, from the duties that criminal wrongdoers owe to the individual people they have wronged to the exclusive right of the state to punish those wrongdoers for the sake of general deterrence. By comparison, the corrective justice and social defense views start with the legal and the political, with a conception of the criminal law as a system of protections foundational to social cooperation, and then understand society's rights against offenders to flow from people's reliance upon that system. I will attempt to explicate Tadros's theory succinctly—a somewhat difficult endeavor—before questioning whether Tadros can make the jump from the moral to the political, and arguing for the advantages of starting with the political.

A. *Explication*

Beginning with the moral, Tadros introduces the (I think sound) notion of an "enforceable duty," a duty that one can be forced to uphold because (a) upholding it "is necessary to avert a great harm" and (b) if it is breached, "compensation will be inadequate, or will be unlikely to be forthcoming."⁸⁹ Tadros continues by arguing that there are enforceable duties to avert the wrongful threats that one has created; this is just the Defensive Means Principle. If one has hired a hit man, for instance, he has a duty to stop him, and he could be forced to uphold this duty, by being used as a means if necessary—say, by being forced to stand in front of the bullet—as death is very serious and not compensable.⁹⁰ Tadros thus identifies a way in which someone can be used as a means permissibly: when doing so forces him to uphold an enforceable duty.

But what if the threat has already come to fruition and there is no ongoing or forthcoming attack to mitigate or prevent? Tadros argues that if one has already breached his duty, "he retains a duty to do the next best thing."⁹¹ If I fail to turn up to paint your fence, as promised, then I ought to find someone to take my place, Tadros argues, or failing that, I ought to paint it as soon as possible.⁹² Or failing both, I could pay damages. But what if the wrong cannot be easily rectified by damages, as Tadros believes is the nature of criminal as opposed to civil wrongs?⁹³ What if Greg has assaulted Henry? What is "the next best thing" that Greg can do, given that he cannot take his assault back? Due to the

88. Tadros describes the Means Problem (or a close version thereof) in at least three places in *The Ends of Harm*. See TADROS, *supra* note 1, at 113–14, 181–82, 266–67.

89. *Id.* at 275. See also *id.* at 131–32, 279.

90. *Id.* at 192–94.

91. *Id.* at 276.

92. *Id.*

93. TADROS, *supra* note 1, at 275–79.

inadequacy of damages as a remedy for assault, Tadros argues that Greg can best fulfill his duty to rectify his wrong by preventing *another* person, say, Xavier, from assaulting Henry.⁹⁴ In this way, Greg could erase his assault, as it were, leaving Henry with the net result of having been assaulted once—just where he would have been had Greg refrained from assaulting him in the first place, with the difference being that Xavier rather than Greg would have inflicted the assault.

An offender's duty of rectification toward his victim is "enforceable," Tadros continues, such that victims can force offenders to uphold their duties by coercively using them as a means of preventing a future offense. The corrective justice view, to outline its basic mechanics once more, employs the same logic vis-à-vis an offender and society: the offender, by contributing to criminality in the past, has a duty to those reliant on the criminal law to rectify this contribution, which he can fulfill by preventing another's criminality contribution, such that those reliant on the criminal law face the same level of criminality over time. Tadros seems to conceive of his theory as grounded on the principles of self-defense and the Defensive Means Principle, but it is clear that the Corrective Justice Means Principle is doing the relevant work. On his theory, self-defense—the prevention or mitigation of ongoing or future attacks—is simply the means by which offenders rectify their past wrongdoing.⁹⁵ It is an offender's duty to rectify his past wrong, rather than any standalone duty to prevent or mitigate an ongoing or future wrong, that justifies

94. *Id.*

95. Daniel Farrell, by comparison, has developed a theory of deterrent punishment connected more directly to self-defense principles. His theory was the first, to my knowledge, to attempt to secure a non-consequentialist grounding for the pursuit of general deterrence—or at least the first contemporary theory, if one wanted to include Hegel in that category. Farrell's theory, while based upon self-defense principles, relies not on the Defensive Means Principle, but on an interpretation of self-defense as a right founded in distributive justice. "When someone knowingly brings it about, through his own wrongful conduct, that someone else must choose either to harm him or to be harmed herself," Farrell writes, "justice allows the latter to choose that the former shall be harmed, rather than that she shall be harmed . . ." Daniel M. Farrell, *The Justification of Deterrent Violence*, 100 ETHICS 301, 302 (1990). Farrell follows Warren Quinn in conceiving of the criminal law as a system of threats of punishment. See Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 327 (1985). But Farrell questions why, if someone has violated a criminal law, we are entitled to follow through on our threat and actually inflict penal harm. He makes the following argument in response: Given that the criminal law is a system of threats, when someone breaks the law he forces us to choose either to (a) harm him consistent with our threats or (b) allow ourselves to be harmed by future offenders, who have learned that we do not follow through on our threats. Farrell, *supra*, at 304–05. Thus, Farrell concludes, we are entitled to punish the offender, letting him rather than us suffer the relevant harm, given that he has forced the choice upon us through his wrongdoing. See also Daniel M. Farrell, *Deterrence and the Just Distribution of Harm*, 12 SOC. PHIL. & POL'Y 220 (1995); Daniel M. Farrell, *The Justification of General Deterrence*, 94 PHIL. REV. 367 (1985).

Tadros replies, I think correctly, that Farrell's argument is "implausibly modest" as a theory of punishment, since it entails that the degree of punishment will be determined not by the offense itself, but by the extent to which the offender's non-punishment would impact the public's respect for the law. TADROS, *supra* note 1, at 272–73. Tadros presents the counterexample of someone who offends away from the public eye. "Suppose that you destroy my car in circumstances where no one else will find out about it." *Id.* at 273. It would seem, on Farrell's theory, that the state would have no reason to punish such an offender, given that his non-punishment would not undermine the credibility of the system of threats, or at least that it would have a much less demanding reason than if the criminal damage occurred in a very public place. This parallels the discussion above regarding whether Kleinfeld's reconstructivist theory can account for the professional and secretive offender. See *supra* note 66. More generally, Farrell's theory requires a rather circuitous dialogue between the state and the offender with regard to the justification of his punishment, one which would be difficult to understand as a normative interpretation of any real system of criminal punishment: "We punish you not because you broke the law *per se*, nor because your actions were *in and of themselves* harmful, but because if we did not punish you, then others would get the wrong idea about how serious we are about upholding the criminal law."

punishment on his theory.⁹⁶

Tadros enters the political realm by arguing that if a victim has a right to inflict harm upon his offender in order to protect himself from future offenses, then victims collectively have enforceable duties to donate their harming rights to the state.⁹⁷ It costs victims very little—indeed, a reasonably just state pursuing general deterrence should prove far more capable of using offenders efficiently and proportionally to prevent future offenses than individual victims acting alone—and such public state punishment will, via general deterrence, protect those non-victims who have no independent right to protection. This duty of donation is, in effect, an enforceable duty of easy rescue, Tadros argues ingeniously.⁹⁸ Crime victims can easily “rescue” non-victims by donating their punishment rights to the state, akin to saving a drowning person at the cost of wetting one’s clothes. Crime victims, that is, can provide a great advantage to non-victims—protection from crime—at the cost of little if anything to themselves.

Offenders, Tadros continues, have no complaint to being used to protect people who are not their victims. This is because when doing so is expedient or necessary, offenders have enforceable *secondary* duties to work together toward the fulfillment of their *primary* duties toward their victims. If only I can prevent a future assault against your victim, and only you can prevent a future assault against my victim, then we each have an enforceable secondary duty to agree to protect the other’s victim.⁹⁹ Given that, in the real world, the best available method of protecting their victims is to threaten future offenders via a system of state punishment, offenders have enforceable duties to work together, as it were, to receive punishment and thereby maintain such a system. So, while offenders are being used to protect people who are not their victims, it is morally permissible because it is in the service of their own personal duties.¹⁰⁰ Thus, for Tadros, with the state bound essentially to both the victim’s right to rectification and the offender’s own duty to rectify, the moral transforms into the political, and the state holds an exclusive right to punish (for the purpose of general deterrence). The Means Problem, meanwhile, is purportedly resolved because when the state uses offenders as a means of preventing crime it is not using them merely to mitigate harms or threats for which they have no responsibility, but rather forcing them to fulfill their own (enforceable) duties of rectification.

96. Tadros emphasizes the “urgency” of enforceable duties, where if someone does not act to uphold his duty *right now*, then very serious, uncompensated harm will result. “[A]s it is urgent that I do my duty and that I do it now,” Tadros writes, “you may force me to do it.” TADROS, *supra* note 1, at 268. See also *id.* at 189. Tadros ought to shed this “urgency” requirement, because it creates an unreasonable escape hatch for many wrongdoers: so long as they could fulfill their duty in the future—even if there is no reason to think that they will in fact do so—then it would not be enforceable. More to the point, if he insists on the “urgency” requirement, then the duty to rectify one’s wrongs would not be enforceable in most cases, and his theory (and the corrective justice theory of punishment, as well) would dissolve. For if we imagine a timeline of future offenses against Henry, whether Greg stops the very first one or not will not substantially impact Greg’s ability to fulfill his duty of rectification. If he fails to stop the first offender, this is in fact highly compensable, by stopping a later one; and so, consistent with the urgency requirement, we could not force him to fulfill his duty. But I cannot see why a duty of rectification in such cases would be unenforceable, assuming we had reason to believe that he would not fulfill the duty at any point in the future. Thanks to Patrick Tomlin for helpful discussion on this point.

97. *Id.* at 293–311.

98. *Id.* at 297–99.

99. *Id.* at 184, 192–94, 266–68, 274–76.

100. *Id.* at 279–81.

B. *Critique and Comparison*

Given its complexity (and ingenuity), criticism of *The Ends of Harm* has been something of a group project.¹⁰¹ No single paper can engage with the work as a whole, and analyses tend to focus on one or maybe two links in its long chain of arguments. While this may seem like a sign of strength, it is actually a weakness. By having so many interlocking components, all of which are necessary for the argument as a whole to work, the theory is wide open to potentially fatal attack, even if many of its individual components are sound; a chain is only as strong as its weakest link. I will focus here on only two aspects of the theory: first, whether victims would have a duty to donate their right of protection to the state and, second, the implications of Tadros's theory for tort law.

As to the first issue, whether victims would have a duty to donate their right of protection to the state, it is not clear that preventing future offenses will always—or even usually—be the best means of rectification. In many situations, the payment of damages would be superior, I believe, given that (a) damages are not *entirely* inadequate as a means of rectification¹⁰² and (b) whether there will be future offenses of the same type to deter is uncertain. If my house was burgled and the chance of a second burglary is low, payment of damages might be better as a means of rectification, however inadequate, than the deterrence of a possible, but unlikely, future burglary. Tadros might reply that punishment could protect victims from other types of offenses. In that case, though, where my house is burgled and I use the offender ultimately to prevent, say, a car theft or an assault, that seems no better than damages at “matching up” with and erasing the initial wrong. As a means of rectifying the particular offense he suffered—the singular moral concern that drives Tadros's entire theory—a victim might strongly prefer the certainty of damages in his pocket to protection from hypothetical future crimes. If the offender lacked the resources to pay immediately, maybe the victim could receive a percentage of his wages for a certain period of time.¹⁰³

Aside from damages, perhaps the victim would prefer a form of equitable remedy other than punishing the offender to prevent future offenses, as Kimberly Kessler Ferzan argues.¹⁰⁴ A victim of car theft, she argues, might prefer that the car thief wash his car regularly, rather than be punished to deter future car thefts.¹⁰⁵ Tadros misreads Ferzan, I think, when he replies that it would be disproportional to harm an offender significantly for the sake of providing a minor benefit to the victim like a car washing; in a complex hypothetical, he imagines a scenario in which a boulder rolls over an offender, breaking

101. See, e.g., symposia on the book in 5 JERUSALEM REV. LEGAL STUD. 48 (2012); 32 LAW & PHIL. 1 (2013); and 9 CRIM. L. & PHIL. 1 (2015).

102. See Kimberly Kessler Ferzan, *Rethinking The Ends of Harm*, 32 LAW & PHIL. 177, 192–94 (2013) (arguing that some crimes, especially but not only property crimes, would be fully compensable with damages, such that the rich who could afford to pay such damages may be able to avoid punishment on Tadros's view); Randy E. Barnett, *Restitution: A New Paradigm for Criminal Justice*, 87 ETHICS 279 (1977) (arguing for a penal system centered on offenders providing financial restitution for victims). But see Daniel McDermott, *The Permissibility of Punishment*, 20 LAW & PHIL. 403 (2001) (arguing that damages could never fully rectify denying someone the treatment she was owed as a rights-holder).

103. See Barnett, *supra* note 102, at 288–90.

104. Ferzan, *supra* note 102, at 192–94.

105. *Id.*

his legs, but somehow triggering a free car wash.¹⁰⁶ Ferzan's vision, however, is of the offender himself doing the car washing, and receiving no further punishment, so Tadros's worry about the disproportionality of car washing as a means of rectification misses its mark.

If this holds, then donating to the state your right to rectification, and thereby giving up your right to damages or non-penal equitable remedies, would not be without cost; and Tadros's "easy rescue" argument as an explanation for why the state can coercively take this right away from victims would be placed into doubt. Consistent with a liberal conception of individual rights, it seems that victims ought to have a choice over how they wish to proceed with their personal right to rectification: to sue for damages or an equitable remedy unrelated to preventing future attacks, to force the offender to serve as a personal bodyguard for some period, to donate their punishment right to the state, or to choose not to pursue any action at all. The corrective justice and social defense views, by comparison, do not require the victim's right to rectification to justify punishment, given that the relevant wrong—a criminality contribution—is against the community as a whole. This coheres with the legal principle that it is the state, rather than the victim, that prosecutes individuals for criminal offenses: it is not *Victim v. Offender*, but *The People v. Offender*. The entire institution of the criminal law, from the police to courts to prisons to the parole system, is engineered for the state and the wider community to assert their own interests against offenders. The notion, then, that this institution is founded on the process of victims donating their moral rights to the state is at best an awkward fit as a matter of interpretation.¹⁰⁷

Secondly, if Tadros were able to reply effectively to these worries, and establish that victims in fact have an enforceable duty to donate their right of rectification to the state for the purpose of general deterrence, then his theory would have an extraordinary implication for tort law. Once more, Tadros believes that the nature of criminal as opposed to civil wrongs is that the former cannot easily be rectified by damages. The purpose of the criminal law, on his view, is to rectify criminal wrongs, while the purpose of tort law is to rectify civil wrongs. Here is the extraordinary implication: there is no place in this story for the victim of a criminal wrong to sue for tort damages. The rectification he seeks would be secured by the prevention of future offenses against him, rather than damages. As a judge might explain in rejecting a victim's suit, the victim has already forced his wrongdoer to suffer so as to prevent future wrongs against him—he has already, say, sent him to jail for his own personal benefit—and so he has already been made whole and can

106. Victor Tadros, *Responses*, 32 *LAW & PHIL.* 241, 304 (2013).

107. There is a movement to increase the participation of victims in the criminal process; its very existence, though, is evidence that victims' rights are not central to the institution as currently structured. *See generally* DOUGLAS E. BELOOF ET AL., *VICTIMS IN CRIMINAL PROCEDURE* (1999); MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS* (2002). *See also* Lynn N. Henderson, *The Wrongs of Victim's Rights*, 37 *STAN. L. REV.* 937, 966–1020 (1985) (discussing reform efforts of victims' rights groups, such as victims' rights to restitution, attendance, participation, allocution, consultation with prosecutors, speedier trials, enhanced sentences, elimination of the exclusionary rule, plea agreement vetoes, refusal of defendants' discovery requests, and consideration of their safety in parole decisions); Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 *J.L. & POL'Y* 229 (2005) (suggesting that victim involvement in the criminal process will increase in the future, and considering how to provide victims with participation rights at a minimal cost to existing procedural protections for defendants).

ask no more of his wrongdoer. Such an outcome—no tort damages for crime victims—is a dramatic consequence of Tadros’s theory, and we should very much prefer a theory that allows for such damages. The corrective justice and social defense theories, by comparison, are able to motivate the criminal law while maintaining a tort system for crime victims. Again, the criminal wrong on these views, that which makes one liable to state punishment, is not a wrong against an individual victim, but rather a wrong against the wider society in the form of a contribution to criminality. Indeed, we can view the criminal wrong as a tort against society, with the corrective justice and social defense principles working to repair that social damage. The offender’s tort against his individual victim—as well as the state’s potential liability for its failure to protect the victim, as discussed above—are distinct issues to be considered in the separate civil system.

VII. EMPIRICAL FOUNDATIONS

The theory of the criminal law and of state punishment which I have set out and defended rests upon an empirical assumption: an effective, reliable criminal law is foundational to the maintenance of a cooperative civil society and to people’s assured liberty. If this assumption (or set of assumptions) were false, then consistent with this Article’s first premise—that to justify its extreme institutional costs, state punishment must deter crime to some sufficient degree—there could be no legitimate system of state punishment.¹⁰⁸ This is not just an issue for the corrective justice and social defense theories, then, but for all purported justifications of state punishment. If we could secure social peace and cooperation without the threat of punishment—if, say, the operation of non-legal social norms would suffice to diminish the threat of crime—then the enormous expense of the criminal justice system, with its police, prosecutors, defense attorneys, judges, prisons, parole officers, and so forth, would be unjustifiable, given the great mass of suffering even a relatively mild system of criminal punishment inflicts on offenders and their dependents, and given all that we might otherwise do with those resources. To be clear, it would be unjustifiable even if retributivists were right that, regardless of its deterrent impact, all offenders deserved to suffer or be censured. For the imperative of retributivist penal desert, even if legitimate, could not be an absolute trump.¹⁰⁹ And if its infliction played a negligible role in deterring crime, then that imperative would be overridden by the wants and needs we could otherwise fulfill with penal resources.

What, then, should we make of the empirical claim regarding the impact of the criminal law—of the threat of criminal punishment—on society and social cooperation? It is difficult to know with certainty. It would require assessing a polity with, and then without, a functioning criminal law over a sufficiently long period of time. The historical examples we have—say, the recent examples of Baghdad after the fall of Saddam Hussein in 2003¹¹⁰ and the Brazilian state of Espirito Santo after its police force went on strike in

108. *See supra* note 1.

109. Kant famously disagrees. IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 198 (William Hastie trans., Edinburgh, T&T Clark 1796) (arguing that, even in a disbanding island society, “the last Murderer lying in the prison ought to be executed . . . in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people”).

110. *See, e.g.*, Naomi Klein, *Baghdad Year Zero*, *HARPER’S MAG.*, Sept. 2004, at 43, 43–53 (reporting

2017¹¹¹—loudly support the thesis that the threat of criminal punishment plays a crucial role in decreasing the crime level. But these “experiments” were not run for long enough, one might argue, and perhaps over a longer period of time sufficient non-penal and possibly non-legal modes of regulation would emerge to guarantee people’s assured liberty.¹¹² Perhaps. Claus Roxin writes perceptively on how we ought to interpret the lack of definitive social science evidence on the deterrent impact of state punishment, given the complex causal relationships at play in someone’s decision to offend.¹¹³ At the same time he articulates the reliance interest of non-victims on the criminal law:

This indeterminacy [in the social science evidence] . . . does not change the fact that a functioning system of social control and criminal justice is—taken in the totality of its social effects—certainly capable of helping to maintain . . . civil peace for citizens. Some crimes will, of course, still be committed. But whereas in Germany one can walk the streets safely at night, there are other countries in which this is impossibly dangerous and where people hide away in their houses surrounded by high walls. One cannot seriously doubt that such a deplorable state of affairs is due to failures of preventive social management, ranging from police work to the operations of the criminal courts and the correctional system. (That these failures are, in turn, a consequence of poverty and other social problems, is a different point.)¹¹⁴

Let us continue, then, with the commonsense empirical view that a functioning criminal law decreases the threat of crime significantly, but with the understanding that should this claim prove false, or should there be less costly non-penal and possibly non-legal modes of securing sufficient crime reduction, that it would gravely damage any justification of the criminal law. To be sure, this is not to assume that the criminal law’s deterrent impact depends upon any particular level of punishment severity, but merely upon the effective threat of at least some level of punishment, the infliction of which would be a matter of public knowledge.¹¹⁵

widespread lawlessness after the fall of the Baathist regime); John F. Burns, *Pillagers Strip Iraqi Museum of Its Treasure*, N.Y. TIMES (Apr. 12, 2003), <http://www.nytimes.com/2003/04/12/international/worldspecial/pillagers-strip-iraqi-museum-of-its-treasure.html> (reporting looting).

111. See, e.g., Paulo Whitaker & Pablo Garcia, *Over 100 Dead in Brazil as Police Strike Spurs Anarchy*, REUTERS, Feb. 9, 2017, <http://www.reuters.com/article/us-brazil-violence-espírito-santo-idUSKBN1501ZT> (reporting widespread violence in the wake of the police strike); Lola Mosanya, ‘*Crazy Violence*’ in *Brazilian State During Police Strike*, BBC NEWS (Feb. 11, 2017), <http://www.bbc.co.uk/newsbeat/article/38942911/crazy-violence-in-brazilian-state-during-police-strike> (same); *Brazilian City of Vitoria Hit by Police Strike*, BBC NEWS (Feb. 6, 2017), <http://www.bbc.co.uk/news/world-latin-america-38879775> (same); Paulo Whitaker, *Some Brazil Police Break Strike Following Wave of Homicides*, REUTERS, Feb. 12, 2017, <http://www.reuters.com/article/us-brazil-violence-idUSKBN15R0SU> (same).

112. Even if that were the case, we might have reason, nonetheless, to prefer a legal to a non-legal system of protections. As Jeremy Waldron writes in discussing the treatment of Romeo and Juliet by the Montagues and Capulets: legal protections have the advantage of not depending upon the potentially fickle affections of a closely-knit social group. JEREMY WALDRON, *When Justice Replaces Affection: The Need for Rights*, in *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991*, at 370, 377 (1993).

113. Roxin, *supra* note 1.

114. *Id.* at 29–30.

115. There is evidence that the certainty of receiving *some* level of punishment is more important for the purpose of deterring would-be offenders than the *severity* of the punishment that they receive. See Daniel S. Nagin, *Deterrence in the Twenty-First Century: A Review of the Evidence*, in *CRIME AND JUSTICE IN AMERICA: 1975–2025*, at 199 (Michael Tonry ed., 2013); ANDREW VON HIRSCH ET AL., *CRIMINAL DETERRENCE AND*

CONCLUSION: SENTENCING IMPLICATIONS

We now have filled in the basic contours and justifications of two novel (but closely related) theories of deterrent punishment. The offender, by contributing to criminality, has diminished the assured liberty of everybody in the jurisdiction by contributing to a social threat that (a) chills the exercise of their rights, (b) forces them to take expensive precautions, and (c) subjects them to unreasonable risks of harm. At the far extreme, criminality can threaten the maintenance of a cooperative, non-violent civil society. Deterrent punishment, which acts to reduce the amount of criminality in society going forward, is the means by which the offender rectifies or mitigates his past and possibly ongoing contributions to criminality, consistent with the corrective justice and social defense theories of punishment, respectively. In this way, he is not simply sacrificed to limit the problem of future crime, for which he has no responsibility, but rather is forced to fulfill his own duties of repair. And thus, in sum, we have a non-consequentialist justification for deterrent punishment, one that coheres with the principle of human inviolability, that is, with a steadfast refusal to sacrifice offenders as mere means to the greater good.

If this indeed works to answer the *why* question of criminal law theory—Why is the state entitled to harm someone when he commits an offense?—the *how much* question remains nonetheless—How much harm should the state inflict?¹¹⁶ I will outline the basic sentencing implications of this view to conclude. The macro implication is as follows: the greater one's criminality contribution, the greater the amount of criminality he would have a duty to erase, and thus the more severe the punishment he would be liable to receive. There are, however, a number of subsidiary issues to consider to make sense of this claim.

First, how do we know when one criminality contribution is greater than another? Given that the ultimate aim is assured liberty, we can ask the following question: how important is it to people, in the planning and execution of their lives, to be able to rely upon others not performing those acts? We can see, in this way, how Inez having a settled intention to kill represents a greater criminality contribution than Ryan having a settled willingness to speed while driving or to drive recklessly.

Second, we need to understand the *fungibility* of criminality when considering an offender's duties. Given that the criminal law is a *system* of protections, such that people rely upon clusters of protections at any given time, one's duties would not be limited to preventing his or her offense type. That is, what Inez did, by making her criminality contribution, was—in concert with other offenders—to chill the exercise of our rights, force us to take expensive precautions, and subject us to unreasonable risks of harm. She could rectify this by deterring offenses of a different type, given that the negative impact

SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 27, 36, 45 (1999).

116. Andrew von Hirsch writes that the latter question is often overlooked in criminal law theory: "Philosophical writing has chiefly confined itself to the general justification of punishment, why the criminal sanction should exist at all. Seldom addressed, however, has been what bearing the justification for punishment's existence has on the question of how much offenders should be penalized." VON HIRSCH, *supra* note 20, at 6. See also DUFF, *supra* note 20, at 131 ("A normative theory of punishment must either include, or be able to generate, a theory of sentencing—an account of how particular modes and levels of punishment are to be assigned to particular kinds of offense and offender. Only then can it guide or even connect with the actual practice of punishment.").

of those other offenses will register in the same manner. She need not deter only murderers, that is; and she would not be acquitted if she happened to be the only murderer in society.

Third, the infliction of harm or suffering upon offenders would only be justified so long as it deterred crime. The suffering of offenders is not an intrinsic good on either the corrective justice or social defense view, as discussed above. They are not retributivist theories. As such, given the tenuous empirical correlation between increased punishment severity and increased deterrence, the two theories should justify a milder system of punishment than current federal and state sentencing schemes.¹¹⁷ Furthermore, it may be more efficient for offenders to fulfill their duties of rectification and mitigation in ways other than (or in addition to) hard treatment, such as fines and community service.¹¹⁸ Any marginal increase in penal harm that was not met with a marginal increase in crime deterrence would represent a wanton and illegitimate injury.¹¹⁹ We must endorse those methods of punishment that enable an offender to fulfill his duty with the smallest degree of injury to him in the process.

Fourth, given that the suffering of offenders is not an intrinsic good on this view, and given that the budget for crime prevention is limited, the state should ask, for each dollar spent, whether non-penal community investments would represent a more efficient means of reducing criminality—with the understanding, consistent with the discussion in Part VII, that not all resources could be diverted from the project of general deterrence via the threat of punishment.

117. *See generally* DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (Alfred Blumstein, Jacqueline Cohen & Daniel Nagin eds., 1978) (collecting data on deterrent effects of criminal punishment); Tracey L. Meares, Dan M. Kahan & Neal Katyal, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1172–93 (2004) (applying social science studies to assess the possible deterrent effects of various criminal sanctions).

118. *See* discussion *supra* note 62.

119. *See* discussion *supra* note 115.