Against Proportional Punishment

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INTRODUCTION

Many criminal defendants are held in detention while they await trial. Though conditions in pretrial detention are much like those in prison, detention is technically not punishment. Since detainees are merely accused of crimes, they are presumed innocent.[1] Their detention is not intended to punish them, and so, the Supreme Court has said, it is not punishment at all.[2] Rather, detention is a means of promoting public safety, reducing witness intimidation, and preventing people accused of crimes from fleeing before trial.

Nevertheless, defendants who are convicted generally receive credit at sentencing for time served in pretrial detention.[3] An offender who deserves two years of incarceration as punishment will have his sentence cut in half if he has already spent one year in detention. Such offsets appear to conflict with principles of proportional punishment. Taken literally, giving credit for time served leads us to systematically underpunish detainees by reducing their punishment by time spent unpunished. To unlock the mystery of credit for time served, defenders of proportionality need to square the widely held view that offenders should receive credit for time served with the widely held view that punishment should be proportional to blameworthiness.

One seemingly plausible solution that I suggest in Part I is to modify our understanding of proportionality. Courts and legal scholars sometimes draw too sharp of a distinction between formal punishment and other harms inflicted by the state. On more careful reflection, however, what they really seem to care about is not proportional punishment but proportional "harsh treatment," which includes not only the suffering and deprivation of formal punishment but also the suffering and deprivation of "punishment look-alikes," like pretrial detention. Even though pretrial detention is technically not punishment, it is harsh treatment, and most people are inclined to give offenders credit for it.

1. Coffin v. United States, 156 U.S. 432 (1895).
2. United States v. Salerno, 481 U.S. 739, 746–47 (1987).
3. *See infra* Part I.C.

Shifting to proportional harsh treatment, however, solves one problem at the expense of several others. As I argue in Part II, once we understand punishment severity in terms of harsh treatment rather than a more neatly bordered but inaccurate construct like days in prison, we must consider the actual amount of harsh treatment we inflict.[4] The amount will vary based on (1) the particular facilities to which inmates are assigned, (2) how inmates experience those facilities, (3) how confinement harms them relative to their unpunished baselines, and (4) how they are affected by the collateral consequences of incarceration for decades to come. Even if these harms do not constitute punishment, they contribute to sentence severity as surely as pretrial detention does.

While we could try to salvage proportional harsh treatment by taking all of this variation into account, I argue in Part III that when we look closely at proportional harsh treatment, it becomes much less appealing and consequentialist punishment theories that do not depend on proportionality look comparatively more appealing. Even though retributivist notions of proportionality are central to sentencing systems around the world and are widely thought to undergird core notions of criminal justice, proportionality has profoundly counterintuitive implications.

I. THE MYSTERY OF CREDIT FOR TIME SERVED

In this Part, I describe what I mean by proportional punishment and how it conflicts with giving offenders credit for time served. I then propose five responses proportionalists might offer to reconcile the two policies. I argue that the best reconciliation requires us to replace proportional punishment with the more general concept of proportional harsh treatment.

A. Background on the Meaning of Punishment

In *United States v. Salerno*,[5] the Supreme Court upheld the federal statute that provides for pretrial detention of dangerous

4. In this Part, I connect and extend claims I made in Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) [hereinafter Kolber, *Subjective Experience*]; Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565 (2009) [hereinafter Kolber, *Comparative Nature*]; Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585, 622–48 (2011) [hereinafter Kolber, *Experiential Future*]; and Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1 (2012) [hereinafter Kolber, *Unintentional Punishment*].

5. 481 U.S. 739 (1987).

offenders.[6] Crucial to the Court's determination was its view that Congress intended pretrial detention to be "regulatory" rather than "punitive."[7] What made the statute regulatory, first and foremost, was that it was not intended to punish.[8] Absent evidence that the legislature expressly intended to punish, the Court only deems a statutory provision punitive if it has no rational alternative purposes or if the provision "appears excessive in relation to the alternative purposes assigned [to it]."[9] In essence, harsh treatment at the hands of the state is only punishment if it is intended to punish or if claims to the contrary seem implausible, even if the conditions of confinement in pretrial detention are just as severe as those in prison.[10]

Many theorists share the Court's view that punishment must generally be intended as such. H.L.A. Hart's widely cited definition of standard cases of punishment requires that painful or unpleasant consequences be "intentionally administered" to an "offender for his offence."[11] David Boonin defends a particular interpretation of the requirement that punishment be intended, stating that "[i]t is not merely that in sentencing a prisoner to hard labor, for example, we foresee that he will suffer. Rather, a prisoner who is sentenced to hard labor is sentenced to hard labor so that he will suffer."[12] Thus, even though pretrial detention is supposed to protect us from dangerous people and those likely to flee or intimidate witnesses,[13] it is technically not punishment; detainees are presumed innocent and are not intended to suffer or be deprived as condemnation for an offense.

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6. *Id.* at 741. Under the statute, if an offender has committed certain serious crimes and a judicial officer finds by clear and convincing evidence that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial." 18 U.S.C. § 3142(e), (f) (2006).

7. *Salerno*, 481 U.S. at 747.

8. *Id.*

9. *Id.* (alteration in original) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

10. The Supreme Court considered it relevant that the federal statute requires detainees to be held in a "facility separate, to the extent practicable, from" people who have been convicted, *id.* at 748 (quoting 18 U.S.C. § 1342(i)(2)), but did not require that conditions in pretrial detention be any less severe than those in prison.

11. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4–5 (1968). Hart speaks of an "actual or supposed" offender, but the inclusion of "supposed" likely refers not to accused people in pretrial detention but to those who are erroneously convicted. *See id.* at 5–6.

12. DAVID BOONIN, THE PROBLEM OF PUNISHMENT 13 (2008); *see also id.* at 14 n.14 (citing theorists who describe punishment as an infliction intended to harm).

13. *Salerno*, 481 U.S. at 748; *see also* Bell v. Wolfish, 441 U.S. 520, 583 (1979) (Stevens, J., dissenting) (recognizing risk of flight as a longstanding justification for pretrial detention).

B. Background on Proportionality

The view that punishment should be proportional—at least in some respect—is enormously popular, capturing the views of most laypeople and probably most theorists.[14] According to Antony Duff, some principle of proportionality is "intrinsic to any version of retributivism."[15] Even young children have proportional-punishment intuitions.[16] Reflecting these views, the almost-half-century-old Model Penal Code was amended a few years ago to make proportionality the centerpiece of its sentencing philosophy.[17]

Proportionality is often considered one of the biggest attractions of retributivism relative to consequentialism.[18] Pure consequentialists punish in order to promote crime deterrence and the incapacitation and rehabilitation of dangerous people.[19] Since we might be able to prevent a great deal of crime by punishing some relatively minor offense with an extremely long prison sentence, disproportional punishment could, under certain circumstances, lead to very good consequences. Therefore, pure consequentialists have no

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14. BOONIN, *supra* note 12, at 35 ("Virtually everyone who has attempted to justify punishment, for example, firmly believes that punishment should be at least roughly proportionate to the severity of the offense."); PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 157–99 (1995) (describing surveys of laypeople that loosely reflect proportional-punishment intuitions).

15. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 132 (2001); *see also* Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 164 (2010) ("Retributivism . . . is centrally concerned with the imposition of punishment in proportion to an offender's moral desert."); *id.* at 168 (describing proportionality as a "fundamental retributive value[]").

16. Norman J. Finkel, Marsha B. Liss & Virginia R. Moran, *Equal or Proportionate Justice for Accessories? Children's Pearls of Proportionate Wisdom,* 18 J. APPLIED DEVELOPMENTAL PSYCHOL. 229, 241 (1997) (reporting that "by grades 2–3, [children] are making proportionate judgments of culpability and handing out proportionate punishments to all defendants" in mock scenarios).

17. MODEL PENAL CODE: SENTENCING § 1.02(2) (Tentative Draft No. 1 2007); *see also Current Projects, Model Penal Code: Sentencing*, AM. L. INST., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=2 (last visited Mar. 20, 2013) ("Once approved by the Council and membership, Tentative Drafts may be cited as representing the most current iteration of the Institute's position until the official text is published.").

18. *See, e.g.*, ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 4 (2005) (stating that deterrence-oriented punishment policies pay insufficient attention to proportionality); Sigler, *supra* note 15, at 170 ("Absent side constraints, utilitarianism countenances the deliberate infliction of punishment on the innocent and accommodates modes and methods of treatment that fail to accord with our basic sense of justice and proportionality." (citation omitted)).

19. *See* C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 7–8 (1987).

principled commitment to proportional punishment.[20] Retributivists, by contrast, usually require proportional punishment and always prohibit knowingly or recklessly punishing people in excess of what they deserve.[21]

The kind of proportionality that I address in Part I and that I ascribe to proportionalists says that offenders should be punished in proportion to their blameworthiness.[22] My claims apply just as well to common variations on this general formula: Some say that an offender's punishment should be proportional to his "desert" or to the "seriousness of his offense."[23] Some understand the seriousness of an offense in terms of its illegality, others in terms of its immorality.[24]

Sometimes the expression "proportional punishment" is used just to mean "appropriate" or "fitting" punishment. I have no quarrel with proportionality when used in such a generic sense. My challenge is to the view that as one's blameworthiness increases, so should one's punishment. For example, some say that consequentialists are committed to a principle of proportionality in the sense that punishment should be "not more harmful than the harm it aims to prevent."[25] This is a very different notion of proportionality—if it can even be called that—than the retributivist forms of proportionality that I am addressing.

Some scholars hold "mixed" or "hybrid" theories of punishment that are largely consequentialist in nature but use retributivist principles of proportionality to limit the amount of punishment

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20. Though consequentialists have no fundamental obligation to punish proportionally, as an empirical matter, there may still be good instrumental reasons to do so. Kolber, *Subjective Experience*, *supra* note 4, at 236.

21. *See, e.g.*, LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY 6, 102 n.33 (2009). Some retributivists might require only that we never knowingly or recklessly punish *particular* individuals in excess of what they deserve. This difference will not affect my analysis, however.

22. *See, e.g.*, ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 169 (1985) ("Penalties should comport with the seriousness of crimes, so that the reprobation visited on the offender through his penalty fairly reflects the blameworthiness of his conduct.").

23. *See, e.g.*, Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 738–39 (2009) (describing a variety of ways in which retributivist proportionality is described); *see also* DUFF, *supra* note 15, at 135 ("Penal proportionality, as orthodoxly understood, is a relation between the seriousness of the crime and the severity of the punishment."); Douglas N. Husak, *Already Punished Enough?*, 18 PHIL. TOPICS 79, 83 (1990) ("A corollary of the 'just deserts' theory is the principle of proportionality, according to which the severity of a punishment should be a function of the seriousness of the offense.").

24. *See* Kyron Huigens, *The Jurisprudence of Punishment*, 48 WM. & MARY L. REV. 1793, 1816–17 (2007).

25. DUFF, *supra* note 15, at 132.

imposed in particular cases.[26] The "narrow proportionality principle"[27] in the Eighth Amendment of the U.S. Constitution could be understood as a cousin to such theories. Though the Constitution does not require anything like precise proportionality, "[t]he concept of proportionality is central to the Eighth Amendment" ban on cruel and unusual punishment and "[e]mbodie[s] . . . the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' "[28]

I address these more limited forms of proportionality in Part III.A.2. In short, though, I argue that retributivist proportionality is deeply troublesome and remains so whether it takes center stage or merely has a supporting role. Moreover, I criticize proportionality without resort to familiar arguments that it is difficult or impossible to convert amounts of blameworthiness into amounts of punishment.[29]

C. Background on Credit for Time Served

About half a million people are currently held in pretrial detention in the United States.[30] Even though pretrial detention is not considered punishment, those who are subsequently convicted usually have their sentences shortened by the amount of time they spent in detention. Federal judges, for example, are required by statute to give credit for time served,[31] as are many state judges.[32]

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26. On some such views, the general justifying aim of punishment is consequentialist (we create institutions of punishment to prevent crime and rehabilitate criminals), but retributivist principles of proportionality constrain the amount of punishment we are permitted to inflict on individual offenders. *See* HART, *supra* note 11, at 8–13; Douglas Husak, *Why Punish the Deserving?*, 26 NOÛS 447, 452–53 (1992) (describing Hart's view).

27. Ewing v. California, 538 U.S. 11, 20 (2003) (quoting Harmelin v. Michigan, 501 U.S. 957, 996 (1991)).

28. Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

29. *See, e.g.*, JESPER RYBERG, THE ETHICS OF PROPORTIONATE PUNISHMENT 148–49 (2004) (critically analyzing efforts to establish which punishments are proportional to which levels of blameworthiness).

30. According to the Bureau of Justice, approximately sixty-one percent of the 735,601 people held in local jails in the middle of 2011 had not been convicted of the crimes for which they were charged. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 237961, JAIL INMATES AT MIDYEAR 2011—STATISTICAL TABLES, at 4 tbl.1, 7 n.7 (2012).

31. 18 U.S.C. § 3585(b) (2006).

32. *E.g.*, CONN. GEN. STAT. § 18-98d (West 2012); 730 ILL. COMP. STAT. ANN. 5/5-4.5-100 (West 2012); LA. CODE CRIM. PROC. ANN. art. 880 (2012); MASS. GEN. LAWS ANN. ch. 279, § 33A (West 2012); N.M. STAT. ANN. § 31-20-12 (West 2012); N.Y. PENAL LAW § 70.30(3) (McKinney 2013); 42 PA. CONS. STAT. ANN. § 9760 (West 2012); TEX. CODE CRIM. PROC. ANN. art. 42.03 § 2 (West 2011).

I focus primarily on pretrial detention, though offenders can also receive credit for other periods of detention, including time during trial and time after conviction but before sentencing. While pretrial detention is often short, measured in days or months, it can also last for years. A Chinese immigrant charged with manslaughter in New York was recently released without trial after spending almost four years in pretrial detention.[33] The International Criminal Court in The Hague recently sentenced an offender to fourteen years of incarceration minus the six years he spent in detention prior to trial and sentencing.[34]

When judges have broad sentencing discretion, it can sometimes be difficult to determine whether an offender received credit for time served. Suppose at sentencing that an offender has already spent two months in detention and that the judge believes the offender deserves a total of one year of confinement. The judge could either sentence the offender to one year of confinement with credit for time served or to ten months' confinement without credit for time served. Either approach causes the offender to spend ten additional months confined. In cases where judges are unclear about whether they credited time served, appellate courts frequently presume that a sentencing judge gave credit so long as the total time spent in presentence custody plus the time to be spent punished is shorter than the maximum permissible sentence.[35] When failure to credit time served would lead to an offender spending more total time in confinement than the statutory maximum, most jurisdictions require judges to give credit.[36] In the small number of states that give judges

33. Corey Kilgannon & Jeffrey E. Singer, *Charges Are Dropped Against Mother in Shaken-Baby Case*, N.Y. TIMES, Jan. 3, 2013, at A22.

34. Marlise Simons, *Congolese Warlord Draws First Sentence from International Criminal Court*, N.Y. TIMES, July 11, 2012, at A4.

35. *See, e.g.*, People v. Jones, 489 P.2d 596, 599 (Colo. 1971) ("The law is clear that if the actual sentence imposed, plus the time spent in jail prior to sentence, does not exceed the maximum sentence which could be imposed, it will be conclusively presumed that the sentencing court gave the defendant credit for the pre-sentence time spent in confinement."). In *Vasquez v. Cooper*, for example, Paul Vasquez was unable to make bail and spent 284 days in detention prior to trial and sentencing. 862 F.2d 250, 251 (10th Cir. 1988). The judge stated at sentencing that "consideration was given" to Vasquez's prior confinement and that "[t]he court does not credit the defendant with any time previously served." *Id.* The Tenth Circuit denied Vasquez's claim that his sentence unconstitutionally failed to credit his time served because the court stated that it took into account his time in detention. *Id.* at 254. "Requiring the judge to determine the sentence necessary to serve the state's penological interests by disregarding the time previously served by the defendant, and then mechanically subtracting that time from the sentence given, would be an artificial and meaningless exercise." *Id.* at 253 (citation omitted).

36. *See, e.g.*, *In re* Benninghoven, 749 P.2d 1302, 1303 (Wash. 1988) (citing State v. Cook, 679 P.2d 413 (Wash. 1984)) ("In determining maximum and minimum sentences, credit must be given for pretrial and presentencing detention time."); Martin v. Leverette, 244 S.E.2d 39, 41–42

discretion to award credit for time served,[37] however, there is arguably no constitutional right to credit.[38]

D. The Conflict Between Proportionality and Credit for Time Served

Though detainees are occasionally denied credit for time served, they usually receive it.[39] Indeed, offenders are sometimes sentenced only to the time that they have already spent in detention.[40] Intuitively, however, justice may have been served in such cases, even though no one was punished at all in the technical sense. Hence, there appears to be a conflict among the following three commonly held beliefs: (1) pretrial detention is not punishment, (2) punishment should be proportional to blameworthiness, and (3) convicted detainees should receive credit for time served. Taken separately, each seems quite plausible. Together, however, they seriously conflict and generate what I call the "mystery of credit for time served."

Proportionalists could resolve the mystery simply by denying that we should credit time served. Few will choose this option, however, as credit for time served seems to be quite popular. Indeed, I know of no scholar who has argued against it.

In the next four Sections, I describe and reject responses that proportionalists might give. They are intended to resolve the mystery by arguing either that credit for time served does not lead to disproportional punishment or that it leads to disproportionality that can nevertheless be justified. In the fifth Section, I introduce an

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(W. Va. 1978) (holding that credit must be given for pretrial detention under West Virginia's Constitution and stating that "the modern trend is to constitutionally require credit for pre- and post-conviction jail time absent some extraordinary factors").

37. ARTHUR W. CAMPBELL, LAW OF SENTENCING § 9:28 (2012).

38. *See* Ibsen v. Warden, 471 P.2d 229, 231 (Nev. 1970) ("No courts considering a request for credit [for time spent in county jail] have found a defendant entitled to credit as a matter of right in the absence of a statute either permitting or requiring the giving of such credit."); *see also* Cobb v. Bailey, 469 F.2d 1068, 1069 (5th Cir. 1972). *But see* Culp v. Bounds, 325 F. Supp. 416, 419 (W.D.N.C. 1971) (failing to credit time served when sentencing to the statutory maximum violates constitutional rights to equal protection and to avoid double jeopardy); Comment, *Credit for Time Served Between Arrest and Sentencing,* 121 U. PA. L. REV. 1148, 1148–50 (1973) (arguing that a "prisoner . . . sentenced to a maximum term [has] a constitutional right to receive credit for presentence incarceration").

39. *See supra* notes 31–32 (citing federal and state statutes mandating the practice).

40. *See, e.g.*, Emily Bazelon, *Shaken*, N.Y. TIMES MAG., Feb. 6, 2011, at 30, 36 (noting that British au pair Louise Woodward was sentenced to time served after her controversial conviction for involuntary manslaughter in the apparent shaking death of the child in her care); Jim Fitzgerald, *NY Bride Who Faked Cancer Released from Jail*, ASSOCIATED PRESS, May 23, 2012, *available at* http://bigstory.ap.org/content/ny-bride-who-faked-cancer-released-jail (describing the sentence of time served for a woman who faked having cancer in order to garner donations for her "dream wedding").

alternative conception of proportionality based on harsh treatment that superficially resolves the mystery of credit for time served. Later, in Part II, I explain why even this approach is inadequate.

1. The Recharacterization Response

Proportionalists might claim that *acquitted* detainees are not punished but argue that *convicted* detainees are punished retroactively upon conviction. By so arguing, they hope to preserve the policy of giving credit for time served while still punishing in proportion to blame. But how can punishment be imposed retroactively?

Proportionalists could argue that our description of an act sometimes changes based on events that happen after the act is completed. For example, if an inmate earnestly participates in vocational training and twelve-step programs while in prison and then abides by the law after release, we are inclined to say that he rehabilitated in prison. But if he participates just as earnestly in these programs, yet upon release behaves in the same violent, chaotic manner that he did before entering prison, we will say he did not rehabilitate. So whether he rehabilitated in prison, one might argue, depends on information we don't know until after he leaves prison. Just as we cannot decide whether participation in vocational training constitutes rehabilitation until years later, we cannot decide whether detention constitutes punishment until an offender's guilt is determined.

But even though we informally recharacterize acts based on subsequent events, these recharacterizations are just shorthand expressions. More accurately, we should say that the inmate participated in acts *intended* to rehabilitate and was successful in one scenario and not the other.

Furthermore, retroactive recharacterization of conduct during detention would require us to radically alter the traditional meaning of punishment. For example, we would have to change the requirement that punishment be "intended to be burdensome or painful"[41] to say something very unnatural like "punishment either is or subsequently was intended to be burdensome or painful." Under this new description, it is not clear when, if ever, we can make a definitive determination about whether a person was punished.

My main argument against recharacterization, however, is that we are unlikely to defend it in a consistent manner. Recharacterizing

41. DUFF, *supra* note 15, at xiv–xv.

conduct is surely convenient, but doing so makes our punishment characterizations too implausible. For example, when a person is erroneously convicted and forced to spend a decade in prison, we could simply recharacterize his treatment after the fact as nonpunishment. But no one would believe it. Indeed, the suggestion is reminiscent of widely debunked efforts to deny by fiat the possibility of punishing the innocent.[42] In any event, most people likely think that whether conduct is punishment depends on the conduct at the time it occurs and not on subsequent events.

2. The Compensation Response

Proportionalists might argue that credit for time served is a form of compensation. Detainees are deprived of liberty, so if they are convicted, we compensate them by punishing them less than they deserve. This strategy salvages a general commitment to proportionality while recognizing a limited exception for purposes of compensation.

If any detainees are entitled to compensation, however, surely those who are acquitted deserve it. But in the United States we deny compensation to even these more deserving detainees. Some countries do compensate defendants who are acquitted or whose charges are dropped,[43] so proportionalists could acknowledge that *all* pretrial detainees deserve compensation and concede that current practice in the United States is simply a second-rate solution.

There are three major reasons, however, to doubt that the compensation response alone can justify credit for time served. First, it is unclear why reduced punishment can compensate for detention. Proportionalists must explain why detention and punishment are sufficiently different pretrial that we can deny detainees the rights associated with being punished yet are sufficiently similar post-trial that they can be traded off on a day-for-day basis.[44]

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42. Anthony Quinton, for example, argued that we cannot possibly punish the innocent because, by definition, punishment must be inflicted on actual offenders. Anthony Quinton, *On Punishment*, 14 ANALYSIS 133, 136–37 (1954). Such "definitional stops," however, do nothing to justify the harsh treatment of innocent people. *See* HART, *supra* note 11, at 5–6.

43. *See* Omer Dekel, *Should the Acquitted Recover Damages? The Right of an Acquitted Defendant to Receive Compensation for the Injury He Has Suffered*, 47 CRIM. L. BULL. 3, art. 5 (2011) (stating that England, France, Germany, Austria, Norway, and Hong Kong, among others, have systems for compensating acquitted defendants).

44. There may indeed be an explanation for treating detention and punishment as commensurable only in certain contexts. For example, we do not allow people to buy bodily organs, but if you forcibly take someone's organ, you owe the person monetary compensation. Even in the organ context, however, we are entitled to an explanation as to why organs and

Second, if we were to compensate detainees, it would be better to provide financial compensation. The compensation could be held in escrow so that the victims of an offender's crime could make a claim against it first. Surely crime victims are more deserving of compensation than the people convicted of causing them harm. Thus, if credit for time served is a form of compensation, it is certainly not the best method of compensating.

Third, punishment reduction lacks certain features, such as transferability, that are common to methods of compensation. For example, if A negligently crashes into B and owes B compensation, B can transfer his interests in compensation to some third party. But if the state owes a punishment reduction to an offender who was detained, the offender cannot transfer it to anyone else. Similarly, we cannot transfer compensation to our future selves by banking up punishment reductions for later use. If an offender spends one month in pretrial detention but is later acquitted, he does not receive a one-month reduction when committing some future crime. And we certainly would not give the offender a get-out-of-jail-free card to commit an offense punishable by less than a month's incarceration.

There are, of course, strong deterrence reasons not to allow people to bank up credit toward future crimes. So perhaps such cases present special exceptions. But consider this possibility[45]: In early 2010, a person evades his taxes in a manner that goes undetected. Later that year, he is falsely accused of murder and spends six months in pretrial detention before the murder charges are dismissed. In 2013, authorities discover his tax evasion from three years prior, and he is sentenced to six months in prison. If time spent in pretrial detention warrants compensation in the form of punishment reduction, then his six months in pretrial detention for a murder he did not commit should serve to eliminate his sentence for the fraud that he did commit. In this case, the deterrence rationale does not work because we may assume that, when he evaded his taxes, he did not anticipate that he would subsequently be falsely accused of murder. Yet proportionalists would likely reject credit for time served in this context even though there is no especially strong deterrence rationale for rejecting it.

Given that compensation proponents find detention and punishment commensurable only when it is convenient for their

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dollars are only sometimes treated as commensurable. Compensation proponents owe a similar explanation in punishment contexts.

45. *See* Shawn J. Bayern, *The Significance of Private Burdens and Lost Benefits for a Fair-Play Analysis of Punishment*, 12 NEW CRIM. L. REV. 1, 19 (2009) (providing a similar example).

theory, and given that we cannot save or transfer credits in the way that we can for other forms of compensation, it seems unlikely that compensation is a strong enough rationale to justify failing to punish proportionally.[46]

3. The Socioeconomic Disparity Response

Some people accused of crimes are detained because they cannot afford bail, even though others accused of equally serious crimes make bail and retain their freedom. If we denied credit for time served, those unable to make bail would systematically be confined longer than those who can. Although the ability to make bail is not perfectly correlated with wealth since courts take people's assets into account when setting bail,[47] as a general rule, poorer people have more difficulty making bail than richer people.

So, one might argue, we should give credit for time served to reduce the disparity in treatment of rich and poor. Even though giving credit for time served leads to disproportional punishment, the disproportionality is justified by the principle that duration of confinement should not be a function of wealth.

Courts have often expressed concern about the disparate socioeconomic effects of bail. Several have held it unconstitutional to deny credit for time served in cases where offenders simply couldn't afford bail, at least when their total time confined implicates the statutory maximum.[48] Crediting time served does not entirely eliminate socioeconomic disparity because acquitted detainees cannot take advantage of the policy, but it at least reduces wealth-related disparate treatment.[49]

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46. In Part II, I argue that prison inflicts a great deal of harm that is technically not punishment. Those who insist we compensate pretrial harm inflicted by the state that is technically not punishment should also be prepared to compensate offenders for the post-trial harm I describe in Part II that is also inflicted by the state and is technically not punishment.

47. Vasquez v. Cooper, 862 F.2d 250, 252 (10th Cir. 1988) ("As a theoretical matter, one need not be indigent to be unable to post bail. . . . A person could have considerable assets and yet be unable to post the level of bail that a judge has determined necessary to prevent flight.").

48. *See, e.g.*, Palmer v. Dugger, 833 F.2d 253, 254 (11th Cir. 1987) (requiring credit for time served for indigent defendant under federal equal protection doctrine); Martin v. Leverette, 244 S.E.2d 39, 41–42 (W. Va. 1978) (same under state constitutional requirement of equal protection and prohibition of double jeopardy); *see also* CAMPBELL, *supra* note 37, § 8:7 (stating that most courts "have required credit for any pretrial incarceration time resulting from an indigent's inability to raise bail, at least where the statutory maximum sentence had been imposed" but recognizing disagreement).

49. Why shouldn't the rich be able to take advantage of their wealth in pretrial detention as they do in so many other areas? After all, only rich people can buy fancy food, cars, health care, and homes. One possible explanation is that our egalitarian intuitions are especially strong in punishment contexts. I suspect, for example, that people would be more willing to permit

The problem with this response is that some offenders who commit especially serious crimes are simply ineligible for bail. They are detained regardless of wealth. If proportionalists only supported credit for time served for bail-eligible crimes, the socioeconomic response might succeed. But credit for time served is widely given even for those ineligible for bail, and I suspect that jibes with most people's intuitions. If so, the socioeconomic disparity response is just a sideshow rather than the main attraction; it cannot explain why we are inclined to give credit for time served as often as we do.

4. The Pleading Pressure Response

Without credit for time served, every day in pretrial detention is a day without liberty that does nothing to reduce a future sentence. Detainees in such circumstances would have strong incentives to resolve their cases quickly. So one reason to credit time served is to reduce pressure on detainees to make hasty plea bargains or inadequately prepare for trial. Thus, proportionalists might argue, even though credit for time served leads to too little punishment, we give credit so that detainees are not inappropriately pressured to short-circuit the time-consuming but hopefully error-reducing process of developing a thorough defense with the assistance of counsel.

It is hardly obvious, however, that we ought to credit time served in order to reduce pressure on defendants. Doing so deviates from proportionality with certainty to correct for the mere risk of a proportionality violation. While this tradeoff might sometimes be warranted, we should be skeptical absent further evidence.[50]

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people in medical quarantine to purchase better, fancier accommodations than they would to permit pretrial detainees to do the same. The very fact that we think rich and poor should be treated in objectively similar conditions in detention suggests that we think about detention in ways that are similar to punishment.

50. There are several reasons to question whether credit for time served eases inappropriate pretrial decisionmaking. First, those more likely to be acquitted may have stronger incentives to commence a trial than those less likely to be acquitted since the acquitted receive no benefits from credit for time served policies.

Second, it is hardly obvious how much, if any, pressure defendants *ought* to feel to plea bargain or speedily prepare a defense. The state pays the cost of every prosecution, as well as the defense in most felony prosecutions. Under these conditions, defendants who expect to receive prison time may have too little incentive to plead guilty or to efficiently prepare for trial because they are not accruing costs while the state is. On the other hand, some defendants and their families must go into debt in order to make bail. The costs of raising capital will create pressure to speedily resolve a case. Even the anxiety of being accused of a crime will have variable effects on how quickly defendants plead or go to trial. In other words, there are many variables at play, and it is difficult to identify the baseline amount of pressure defendants should experience in order to encourage them to resolve their cases at the appropriate pace.

More importantly, even if crediting time served sometimes eases excessive pressure on defendants, such pressure does not explain the general policy of crediting time served. Simply imagine a defendant who is smart, well advised by counsel, and faces a sentence that is sufficiently long that his time spent in pretrial detention is unlikely to affect his deliberations. In such a case, we are still inclined to credit his time served. In fact, our intuitions about whether he ought to receive credit are unaffected by the deliberative pressures he faces. Hence, the pleading pressure excuse cannot tell the whole story of why we credit time served. Indeed, we credit time served because most people think doing so *promotes* proportionality.

5. The Proportional Harsh Treatment Response

Until now, I have taken quite literally the retributivist view that offenders deserve punishment. What they may really mean, however, is that offenders deserve to suffer,[51] even when that suffering is not specifically intended as punishment for an offense. Hence, a more plausible response to the mystery of credit for time served than those I have considered so far is to give up on proportionality between blameworthiness and punishment and replace it with proportionality between blameworthiness and harsh treatment (where harsh treatment refers to the causing of suffering or deprivation even when not intended as punishment).[52] Though detention is not punishment, it is still harsh treatment and should therefore make an offender less deserving of additional harsh treatment.[53]

Third, prosecutors already exert enormous pressure on defendants to plead by offering them deals with substantially less severe punishments than they face at trial. Such pressure may swamp the effects of credit for time served policies. Moreover, even if crediting time served does create inordinate pressure to plea bargain, we might correct the problem by altering prosecutorial discretion or increasing judicial oversight rather than by making punishments disproportionally short.

51. *See* Mitchell N. Berman, *Two Kinds of Retributivism*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 433, 437–38 (R.A. Duff & Stuart P. Green eds., 2011).

52. In the text, I say that we should speak of "proportional harsh treatment" instead of "proportional punishment" to highlight the distinction. Alternatively, we could uniformly speak of "proportional punishment" but recognize that "punishment" in this context includes certain unintentional harsh treatment as well. In the past, I have sometimes taken this second approach. *See, e.g.*, Kolber, *Comparative Nature*, *supra* note 4, at 1602–03 ("Retributivists who claim that they can ignore the full, comparative range of harms to inmates simply because those harms are unintended have failed to fully justify those punishments.").

53. Jack Chin has argued that deportation, detention, and civil fines constitute "quasi-punishment" that should be considered at sentencing. Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1454–56 (2011). And at least with respect to harsh treatment deemed to be a "collateral sanction," the ABA Criminal Justice Standards state that sentencing "court[s] should consider

Precisely what constitutes the kind of harsh treatment that should count for proportionality purposes is debatable. After all, offenders may have experienced a wide variety of harsh treatment throughout their lives. Sometimes the harsh treatment precedes their crimes by many years, as where offenders suffered severe abuse or deprivation as children. Sometimes suffering results directly from offenders' crimes. A robber might break a leg or be paralyzed during a dangerous robbery. Similarly, parents who negligently leave an infant to die in the backseat of a hot automobile suffer severely from their own criminal negligence.[54] Reasonable people may disagree about whether the suffering that counts in proportionality analysis must be inflicted before or only after the pertinent crime and about whether it must be inflicted by the state, as opposed to other people or natural causes.[55] Even if we restrict the relevant harsh treatment to state acts, fair questions arise about which sorts of acts count. If an inmate is injured in a prison fire through no fault of prison officials, we may not consider such purely accidental harm part of the inmate's harsh treatment.

Tricky details about what constitutes harsh treatment aside, pretrial detention is surely an easy case. The state knowingly imposes the harsh treatment of detention as part of our penal machinery. If any kind of harsh treatment should count, surely pretrial detention should. Hence, as offenders receive harsh treatment in detention, the amount of punishment they continue to deserve declines accordingly. Thus, we give credit for the harsh treatment of detention.

When proportionality focuses on harsh treatment rather than punishment, we can better square the Supreme Court's view that pretrial detention is not punishment with the policy of giving credit for time served. Since pretrial detention is not punishment, the Court can argue that detainees are denied the set of constitutional rights associated with punishment. Nevertheless, we grant detainees credit for time served to promote proportional harsh treatment.

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applicable collateral sanctions in determining an offender's overall sentence," STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 19-2.4(a) (3d ed. 2004), and "should ensure that the totality of the penalty is not unduly severe," *id.* at 19-2.4(a) cmt.

54. *See* Gene Weingarten, *Fatal Distraction*, WASH. POST, Mar. 8, 2009, at W8; Mitchell Berman, *Hasn't Kesen Hu Suffered Enough?*, AUSTIN-AM. STATESMAN (Feb. 20, 2010), http://www.statesman.com/news/news/opinion/berman-hasnt-kesen-hu-suffered-enough-1/nRqhb.

55. For example, according to Gertrude Ezorsky's whole-life view of desert, a proper "[a]ssessment of a criminal's desert after an offense would require that one balance all of his moral wrongs against the suffering of his entire life." Gertrude Ezorsky, *The Ethics of Punishment*, *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT, at xi, xxvi (Gertrude Ezorsky ed., 1972).

We can also understand certain debates about credit for time served as reasonable efforts to untangle the nature of the harsh treatment that should count for purposes of proportionality. For example, many state statutes and court decisions require that offenders receive credit for time involuntarily confined at mental institutions while awaiting trial.[56] Like pretrial detention, involuntary commitment is what I call a "punishment look-alike." The harsh treatment of state-imposed institutionalization is often deemed sufficiently comparable to the harsh treatment of incarceration to warrant giving credit.

It is less clear whether time spent involuntarily restricted to a community treatment center should count for purposes of giving credit, and jurisdictions split on the issue.[57] Confinement at a community treatment center generally entails less restrictive conditions than pretrial detention or incarceration, making it a "punishment *less*-alike." Since it falls considerably short of the severity of punishment, we are disinclined to grant full credit for time served. Forced to choose between counting such time completely or not at all, courts vary. Conditions in pretrial home confinement might be deemed less restrictive than in community treatment centers, and courts have been particularly unlikely to treat home confinement, another punishment less-alike, as warranting credit for time served.[58]

When proportionality focuses on harsh treatment, we can identify more sensible policies toward punishment less-alikes. Namely, we can give partial credit.[59] While it is difficult to assess precisely how much credit those sentenced to community treatment

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56. *See* GA. CODE ANN. § 17-10-11 (2012); N.C. GEN. STAT. § 15-196.1 (2012); People v. Cowsar, 115 Cal. Rptr. 160, 160 (Cal. Ct. App. 1974) (requiring credit for time confined to a mental health facility); Prejean v. State, 794 P.2d 877, 878 (Wyo. 1990) (same); CAMPBELL, *supra* note 37, § 9:28 ("Many states explicitly require credit for time spent in government mental institutions in connection with the current offense."); *cf.* Closs v. S.D. Bd. of Pardons & Paroles, 656 N.W.2d 314, 315, 318 (S.D. 2003) (denying credit for *postconviction* involuntary confinement in a mental health facility deemed unrelated to the inmate's criminal sentence).

57. CAMPBELL, *supra* note 37, § 9:28; *see also* Reno v. Koray, 515 U.S. 50, 64–65 (1995) (resolving a split among federal circuit courts by holding that time spent in pretrial detention at a community treatment center did not constitute the kind of detention required to receive credit under the federal credit for time served statute).

58. *See, e.g.*, Fraley v. U.S. Bureau of Prisons, 1 F.3d 924, 925–26 (9th Cir. 1993) (declining to grant credit for time spent in pretrial home confinement); State v. Hughes, 476 S.E.2d 189, 199 (W. Va. 1996) (same); CAMPBELL, *supra* note 37, § 9:28 ("[M]ost states refuse to credit time spent under house arrest."). *But cf.* 730 ILL. COMP. STAT. ANN. 5/5-4.5-100 (West 2012) (stating that, with some exceptions, "the trial court shall give credit to the defendant for time spent in home detention on the same sentencing terms as incarceration").

59. *See generally* Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. (forthcoming 2014), *available at* http://ssrn.com/abstract=1992034 (describing the relative benefits of "smooth" laws that provide for outputs more closely tied to their inputs).

centers, house arrest, or work furloughs deserve, any amount greater than zero would more accurately reflect the amount of harsh treatment they receive than do prevailing policies that give no credit at all. So even if courts would have difficulty determining the precise amount of credit to give for time spent in punishment less-alikes, surely the legislature could pass statutes that would better reflect the amount of harsh treatment we impose.

Overall, focusing on proportional harsh treatment rather than proportional punishment may offer the best retributivist solution to the mystery of credit for time served that still retains some notion of proportionality. It explains why constitutional rights in detention may differ from those in prison and may point us to practical methods to treat more uniformly the various kinds of liberty restrictions we impose.

II. AGAINST PROPORTIONAL HARSH TREATMENT

Shifting from proportional punishment to proportional harsh treatment, however, only solves the mystery of credit for time served by generating even deeper problems that strike at the very heart of retributivist proportionality in its familiar forms. Namely, we inflict lots of harsh treatment that we ignore at sentencing. If harsh treatment must be proportional to blame, then we can no longer ignore it. Even if we restrict harsh treatment to inflictions knowingly imposed by the state, we would have to radically revise our sentencing policies to properly measure and dispense harsh treatment. Most importantly, actually implementing the necessary changes would lead to very counterintuitive—some would say absurd—results.

A. The Different Facilities Challenge

Suppose inmates Cushy and Rough are equally blameworthy and are sentenced to four-year prison terms. Assume they are alike in all pertinent respects except that Cushy is sent to a relatively comfortable prison with spacious one-person cells, lots of natural light and time outdoors, good access to television and other media, and plenty of opportunities to see his family. Rough, by contrast, is sent to an austere prison with small multiple-occupancy cells, little natural light or time outdoors, poor access to television and other media, and few opportunities to see his family.

Even though their prison sentences are the same length and they are equally blameworthy, Rough receives harsher treatment than Cushy. Under a principle of proportional harsh treatment, Cushy and

Rough are not both treated proportionally, even though their blameworthiness calls for equally severe treatment.

The mere fact that the duration of their sentences is the same is not enough. Even though most systems of sentencing have what I call a duration fetish[60]—a nearly exclusive focus on the period of time during which a person is confined—sentence severity also depends on other prison hardships, like the small size of cells or limited availability of natural light. Duration cannot be the sole determinant of severity. For one thing, some punishments, like fines, are transactional and have no meaningful duration. Moreover, sentences of a year's confinement at home, in prison, and in solitary confinement clearly differ in their severity, even if they all have one year's duration. If we recognize those variations in conditions, we must recognize the same, albeit more modest, variations in conditions across different kinds of ordinary incarceration.

There has to be some way of aggregating the severity of different aspects of incarceration, otherwise it would be extremely difficult to assess sentence severity and have confidence that offenders receive proportional harsh treatment. We can put our heads in the sand and try to ignore differences among facilities, but that will not make sentences more proportional. Even if a jurisdiction has only one prison, conditions of confinement will vary based on inmates' particular cell assignments, cellmates, guards who interact with them, and so on.

Proportional harsh treatment requires a fairly detailed examination not only of the duration of offenders' prison sentences but also of the conditions they will likely face while incarcerated.[61] Nevertheless, in most jurisdictions, the assignment of particular offenders to particular facilities is primarily the task of prison bureaucrats, not judges.[62] Corrections officials assign inmates to facilities based on a number of factors, like offender dangerousness and space availability. So if we were really committed to treating offenders proportionally, we would have to better combine the tasks of sentencing and punishment administration.

Whenever judges ignore conditions of confinement at sentencing (as they often do), they take a big risk that the specific individual being sentenced will end up confined more harshly than is

60. Kolber, *Comparative Nature*, *supra* note 4, at 1606.

61. Because incarceration extends over time, I believe that the state must also consider the ongoing impact of prison sentences, though my argument will not depend on this stronger claim.

62. Judges may recommend particular facilities, but prison administrators are not obligated to follow those recommendations. *See, e.g.*, 18 U.S.C. § 3621(b) (2006) ("The Bureau of Prisons shall designate the place of the prisoner's imprisonment.").

warranted. And when bureaucrats assign offenders knowing that sentencing judges likely had less severe conditions in mind, they knowingly inflict harms on offenders disproportional to what judges thought they deserved. Such disproportionality is verboten to most retributivists. According to Hegel, "[A]n injustice is done if there is even one lash too many, or one dollar or one groschen, one week or one day in prison too many or too few."[63] Similarly, Richard Burgh writes, "[I]f [an] offender can be said to deserve only so much punishment, then any punishment in excess of this should be considered as objectionable as imposing an equivalent amount on an innocent person."[64] Even though Burgh speaks of punishment, once we realize that talk of punishment severity is really talk of harsh treatment, his comment seems to prohibit all inflictions in excess of desert that are knowingly or recklessly imposed by the state.

1. Counterintuitive Implications

So far, proportionalists could accept the different facilities challenge and recognize that we need to make substantial changes to our sentencing policies. But there is a more counterintuitive implication lurking in the background. Prison bureaucrats generally assign more dangerous inmates to higher-security prisons with more austere conditions. In fact, it is quite possible that Rough was assigned to a more austere prison than Cushy because Rough was deemed more dangerous than Cushy (even though they are equally blameworthy for their criminal conduct). So when comparing equally blameworthy offenders, proportionalists have to give more dangerous offenders *shorter* sentences than less dangerous offenders in order to inflict proportional harsh treatment on both of them. This seems like an unappealing conclusion for proportionalists but one that is hard to escape in any prison system that makes facility assignments based even in part on dangerousness.

B. The Subjective Experience Challenge

One might think we could avoid the different facilities challenge by allowing sentencing judges to make facility assignments or by having just one kind of facility for all prisoners. Neither solution, however, would adequately reflect the fact that even in identical prison conditions, prisoners vary substantially in their experiences of

63. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 245 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821).

64. Richard W. Burgh, *Do the Guilty Deserve Punishment?*, 79 J. PHIL. 193, 197 (1982).

confinement, often predictably so. Some but not all offenders become depressed, anxious, or claustrophobic. Even when their suffering does not rise to the level of a clinical diagnosis, it can nevertheless be very intense.

Suppose Sensitive and Insensitive commit crimes for which they are equally blameworthy and receive sentences of equal duration in identical prison conditions.[65] In fact, they are alike in all pertinent respects except that Sensitive is predictably much more distressed by incarceration than Insensitive. Unless we take differences in subjective experience into account, especially when we are aware of them in advance, we do not treat them proportionally.

Moreover, if we lack a good reason for causing Sensitive additional distress, then we have no justification for inflicting it. The central reason we have theories of punishment is to justify the harms we cause offenders. Just as you and I cannot inflict serious harms—like the harms of incarceration—on others without a justification, the state must have a justification when it seriously harms offenders.[66]

A retributivist might say that we are justified in harshly treating offenders to the extent that they deserve it. But if Insensitive receives the maximum permissible harm given his blameworthiness, then the equally blameworthy Sensitive receives excessive harm that is knowingly inflicted by the state but cannot be justified in terms of proportional harsh treatment. Thus, if we do not measure the harms we inflict, including the experiential harms, we risk not only treating offenders disproportionally but also giving them harsh treatment in excess of what is justified.[67]

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65. Kolber, *Subjective Experience*, *supra* note 4, at 183.

66. Kolber, *Unintentional Punishment*, *supra* note 4, at 14–16 (defending the "justification symmetry principle").

67. In prior work, I argued in much more detail that any justification of our punishment practices must take subjective experience into account. *See* Kolber, *Subjective Experience*, *supra* note 4. Several writers responded by claiming that we need not ordinarily consider inmates' subjective experiences. *See* David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1652–53 (2010); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 909 (2010); Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1 (2009). Yet none of them addressed my central claim by explaining how we can justify our punishment practices if we ignore experiential harms. Perhaps they deny that *punishment* theorists need to justify such harms at all if they are technically not punishment. *See* Kolber, *Unintentional Punishment*, *supra* note 4, at 24. This response fails, however, because theorists who cannot justify the experiential harms we knowingly inflict cannot justify sentences of incarceration or any other real-world punishments that inevitably include such harms. Punishment theorists (aside from abolitionists) ought to be able to do so. *See id.* at 23–29; *see also* Michael Tonry, *Can Twenty-First Century Punishment Policies Be Justified in Principle?*, *in* RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 3, 20–21 (Michael Tonry ed., 2011) (characterizing the view of Markel and Flanders as a "definitional stop").

Nevertheless, we ignore much of the harm we cause prisoners by failing to examine the experiences particular inmates actually have or are expected to have. We do so even though offenders would often be eager to present evidence of their prison-related sensitivities. When an inmate proffers reliable evidence of his sensitivity that courts ignore, courts knowingly cause him additional distress that they would not cause a similarly situated offender who lacks the sensitivity. Courts therefore treat him harshly in excess of what is proportional.

Some have understood sentence severity in terms of deprivations of liberty rather than experiential distress.[68] Doing so, one might argue, is still sufficient to solve the mystery of credit for time served. One day of pretrial detention deprives a person of about the same amount of liberty as one day in prison, so we give credit to preserve proportional harsh treatment.

But even if we count deprivations of liberty as part of the severity of a sentence, we cannot ignore how prisoners experience their sentences.[69] As I noted earlier, the harms we cause offenders require justification. If retributivists ignore experiential harms and fail to count them against an offender's desert debt, then they have given no justification for inflicting those harms. And since all plausible methods of punishment cause experiential harms, proportionalists have no justification for actually punishing anyone.

In addition to the justification problem, sole focus on objective measurements of liberty deprivation risks making punishment morally arbitrary. Consider units of length. An eight-foot-tall man in a tiny prison cell is likely to experience his confinement as much harsher than a four-foot-tall man would.[70] Yet nothing about being tall

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68. *See, e.g.*, Robert P. George, *Moralistic Liberalism and Legal Moralism*, 88 MICH. L. REV. 1415, 1426 (1990) ("[A] criminal may justly be deprived of liberty commensurate with the liberty he wrongfully seized in breaking the law."); Kenneth W. Simons, *On Equality, Bias Crimes, and Just Deserts*, 91 J. CRIM. L. & CRIMINOLOGY 237, 243 (2000) ("When the state imposes criminal sanctions, it deprives the offender of property or liberty, and it accompanies that deprivation with a solemn moral condemnation."); *cf.* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10 (1955) (stating that under the proper conditions, "a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen").

69. Notice that I need not argue that all harms are experiential, only that at least some are. *See* Kolber, *Comparative Nature*, *supra* note 4, at 1595 (describing the "limited subjectivist" position); Kolber, *Subjective Experience*, *supra* note 4, at 215–16. In addition, some harms, like those of capital punishment, can be at least partly explained as deprivations of positive experiences.

70. *See* Kolber, *Subjective Experience*, *supra* note 4, at 206–07 (presenting this example); *see also* Christopher Beam, *Hard Time*, SLATE (Feb. 3, 2011, 4:23 PM), http://www.slate.com/articles/news_and_politics/crime/2011/02/hard_time.html (discussing a six-foot-nine-inch tall,

makes the man warrant greater suffering. Deserved harsh treatment should not depend on arbitrary facts about offenders, like their height.

We can reduce our bias in favor of objective measurements by imagining a fictitious punishment that I call "boxing."[71] People who are boxed are confined to a cell that is n by n by n, where n is the height of the offender. Many have the intuition that if the eight-foot-tall and four-foot-tall offenders are boxed for the same period of time, they are given essentially the same treatment. And on a view that takes their experiences of boxing into account, it is quite possible that they are treated roughly equally. But under the view that only objectively measured liberty deprivations matter, boxing the shorter man causes a much greater deprivation of liberty for he is allocated only one-eighth of the space as the larger man.[72]

We cannot have it both ways. If all boxed offenders receive essentially the same harsh treatment, then our current offender-insensitive forms of confinement inflict quite variable amounts of harsh treatment. The bottom line is that when we focus solely on objectively measured liberty deprivations, we miss out on an important dimension of harm.

Similar concerns arise in measurements not only of length but of time. How do theorists who believe that prison is a deprivation of liberty measure time? Surely the *legal* treatment of time is irrelevant to our considered judgments about sentence severity. In order to better align its clocks with eastern trading partners, the island nation of Samoa skipped the day of December 30, 2011.[73] Regardless of how the time change is treated under Samoan law, when assessing severity, the duration of the sentence of an offender imprisoned there at noon on December 29, 2011, and released at noon on December 31, 2011, was one day not two.

But we must be cautious even when measuring time as an objective physical process. Special relativity teaches us that even if we wanted to resort to objective measurements of time, there is no observer-independent rate at which time passes. To illustrate, assume that in the distant future we launch spaceships that travel at speeds

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five hundred-pound Dutch prisoner who challenged his conditions of confinement under the European Convention on Human Rights given his small cell and large body).

71. Kolber, *Subjective Experience*, *supra* note 4, at 235. While boxing is surely a horrendous form of punishment, similar methods of punishment can easily be imagined where each side is $2n$ or some other multiple.

72. The larger man is boxed in a space that is $8\times8\times8 = 512$ cubic feet, while the smaller man is boxed in a space that is $4\times4\times4 = 64$ cubic feet. Perhaps the comparison should be in square feet instead of volume, but I do not see how a liberty-deprivation theorist can meaningfully decide without reference to subjective experience.

73. Seth Mydans, *Samoa Sacrifices a Day for Its Future*, N.Y. TIMES, Dec. 29, 2011, at A4.

approaching the speed of light and then eventually return to Earth. Due to the effects of special relativity, a person on such a ship will, on average, age slowly from the perspective of people on Earth. For example, a space traveler might age four years on his trip but come back to a planet whose inhabitants are eight years older.

Now, suppose that twin brothers, alike in virtually all respects, commit crimes of equal blameworthiness. The only pertinent difference in their circumstances is that one is incarcerated on Earth while the other is incarcerated on a roundtrip journey through space traveling near the speed of light. Assuming the twins deserve equal harsh treatment, is it more accurate to measure the duration of their sentences based on an Earth clock or a spaceship clock? Neither. At least as a rough proxy, the duration of each twin's confinement depends on the clock in the twin's frame of reference.[74]

But if we ought to individualize time measurements based on frames of reference, why stop there? Just as one person's clock might appear to tick slower than another's because of special relativity, one person might experience time moving slower than another because of his unique brain chemistry. When assessing the severity of harms associated with confinement, there is no obvious moral reason to consider the ticking of their clocks but not the ticking of their brains, so to speak.[75]

Importantly, we are not harmed by the mere passage of time. But the harm of experiences like distress, anxiety, and boredom are related to their perceived duration. And these experiences affect how harshly offenders are treated by confinement. The difficulty in accurately measuring them makes them no less harmful.

Alon Harel and Richard Frase have argued that retributivists who focus on the expressive nature of punishment need not worry about how punishment is experienced: they can simply understand punishment in purely objective terms.[76] On the contrary, however,

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74. Similar arguments from special relativity could be made about the magnitude of liberty deprivations in spatial dimensions, since measurements of length also depend on frames of reference. *See, e.g.*, Yuri Balashov, *Persistence and Space-Time Philosophical Lessons of the Pole and Barn*, 83 MONIST 321, 322–29 (2000) (describing spatial contraction and expansion under special relativity).

75. On our varied experiences of the passing of time itself, see, for example, Melanie Rudd, Kathleen D. Vohs & Jennifer Aaker, *Awe Expands People's Perception of Time, Alters Decision Making, and Enhances Well-Being*, 23 PSYCHOL. SCI. 1130 (2012), and Kathleen D. Vohs & Brandon J. Schmeichel, *Self-Regulation and the Extended Now: Controlling the Self Alters the Subjective Experience of Time*, 85 J. PERSONALITY & SOC. PSYCHOL. 217 (2003).

76. RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 110 n.5 (2013); Alon Harel, *Economic Analysis of Law: A Survey*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 46 (Alon Harel & Keith N. Hylton eds., 2012).

how much we harm an offender does not depend on public perceptions. Assessments of sentence severity sometimes require difficult value judgments, but no one is entitled to be wrong about the facts. If all nonincarcerated Samoans forget that the country skipped a day on the calendar, it will not ease the actual severity of the sentences of inmates confined on the day that was skipped. More dramatically, if the public believes that people of a certain race do not feel pain, the public's mistaken view carries no weight when assessing whether our policies that cause pain to people of that race are justified. Similarly, merely believing that a day in prison inflicts the same harm on all inmates does not make it so. The fact that harm varies from prisoner to prisoner never goes to the public for a vote.[77]

There certainly are consequentialist reasons for considering how the public perceives criminal sanctions. If the public views sentences in objective terms, we ought to consider such information when seeking to optimally deter crime. But whether you are a consequentialist or a retributivist, you must have a sense of the *true* amount of harm a sentencing practice causes in order to plausibly claim that it is justified. So *perceptions* of sentence severity can play a limited or indirect role in justifying punishment, but they cannot supplant a genuine analysis of sentence severity.

It is, of course, quite difficult and costly to take the actual or anticipated experiences of offenders into account at sentencing or afterward. Still, we already seek to assess a defendant's *mens rea* at trial, and such efforts are also difficult and costly. Moreover, many jurisdictions have parole boards that seek to measure dangerousness, and it is hardly clear that it is easier to measure dangerousness than to assess prisoner experiences. Even now, sentencing policies seem to embed assumptions about the experiences of prisoners. For example, the federal sentencing guidelines state that "[m]ental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[78]

In civil suits, we purport to measure negative experiences like pain, distress, and anxiety all the time.[79] Indeed, false imprisonment

77. For more detailed discussion, see Kolber, *Subjective Experience*, *supra* note 4, at 208–10.

78. U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (2012).

79. Kolber, *Subjective Experience*, *supra* note 4, at 219–20.

cases require juries to estimate harms associated with confinement.[80] To the extent that we can cost-effectively make rough measurements of punishment severity that are experientially sensitive, we are morally obligated to do so: it cannot be the case that the experience of punishment only becomes morally relevant when we have technologies that measure experiences perfectly.[81]

More importantly, however, practical concerns about cost and administrative difficulty obscure our current focus. We are trying to unravel the concept of punishment severity so we can better understand what it means to dispense proportional harsh treatment. Even if there are practical difficulties in actually dispensing proportional harsh treatment, we can assume that we are able to do so in order to evaluate whether proportional harsh treatment serves as a desirable ideal.

1. Counterintuitive Implications

In a world where we could accurately measure the subjective experiences of inmates, we would likely see that rich and famous people, accustomed as they are to luxurious living, experience the cramped conditions of prison more severely than average prisoners. Hence, if we want to give them proportional harsh treatment, they should spend less time in prison than average prisoners (or the same amount of time but in more comfortable conditions).

As Doug Husak has noted, however, "Few suggestions are more distasteful to the public than that the privileged, in virtue of their elevated status, should be punished less severely than the disadvantaged."[82] Of course, proportionalists need not argue that the rich should be punished less severely overall but just that they should be punished less severely in *objective* terms in order to effect *equal* treatment all things considered. Even framed in that way, however, few people would defend proportional harsh treatment once they realized that wealthy people would likely spend less time incarcerated (or the same amount of time but in more comfortable conditions) than their equally blameworthy but poorer cellmates. I suspect that most people would rather see rich and famous prisoners suffer *more* than

80. *Id.* at 220.

81. *Cf.* Kolber, *Experiential Future*, *supra* note 4, at 587–622 (arguing that emerging neuroscience technologies may eventually enable more objective assessments of subjective experiences); Tobias Stalder et al., *Cortisol in Hair and the Metabolic Syndrome,* J. CLINICAL ENDOCRINOLOGY & METABOLISM (forthcoming) (using strands of hair to measure stress hormone levels over extended periods of time).

82. Husak, *supra* note 23, at 82.

their equally blameworthy but less sensitive fellow inmates, so long as the duration of their sentences were roughly comparable. In other words, many people find truly proportional harsh treatment undesirable when applied across the socioeconomic spectrum.[83]

C. The Baseline Challenge

The biggest problem with proportionality, however, does not depend on whether punishment is measured in units of bad experiences or liberty deprivations or some combination of both. The most devastating problem is that we measure incarceration using an idiosyncratic, morally irrelevant method that is inconsistent with the way we understand harm in other contexts.

To sensibly measure the harm associated with a sentence, we need to do so the same way we measure other kinds of harm: as a worsening from a baseline condition.[84] We compare the condition of something after an injury to either its condition before the injury (a historical baseline)[85] or, on some views, the condition it would have been in had it not been injured (a counterfactual baseline).[86] If I crash into your car, for example, we measure the harm I caused by comparing the car's condition after the accident to its baseline condition.[87] The key point is that harm is a *worsening* from one reference point to another.

Suppose an inmate is incarcerated for one year, under conditions that give him ten units of quality of life each day of the year. How much have we harmed him by incarceration? It is impossible to say. To determine how much he has worsened in prison, we need to know his baseline condition. If he would have had one hundred units of quality of life each day in his baseline condition, then

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83. In Kolber, *Subjective Experience*, *supra* note 4, at 230–35, I consider various attempts to make our intuitions about wealthy offenders consistent with proportional-punishment intuitions but conclude that, ultimately, they probably cannot be made to cohere.

84. *See* JOEL FEINBERG, HARM TO OTHERS 31–64 (1984); *see also* Stephen Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283, 1309–13 (2003). Seana Shiffrin challenges the "comparative model" of harm in Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 120–22 (1999), and I respond in Kolber, *Comparative Nature*, *supra* note 4, at 1579–81.

85. *See* Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, *in* FREEDOM AND FULFILLMENT 3, 7 (1992).

86. *Id.*

87. *See, e.g.*, Livingstone v. Rawyards Coal Co., [1880] 5 A.C. 25 [39] (H.L.) (appeal taken from Scot.) (stating that juries should award "that sum of money which will put the party who has been injured . . . in the same position as he would have been in if he had not sustained the wrong"); *see also* John C.P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315, 1321 n.19 (2003); Perry, *supra* note 84, at 1310 n.49.

his harsh treatment consists of a ninety-unit-per-day deprivation in quality of life.

When it comes to our actual sentencing practices, however, we don't measure the severity of sentences using the comparative method just described. As I have argued elsewhere in more detail,[88] we measure the severity of prison sentences in absolute terms by looking only at the condition of inmates while incarcerated. We tend to think two sentences are equal if they have the same duration and conditions. Yet we are actually depriving people of quality of life to very different degrees because, before being sent to prison, offenders vary widely in their baseline amounts of property, freedom of motion, life satisfaction, social connectivity, and so forth. A person with a lot of baseline autonomy is more restricted by some set of prison conditions than a person with less baseline autonomy. Whether we measure in generic units of quality of life or in utiles (units of good experiences) or in libertiles (units of liberty)[89] makes no difference. Sentencing still constitutes a worsening.

Since we must understand sentence severity comparatively, our noncomparative intuitions about incarceration are confused. We arbitrarily focus on punishment's "end-state condition," meaning the condition of an offender as a result of his punishment.[90] End-state conditions tell consequentialists something important about preventing crime: if a person is locked up, he poses less danger to people outside prison walls. But end-state conditions tell us nothing about the burden prison imposes on inmates unless we can make good assumptions about their baselines.

We actually use the proper comparative method of measuring harms when we fine offenders. By their very nature, fines specify the amount by which to worsen a person's condition. Fines implicitly say: "Take how much money you had in your baseline condition and reduce it by the amount of the fine." Whether we should understand fine severity in objective terms, like dollars, or in more subjective terms, like disutility, we still treat fines as reductions (from a baseline level of assets or a baseline level of utility).[91]

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88. Kolber, *Comparative Nature*, *supra* note 4.

89. *See id.* at 1567 (describing "libertiles").

90. *Id.* at 1592, 1605–07.

91. Some countries do take income level into account when setting fine amounts, perhaps as a rough proxy for experiential harm. *See* Kolber, *Comparative Nature*, *supra* note 4, at 1575–77; Kolber, *Subjective Experience*, *supra* note 4, at 226; *see also* Alan Cowell, *Not in Finland Anymore? More Like Nokialand*, N.Y. TIMES, Feb. 6, 2002, at A3 (describing a Finnish executive who was fined approximately one hundred thousand dollars, based on his income, for traveling at forty-six-miles per hour in a thirty-miles-per-hour zone).

We also make a crude effort to use the proper comparative method when assessing the punishment of people already in prison. When a prisoner escapes and is later tried and convicted for the independent crime of prison escape, his new sentence will begin after his current sentence rather than run concurrent with it.[92] If the new sentence were to run concurrently, he would receive essentially no harsh treatment at all for escaping because his punished condition would be the same as his baseline (already imprisoned) condition. Thus, we do take baseline conditions into account when it would clearly be silly to do otherwise. But we cannot have it both ways. If the comparative method of measuring fine severity is correct and the comparative method of punishing prisoners for escape is correct, then the end-state method we use to measure the severity of incarceration in run-of-the-mill cases is deeply flawed.

1. Counterintuitive Implications

To measure the severity of incarceration in run-of-the-mill cases using the comparative approach, we would have to first assess the quality of a person's life in his baseline condition and then ratchet it down in prison to inflict the appropriate worsening of his condition. Doing so is a drastic departure from our current sentencing policies that focus almost exclusively on offenders' end-state conditions (like how long they spend incarcerated). If proportionalists do adopt the comparative approach, however, they will quickly run into its very counterintuitive implications for proportionality.

Suppose, for example, that Freeman and Quarantine both steal money from a bank by hacking into its computer system and are equally blameworthy for doing so. They are alike in all relevant respects except that Freeman commits his crime on his home computer while Quarantine uses a computer in the facility where he is under long-term quarantine for a contagious, currently incurable disease that he contracted due to no fault of his own.

Let's assume that proportional treatment for Freeman requires us to incarcerate him for one year. How do we give Quarantine equal harsh treatment? Since Quarantine begins with less liberty (and lower quality of life) than Freeman, in order to give Quarantine the *same* amount of harsh treatment we would have to make his sentence much longer or else make his confinement conditions much more restricted. Because Freeman has much more liberty (and higher quality of life) to

92. *See, e.g.*, People v. Unger, 66 Ill. 2d 333, 335–36 (1977) (considering the appeal of an inmate given a consecutive sentence for escape).

begin with, proportional harsh treatment means that Quarantine must be subjected to extreme conditions of deprivation. Perhaps he must be placed in solitary confinement to effect the *same* deprivation as was imposed on Freeman.

While Freeman and Quarantine represent an extreme case, the rest of us differ in our baseline quality of life as well. For example, richer people have more possessions than poorer people, so prison deprives them of more. Nevertheless, most people are happy to ignore the greater deprivations of incarcerated rich people relative to incarcerated poor people. This is so even if we knew people's wealth with certainty. Yet if retributivists ignore the changes in conditions imposed by incarceration, then they fail to recognize the full impact of the sentences they impose and do not really inflict proportional harsh treatment.

Indeed, we seem to treat end-state conditions as if they matter to the complete exclusion of baseline conditions. For even when we specify that two inmates had very different levels of wealth outside of prison, people likely maintain the intuition that such inmates are punished equally by equal terms in identical prison conditions, even though one is deprived of far more property rights in prison than the other. Given that punishment severity can only be understood as a change from a baseline, our current intuitions about punishment are actually leading to *disproportional* outcomes. Since our intuitions are mostly unfazed by baseline conditions, it means that we are not really committed to proportional harsh treatment.[93]

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93. Another possibility is that offenders do not deserve worsenings in their conditions but rather to be put in circumstances that reflect what they deserve. *See* Ezorsky, *supra* note 55 (describing the whole-life view of desert in which a proper "[a]ssessment of a criminal's desert after an offense would require that one balance all of his moral wrongs against the suffering of his entire life"). The whole-life view may be immune to the baseline challenge because it deliberately focuses on making *end-state* conditions fit with a person's lifetime desert. Moreover, the whole-life view may resolve the mystery of credit for time served: relative to an otherwise identical offender who has not been detained, a detained offender has faced additional suffering in detention that warrants being released sooner.

The whole-life view of desert has several serious problems, however, aside from the enormous practical difficulties of implementing it. First, a person who engaged in many acts of great moral virtue would seem to be entitled to commit some minor crimes without any punishment at all. Second, criminal fines are inconsistent with such a system since they represent amounts by which to deprive an offender relative to a baseline. Fines under a whole-life view of desert would have to stipulate asset levels rather than just deviations from current assets, as fines do today. Finally, if we ought to radically revise the criminal justice system to ensure that offenders get what they deserve, there is no obvious reason to only give people what they deserve when they commit crimes and not to correct more generally whenever they receive more or less than they deserve. Such a world is probably inconsistent with anything like a free-market economy since the spoils of free markets will deviate substantially from moral desert.

D. Collateral Consequences

I have described some of the many ways that harsh treatment varies among inmates. Such harsh treatment continues to vary long after inmates are released.[94] For example, released inmates are often limited in their rights to vote, carry weapons, receive public benefits, hold particular jobs, and so on.[95] Some are greatly distressed by a loss of voting rights, while some are indifferent. Some are greatly worsened by reduced job opportunities relative to their baselines (for example, physicians who lose their licenses to practice medicine) while some are worsened to lesser degrees (for example, the perennially unemployed).

Of course, the post-release harms offenders suffer are not typically considered *punishment*.[96] But that's irrelevant. Time served in detention is not considered punishment either. Yet if we are willing to count the harsh treatment of pretrial detention that precedes conviction, surely we must count the harsh treatment that comes after. Merely stipulating that an offender's sentence ends when he is released from prison does not mean he is no longer harshly treated by the state's prior deliberate actions.

Some may find it counterintuitive to treat collateral consequences as a form of harsh treatment. Others may find it a much-needed corrective. Currently, collateral consequences are either ignored at sentencing or considered haphazardly. Consistently treating collateral consequences as harsh treatment would represent a dramatic departure from current practices.

III. THE CONSEQUENTIALIST SOLUTION

In this Part, I explain how the criticism of proportionality in Part II also applies to more limited notions of proportionality. I then argue that the failure of retributivists to offer an appealing notion of

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94. Kolber, *Unintentional Punishment*, *supra* note 4, at 21; *cf.* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463, 1482–96 (2010).

95. *See, e.g.*, JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 9 (2003) ("Since 1980, the United States has passed dozens of laws restricting the kinds of jobs for which ex-prisoners can be hired, easing the requirements for their parental rights to be terminated, restricting their access to public welfare and housing subsidies, and limiting their right to vote.").

96. *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 672 (2008) ("Direct consequences include the potential jail or prison term, fines, and any other criminal punishment that a trial judge may impose after conviction. Almost everything else is deemed 'collateral.' ").

proportionality weakens their primary claim that retributivism is superior to consequentialism.

A. Other Kinds of Proportionality

1. Close-Enough Proportionality

Jesper Ryberg notes that the whole business of proportionality is a rough approximation:

> [T]he imposition of inadvertent disproportionate punishment is indeed the most likely result of any real life punishment system no matter how carefully it is designed. That a person receives the punishment he deserves, that is, the one which is precisely proportionate to the crime he has committed, will be the exception, not the rule.[97]

Perhaps, he suggests, we are obligated to "punish a criminal in such a way that it is most reasonable to expect the punishment to be proportionate to the crime."[98] In other words, maybe proportionality need only be close enough.

I have given examples, however, that do not depend on precise determinations of proportionality. Cushy and Rough are knowingly harmed to different degrees when they are placed in different facilities. The inmate who has subclinical levels of claustrophobia is knowingly harmed much more than the inmate who feels calmed by confined quarters. The rich and poor offenders who are imprisoned and forced to give up different property rights are knowingly worsened to very different degrees. These examples show that the absurd features of our proportionality intuitions do not arise out of the difficulties of precisely assessing the severity of punishment. They arise from the fact that we are not inclined to dispense harsh treatment in proportion to blame even when we have all the relevant facts. So we do not even aspire to follow Ryberg's suggestion to act in a manner that makes it reasonable to expect proportional treatment.

2. Banded Proportionality

So far, I have focused on pure forms of proportionality that say we should punish or harshly treat offenders in proportion to their blameworthiness. Some subscribe to a weaker form of proportionality, however, that merely requires imposing a sentence that is not

97. RYBERG, *supra* note 29, at 160.

98. *Id.* at 165–66.

undeserved, meaning it is "neither too lenient [nor] too severe."[99] Such "banded" forms of proportionality do not mandate anything like a precise relationship between blameworthiness and punishment severity.

Indeed, one popular form of banded proportionality is the "limiting retributivist" view that proportionality only places an upper boundary on sentencing.[100] Limiting retributivists may hold that there is no affirmative duty to punish at all or that affirmative obligations to punish come from nonretributive considerations like consequentialism.[101] Though the Justices of the Supreme Court are hardly univocal in describing the "narrow proportionality principle"[102] in the Eighth Amendment,[103] it has limiting retributivist overtones to the extent that it only invalidates sentences that are "grossly disproportionate to the severity of . . . crime[s]."[104]

Since proportionality is a troublesome concept, any view that relies on it less is correspondingly less troublesome. Suppose, for example, that A and B are sentenced for conduct that warrants a minimum of five years' and a maximum of fifteen years' incarceration as experienced by average offenders in average prison facilities. Suppose, too, that A and B each receive ten-year sentences. Now, even though A and B will be in different facilities, experience their conditions differently, and be worsened by incarceration to different degrees, it is at least possible that when all of these features are properly accounted for, neither offender's sentence violates the constraints of banded proportionality. So even though we must still measure harm using the methods I describe to ensure that sentences stay within the permitted bands, banded proportionality will lead to fewer proportionality violations.

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99. MICHAEL TONRY, *Interchangeability, Desert Limits, and Equivalence of Function*, *in* PRINCIPLED SENTENCING 291, 292 (Andrew von Hirsch & Andrew Ashworth eds., 1998); *see also* Norval Morris, *Desert as a Limiting Principle*, *in* PRINCIPLED SENTENCING, *supra*, at 180.

100. *See* RYBERG, *supra* note 29, at 192 (describing "limiting proportionalism").

101. *Cf.* DUFF, *supra* note 15, at 19 (distinguishing retributivists who "tell[] us only that we *may* punish the guilty" from those who "hold[] that we *ought* to punish the guilty").

102. Ewing v. California, 538 U.S. 11, 20 (2003).

103. *Compare Ewing*, 538 U.S. at 25 ("[T]he Constitution does not mandate adoption of any one penological theory," as a "sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation."), *with id.* at 31 (Scalia, J., concurring in the judgment) ("Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution.").

104. Rummel v. Estelle, 445 U.S. 263, 271 (2003). "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare," however. *Id.* at 272. According to the Court, the proportionality principle "would . . . come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment." *Id.* at 274 n.11.

But even limited proportionality requirements do not avoid the concerns I have raised, for precisely where banded proportionality matters—around the bands—the counterintuitive implications creep back in. Suppose in the previous example that A and B are sentenced to fifteen years (the top of the band) instead of ten years, and replace their names with Cushy and Rough, Sensitive and Insensitive, or Freeman and Quarantine. In all of these cases, we reach the same counterintuitive results described earlier.

If, for example, a rich person and an ordinary person commit crimes of equal blameworthiness, it could be that the ordinary person is appropriately sentenced to the maximum permissible punishment but that the sentence is too severe for the rich person. Thus, banded proportional harsh treatment leads to cases where rich people ought to be in objectively less severe conditions than ordinary people, contrary to the intuitions of most people. In precisely those circumstances where banded proportionality matters—namely, around the bands—it suffers from the same drawbacks as nonbanded proportionality.

3. Proportional Incapacitation

We can imagine a kind of proportionality that would explain many of our intuitions in the difficult cases I describe. Under what we could call the principle of "proportional incapacitation," an offender should be incapacitated for a duration proportional to his blameworthiness. Hence, even though Rough and Cushy are confined in very different conditions, since they are equally blameworthy, they should spend the same amount of time in prison. Similarly, even though Sensitive and Insensitive experience prison differently, they should nevertheless spend the same amount of time in confinement. And finally, even though Freeman and Quarantine are worsened to very different degrees by incarceration, they too should spend the same amount of time confined.

Despite its surprising congruence with our punishment intuitions, however, the principle of proportional incapacitation enshrines what I earlier criticized as our "duration fetish": our focus on the duration of sentences with little regard for the many other factors that affect sentence severity.[105] If one cares about common retributivist ends like inflicting deserved suffering or deserved deprivations of liberty, it makes no sense to focus exclusively on the length of time a person is confined. For any period of confinement, some will suffer a lot and some will suffer a little. Similarly, for any

105. Kolber, *Comparative Nature*, *supra* note 4, at 1606–07.

period of confinement, some may be deprived of a lot of liberty (in prisons with austere conditions) or just a moderate amount of liberty (in spacious prisons with lax restrictions). Moreover, merely focusing on duration of confinement cannot account for the widely agreed-upon differences in severity of solitary confinement, typical prisons, and house arrest.

B. Consequentialism

Once we see that our punishment intuitions only loosely cohere with retributivist proportionality, claims that retributivism better matches our intuitions become suspect. In fact, many of our intuitions that seem to be about proportionality can be explained surprisingly well in consequentialist terms. As a general rule, consequentialists, like proportionalists, will seek to incarcerate more blameworthy offenders longer. More blameworthy offenders tend to be more dangerous and warrant greater deterrence, longer incapacitation, and longer or more intense rehabilitation.

Before addressing the larger battle between retributivism and consequentialism, however, I begin by showing how pure consequentialists can rather quickly resolve the mystery of credit for time served.

1. Credit for Time Served

Just as they evaluate other policies, consequentialists should consider the relative costs and benefits of giving credit for time served. On the benefits side, the good consequences of pretrial and post-trial incapacitation are likely to be quite similar. A day of detention incapacitates about as well as a day of punitive confinement. There may be some minor differences in terms of how much pretrial detention deters or rehabilitates relative to punitive confinement, but the differences are plausibly small. So as a rough-and-ready guide, we expect that the benefits of confinement will largely be a function of its duration and severity no matter whether we call it pretrial detention or punitive confinement.

Consequentialists must also consider the costs of pretrial detention relative to punitive confinement. Since pretrial detention and punitive confinement both cause roughly similar levels of distress and deprivation of liberty, most consequentialists treat them as roughly the same for purposes of measuring harm caused. Similarly, the financial costs to detain a person for a day or to imprison him for a day are likely to be at least roughly comparable. Therefore,

consequentialists need not draw much of a distinction between pretrial detention and imprisonment on either the benefit side or the harm side of the equation. Hence, consequentialists credit time spent in pretrial detention because it serves essentially the same goals as time spent incarcerated.

Of course, consequentialists can also explain why we do not give offenders credit for time served in pretrial detention for crimes unrelated to a current indictment. If we could store up time in pretrial detention to count against future crimes, such a get-out-of-jail-free card would mean that people could commit crimes without fear of any harsh treatment. Doing so would surely frustrate consequentialist goals.[106]

I emphasize that all of this is a rough analysis because painting the full consequentialist picture would require us to better identify all of the pertinent harms and benefits of giving credit for time served and to determine how to value them against each other. We would need a careful study of the complicated differences in behavior we would expect to see among judges, prosecutors, and defendants in a world that gives credit relative to a world that does not. To my knowledge, no one has conducted such a study. But there is good reason to believe that consequentialists can justify credit for time served and without much difficulty at that.

2. Measuring Harsh Treatment

I have argued that even when proportionality is understood as a relationship between blame and harsh treatment, it still has very counterintuitive implications. Consequentialists have no principled commitment to proportionality, so they are not subject to the same criticism. Like retributivists, however, they must measure and justify the harms of criminal justice. Imprisoning offenders knowingly causes them experiential harms and, more generally, causes harms measured

106. Consequentialists might even offer an interesting defense of our policy of giving credit for time served but not compensating acquitted detainees. In a well-run criminal justice system, most people charged with crimes actually committed them. Yet even in a well-run system, it will often be difficult to prove guilt beyond a reasonable doubt; thus, many guilty people will be acquitted. By confining some of the most dangerous offenders in pretrial detention, detention provides at least a modest general deterrent against commission of these offenses, even when they cannot be proven beyond a reasonable doubt. To put the point more strongly, a system that compensates acquitted detainees will have little deterrent effect on offenses that are very difficult to prove at trial. Failing to credit acquitted detainees provides at least some deterrence. If, however, our current system arrests and detains lots of innocent people, then consequentialist considerations might actually counsel compensating acquitted detainees. *Cf.* Dan Markel & Eric J. Miller, *Bowling, As Bail Condition*, N.Y. TIMES, July 14, 2012, at A17 (criticizing judges who have allegedly used bail conditions as surreptitious punishment).

as changes from a baseline. To the extent that consequentialists fail to appropriately measure and consider these harms, they fail to properly conduct cost-benefit analyses and therefore fail to justify their punishment practices.[107]

Consequentialists can justify some measurement failures on the ground that the costs of measurement would exceed the benefits.[108] They can also argue that, right or wrong, laypeople understand punishment severity in ways that ignore experiences and baselines and that there would be bad effects if we punish in ways that deviate so substantially from lay expectations.[109] Some scholars have even argued that people are less likely to comply with legal systems that do not conform with their deep-seated beliefs.[110]

By way of example, in many apartment buildings, the thirteenth floor is labeled the fourteenth floor because some people believe the number thirteen is unlucky. Though such beliefs are just superstition, it would be foolish when considering resale value to entirely ignore the beliefs of future buyers. Similarly, even though consequentialists do not endorse proportional intuitions, they may sometimes be warranted in acting as though those intuitions have merit. Still, consequentialists must at least approximate the magnitude of the harms they cause; otherwise, they cannot be confident that the benefits they obtain exceed their costs.

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107. Consequentialists must also take offenders' *anticipated* subjective experiences of punishment into account in order to optimize deterrence. Kolber, *Subjective Experience*, *supra* note 4, at 217–18, n.101. Miriam Baer argues that consequentialists can also improve deterrent effects by differentially distributing enforcement resources and claims that I dismiss this possibility. Miriam H. Baer, *Evaluating the Consequences of Calibrated Sentencing: A Response to Professor Kolber*, 109 COLUM. L. REV. SIDEBAR 11, 13 n.10 (2009). Rather than dismissing it, however, I merely made the *simplifying* assumption that individually calibrating enforcement resources was not a viable option. Kolber, *Subjective Experience*, *supra* note 4, at 218 n.101. Surely, however, both the probability of detection and the expected harms of punishment affect the decisions of rational actors to break the law, so consequentialists could try to calibrate *both* sentences and probabilities of detection. Importantly, however, calibrating enforcement resources based on offender sensitivity will not relieve consequentialists of the obligation to measure experiential harms for purposes of justifying the harsh treatment we inflict.

108. Retributivists *might* offer a similar excuse, though they are less likely than consequentialists to explicitly state how to trade off cost and punishment goals. *See* Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 820 (2007). Moreover, some failures to measure may violate the common retributivist requirement to never knowingly or recklessly overpunish particular individuals. *Cf.* ALEXANDER & FERZAN, *supra* note 21, at 102 n.33.

109. *See* Kolber, *Subjective Experience*, *supra* note 4, at 236.

110. *See generally* Adam J. Kolber, *How to Improve Empirical Desert*, 75 BROOK. L. REV. 433 (2010) (challenging defenders of "empirical desert" who advocate making laws better conform with lay intuitions).

3. The Retributive Superiority Claim

As I noted earlier, proportionality is often considered one of the biggest attractions of retributivism relative to consequentialism.[111] For example, some have argued that, under certain circumstances, consequentialism might advise us to hang pickpockets or even people who double park.[112] Such circumstances are hard to imagine in the real world since the harms of such policies are so enormous relative to their likely benefits. It is true, though, that consequentialism could endorse draconian treatment under some imaginable circumstances.

Now we see how proportional retributivism also has strange consequences but in much more ordinary circumstances: Proportional *punishment* requires us to abandon the popular policy of giving credit for time served and provides no justification for the unintended harmful side effects of punishment. Proportional *harsh treatment* requires us to give more dangerous offenders shorter sentences than we give equally blameworthy but less dangerous offenders who are confined in better facilities. It also leads us to give rich people shorter sentences or better conditions than we give equally blameworthy ordinary people.

Finally, the most devastating attack on proportionality comes from the baseline challenge. Consider those whose baseline quality of life is just a little better than it is in prison. For such people, true proportional harsh treatment would mean imprisoning them for an exceptionally long time or in prison conditions that are especially unpleasant or restrictive. Yet few have the intuition that doing so is appropriate. Thus, unlike the farfetched circumstances meant to embarrass consequentialists—where executing pickpockets and parking violators is said to maximize good consequences—I have demonstrated counterintuitive implications of proportionality in real-world settings that arise on a daily basis.

CONCLUSION

One way to resolve the mystery of credit for time served is to understand sentence severity in terms of harsh treatment rather than punishment. But when we apply principles of proportionality to this more enlightened understanding of sentence severity, we generate odd

111. *See supra* note 18.

112. Larry Alexander, *The Doomsday Machine: Proportionality, Punishment and Prevention*, 63 MONIST 199, 209 (1980) (noting the pickpocket example); Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y OF LONDON B 1775 (2004) (noting the parking violation example).

consequences that are generally overlooked. Those consequences are not always visible because sentencing is such a messy business to begin with. But when we examine the underlying machinery of proportionality, we see that the strange consequences are *always* there.

Antony Duff argues that "[a] philosophical account of the justification of punishment is not refuted merely by the fact that it does not match or justify existing systems of punishment."[113] The aim of a punishment justification, he claims, "is not to describe, or to justify, punishment as it actually is, but to describe and justify punishment as it ought to be."[114] Yet my critique of proportionality applies not only to our actual punishment practices but to any punishment practices proportionalists can plausibly imagine implementing. Inmates will always vary in their conditions of confinement, their sensitivity to those conditions, and their unpunished baselines.

Our failure to implement true proportional harsh treatment is not solely due to cost and administrative difficulties. Most people would find true proportional harsh treatment quite objectionable. So even if we revise the concept of proportionality so that it accurately measures harsh treatment, we are still left with an unappealing basis for distributing punishment.

A full-fledged defense of consequentialism is beyond the scope of this Article. I have demonstrated, however, that consequentialists can give a rough-and-ready justification for crediting time served. More importantly, familiar arguments that consequentialism leads to disproportionality are now suspect, given that the forms of proportionality retributivists aspire to achieve are themselves disproportional when punishment severity is properly analyzed. Indeed, proportional harsh treatment often leads to results more outlandish than those attributed to consequentialism. So even if we actually knew how to determine what punishments are proportional to what crimes—and surely we do not—proportionality has such counterintuitive implications that it should not serve as the moral foundation for just punishment.

113. Antony Duff, *Retributive Punishment—Ideals and Actualities*, 25 ISR. L. REV. 422, 423 (1991).

114. *Id.*