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PREVENTING UNDESERVED PUNISHMENT

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Defendants should not be punished more than they deserve. Sentencing scholars describe this precept against undeserved punishment as a consensus norm in American law and culture. Yet America faces a plague of mass incarceration, and many sanctions seem clearly undeserved, often far exceeding an offender's culpability or the seriousness of an offense. How can a society committed to desert as a limitation on legitimate sanctions allow such undeserved punishments?

Critics argue increasingly that our focus on what offenders deserve is itself part of the problem. They claim that the notion of desert is too amorphous, malleable, and arbitrary to limit sentences, and instead operates as a moral license for excess. To avoid overpunishment, they urge us to pay less attention to desert.

The problem, however, is not too much attention to desert. The real problem is too little attention to desert as a constraint. Sentencing statutes do not require an explicit determination of the limits of desert. Most regimes instruct judges to select sentences based on both desert and utility as if they were commensurate concerns. This tempts judges to exaggerate or ignore the limits of desert when greater severity would advance utilitarian ends, such as incapacitating the defendant or deterring others. A sentencer's perceptions of what is good for society as a whole can lead to sentences of virtually unchecked brutality. Remarkably, the rich existing literature on desert in sentencing has overlooked how our sentencing procedures thus invite sentencing excess.

To prevent undeserved punishment, we must reform the sentencing process. Sentencing should begin with a cap, a specification of the maximum set by desert, prior to any inquiry into possible future benefits that a penalty might achieve. No final sentence should exceed that preset upper limit. Although existing statutory minimum penalties

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might still require undeservedly severe punishments, this proposed reform would expose their injustice and bolster the case for their repeal.

INTRODUCTION

America now faces a moral reckoning over its approach to crime and punishment. Mass incarceration in this country has become a "humanitarian and democratic crisis."[1] State and federal jails and prisons hold roughly two million people[2]—500% more than the number held behind bars forty years ago,[3] an increase that has far outpaced national growth in population.[4] More people are incarcerated in America, both in total number and by rate,[5] than in any other country in the world, according to available data.[6] The United States also continues to impose penalties abandoned throughout most of the developed world, including the death penalty[7] and life imprisonment without parole.[8] These penal policies carry particularly heavy burdens for the poor, minorities, and the mentally ill. Black adults are incarcerated at five times

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1 Fred O. Smith, Jr., *Policing Mass Incarceration*, 135 HARV. L. REV. 1853, 1857 (2022) (book review).

2 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/E52Z-WF24].

3 *Growth in Mass Incarceration*, THE SENT'G PROJECT, https://www.sentencingproject.org/research/ [https://perma.cc/R5BR-3JLW].

4 *See* COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 334–35 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) ("The U.S. rate of incarceration in 2007 was more than four and one-half times the rate in 1972 . . . . Today, adult incarceration rates of the Western European democracies average around 100 per 100,000 . . . . The U.S. rate in 2012 was seven times higher, at 707 per 100,000. At this level . . . the United States (accounting for about 5 percent of the world's population) holds close to 25 percent of the global incarcerated population.").

5 *See* HELEN FAIR & ROY WALMSLEY, INST. FOR CRIME & JUST. POL'Y RSCH., WORLD PRISON POPULATION LIST 2 (13th ed. 2021). *But see id.* (noting that China's tally of 1.69 million prisoners does not include "unknown numbers in pre-trial detention and other forms of detention").

6 *See* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 2 (2019) ("[J]urisdictions throughout America have produced the highest incarceration rate in the world among major nations, with more than 2.2 million people incarcerated in prisons and jails . . . .").

7 DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 13 (2010) ("The American death penalty is *peculiar* insofar as it is the only capital punishment system still in use in the West.").

8 *See* Michael M. O'Hear, Editor's Observations, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 4, 7 (2010) (noting "an emerging international consensus against [life without parole]" but "not . . . much of a domestic constituency for conforming American penal practices to international norms"); ASHLEY NELLIS, THE SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 4 (2021) ("The number of people serving life without parole—the most extreme type of life sentence—is higher than ever before, a 66% increase since our first census in 2003 . . . .").

the rate of White adults.[9] Approximately 20% of inmates in jails and 15% of inmates in state prisons have a serious mental illness.[10] These ugly realities have fomented distrust, racial alienation, and outrage among many Americans.[11]

Critics have demanded change. A growing number of criminal law scholars have joined the "burgeoning abolitionist movement that seeks to do away with prisons altogether."[12] Others have campaigned for more immediate reforms, such as decriminalization of drug offenses,[13] repeal of mandatory minimums,[14] abolition of the death penalty,[15] and an end to life without parole.[16]

Some other scholars, however, argue that unwinding mass incarceration requires a paradigm shift in legal principle. They believe our bedrock norm that punishment must be deserved invites incarceration and excess and urge us instead to focus on utility and social justice.[17] On this view, we should choose sentences based on whether their costs and burdens are justified by their utilitarian benefits—such as individual deterrence, general deterrence, incapacitation, rehabilitation, and

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9 *See* WILLIAM J. SABOL & THADDEUS L. JOHNSON, JUSTICE SYSTEM DISPARITIES: BLACK-WHITE NATIONAL IMPRISONMENT TRENDS, 2000 TO 2020, at 2 (2022). This ratio used to be worse: in 2000, the ratio was eight to one. *See id.*

10 E. FULLER TORREY, MARY T. ZDANOWICZ, AARON D. KENNARD, H. RICHARD LAMB, DONALD F. ESLINGER, MICHAEL C. BIASOTTI & DORIS A. FULLER, TREATMENT ADVOC. CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 24 (2014).

11 *See* Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1637 (2020) ("[T]he May 2020 killing of George Floyd by police officers has invigorated movements for both criminal law reform and racial justice more broadly, and these movements are rightfully challenging the presumption of legitimacy that criminal law and law enforcement have long enjoyed." (footnote omitted)).

12 Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 248 (2023). *See generally Prison Abolition: A Curated Collection of Links*, THE MARSHALL PROJECT (Oct. 25, 2023, 7:09 PM), https://www.themarshallproject.org/records/4766-prison-abolition [https://perma.cc/9P5W-MYED].

13 *See, e.g.*, Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 516–25 (2014).

14 *See, e.g.*, Alison Siegler, *Shift the Paradigm on Mandatory Minimums*, 36 CRIM. JUST. 28, 29 (2022) ("To dismantle this country's dehumanizing and racially skewed human caging system, we must eliminate mandatory minimums.").

15 *See, e.g.*, CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 271 (2016) (presenting a "[b]lueprint for [c]onstitutional [a]bolition").

16 *See, e.g.*, NELLIS, *supra* note 8, at 5 (arguing for abolition of life imprisonment without parole on the grounds that it violates human dignity and harms both individuals and society).

17 *See* MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 25 (AM. L. INST., Proposed Final Draft 2017) ("It is often said among American criminal-justice professionals that legal doctrines of 'proportionality' and 'desert' are too amorphous and contestable to provide a genuine systemic constraint on overly harsh (or overly lenient) sentences.").

reinforcement of social norms through denunciation. "[T]he justification of punishment should eschew individual retributivist 'desert' and focus primarily on the effects of punishment," especially "the effects of mass incarceration," writes Ekow Yankah.[18] Alice Ristroph argues that "[e]ven if desert is a permanent part of our moral discourse, it need not and should not be elevated to a central and independent sentencing principle."[19]

These scholars do not simply reject retribution as a proper aim of punishment. They oppose the entire orientation of our legal system toward the notion of desert. In their view, a focus on desert is dangerous[20]—despite its theoretically limiting function[21]—because notions of desert are amorphous and malleable,[22] easily exaggerated to justify harsher punishments,[23] and prone to the taint of racial bias.[24] By invoking the moral rhetoric of desert, sentencing authorities can rationalize draconian sanctions as rightful vengeance and insulate them from empirical critiques.[25] Ristroph explains: "As a sentencing principle, desert is dangerous . . . because it is opaque and because it provides a cloak of moral authority that can obscure prejudice or disutility."[26]

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18 Ekow N. Yankah, *Punishing Them All: How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185, 185 (2020) (arguing that unwinding mass incarceration requires turning away from the idea of desert).

19 Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1298 (2006); *see also* Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 87 (2013) ("[O]ur research suggests that the best way to reconcile the tension between desert and preventive considerations may well be to focus primarily on the latter rather than the former."); BARKOW, *supra* note 6, at 125 (attributing American penal severity to uninformed and unchecked "retributive impulses").

20 *See, e.g.*, Slobogin & Brinkley-Rubinstein, *supra* note 19, at 79 (objecting to the "deleterious effects of reliance on desert as the linchpin of punishment policy").

21 Most criminal law theorists treat desert as a critical limiting principle. *See* Mitchell N. Berman, *Proportionality, Constraint, and Culpability*, 15 CRIM. L. & PHIL. 373, 374 (2021).

22 *See, e.g.*, Ristroph, *supra* note 19, at 1297 ("A study of the actual deployment and operation of the concept of desert suggests that, contrary to many theorists' hopes, democratic conceptions of desert are too malleable to serve as a meaningful limiting principle.").

23 *See, e.g.*, *id.* at 1337; Slobogin & Brinkley-Rubinstein, *supra* note 19, at 77.

24 *See, e.g.*, Ristroph, *supra* note 19, at 1334 (describing the assessment of desert as an "avenue to reproduce socioeconomic injustice or racial bias into penal practice").

25 *See id.* at 1318, 1335–37; James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 106 (2003) ("The very activity of 'blaming' tends to excite people, and indeed to bring out unexpectedly savage and vindictive impulses."); BARKOW, *supra* note 6, at 5, 15 (urging reorientation of American penal policies away from lay "desire for vengeance and justice in the here and now," and toward expert regulation of penal policies).

26 Ristroph, *supra* note 19, at 1337.

Such arguments against desert merit attention.[27] American punishments are unusually severe, burdensome, and racially disproportionate. If desert fails in practice to constrain sentencing severity and instead operates as a license for discrimination and excess, it may indeed be time to rethink whether desert plays a just role in our criminal system.[28]

This Article contends that the principle of desert is not in fact to blame for American penal excesses. To the contrary, the principle of desert is a crucial barrier against unjust severity. As the Supreme Court has stated, "[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense."[29] Just punishment depends "on whether a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice."[30] Without this moral constraint on punitive severity, draconian punishments could be imposed on defendants solely for purported benefits to others. Even innocent people could be punished to reduce perceived social threats.

Common sentencing practices, however, flout this crucial principle of justice. In most cases, judges have significant discretion to select what penalties defendants will receive.[31] The present process of

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27 *Cf.* Youngjae Lee, *Keeping Desert Honest*, *in* CRIMINAL LAW CONVERSATIONS 49, 50 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) ("Such corrupting influences [as cruelty, inhumanity, and racial prejudice] can seep in unannounced and infect our desert judgments in ways that are difficult to police, and Ristroph is right to worry about this.").

28 *Cf.* Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 L. & CONTEMP. PROBS. 47, 47 (1986) ("The crucial element in any theory of punishment is its treatment of the matter of desert.").

29 Weems v. United States, 217 U.S. 349, 367 (1910); *see also* Solem v. Helm, 463 U.S. 277, 290 (1983); MODEL PENAL CODE: SENT'G § 1.02(2) cmt. at 4 (AM. L. INST., Proposed Final Draft 2017) ("Across nearly all theories of criminal punishment, as voiced by judges, practitioners, and academics, there is consensus that disproportionate penalties are undesirable if not impermissible, and should not be consciously fostered by a just system of laws."); Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 319 (2015) (noting the prevailing view that punishment requires culpability, and "[r]elatedly, [that] culpability limits the quantum of punishment"). Proportionality focused on culpability differs from utilitarian ideas of proportionality that "focus on excessiveness relative to the achievement of practical purposes, such as crime control or regulatory goals, rather than to an actor's blameworthiness." E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 7 (2008).

30 Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting).

31 BARKOW, *supra* note 6, at 196 ("In most cases, judges choose the sentences defendants will ultimately receive. Unless there is a mandatory sentence—usually a mandatory minimum—the judge will have the freedom to pick a sentence within a wide range. In

discretionary sentencing invites undeserved sanctions for two core reasons. First, sentencing rules fail to clarify that undeserved punishment is absolutely impermissible.[32] Second, sentencing statutes allow sentencing courts to address the crucial question of how much punishment is *deserved* at the same time as they consider how much punishment would be *useful*. This process tempts sentencing courts to impose undeserved penalties in order to achieve future benefits, such as incapacitation or deterrence.[33] When focused on future public safety, a judge may not even realize that her consideration of desert has been perfunctory and inadequate. Even when a judge seeks to be just, she may unconsciously exaggerate the amount of punishment that a defendant deserves when greater punishment seems useful or necessary to protect others. As Ristroph observes, "When utilitarian concerns prompt increases in criminal penalties, perceptions of desert seem to catch up quite quickly."[34]

The risk of undeserved punishment for the sake of benefits to others is not speculative. A California judge sentenced Gary Ewing to twenty-five years to life in prison for stealing three golf clubs in order to advance "the State's public-safety interest in incapacitating and deterring recidivist felons."[35] A Louisiana judge sentenced Ricky McGraw to seven years in prison for selling ten dollars' worth of marijuana in order to prevent McGraw from committing such offenses again.[36] An

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states without sentencing guidelines, that range can be quite substantial. It is not uncommon, for example, for a judge to have the freedom to choose a sentence anywhere within a range of 0 to 20 years.").

32 *See infra* subsection II.C.1 (describing sentencing statutes).

33 *See* John Monahan & Mary Ruggiero, *Psychological and Psychiatric Aspects of Determinate Criminal Sentencing*, 3 INT'L J.L. & PSYCHIATRY 143, 150 (1980) ("[R]egardless of whether the offender had committed prior offenses, subjects perceived the offender with a 20% chance of recidivism as morally 'deserving' a sentence slightly in excess of 1 to 2 years, while perceiving an offender with an 80% chance of recidivism as 'deserving' a sentence of almost 5 to 6 years."); *cf.* David Garland, *The Current Crisis of American Criminal Justice: A Structural Analysis*, 6 ANN. REV. CRIMINOLOGY 43, 57 (2023) (arguing that lack of a developed welfare state means that "when American policy-makers are faced with problems of violence or disorder, they have fewer options at their disposal" and by default "turn to the police, the prison, and the broad imposition of harsh penal control").

34 Ristroph, *supra* note 19, at 1312.

35 Ewing v. California, 538 U.S. 11, 29, 17–18, 20 (2003) (plurality opinion); *see also id.* at 31–32 (Scalia, J., concurring in judgment) (noting that the plurality opinion "does not convincingly establish that 25-years-to-life is a 'proportionate' punishment for stealing three golf clubs," *id.* at 31, and that is why "the plurality must then *add* an analysis," *id.* at 32, defending the sentence based on state interests in incapacitation and deterrence); *id.* at 51–52 (Breyer, J., dissenting) ("No one argues for Ewing's inclusion within the ambit of the three strikes statute on grounds of 'retribution.'").

36 State v. McGraw, 201 So. 3d 987, 988 (La. Ct. App. 2016) ("Based upon the likelihood that McGraw's criminal activity would continue, the court sentenced McGraw to seven years' imprisonment at hard labor, to run consecutively to any other sentence.").

Arizona judge sentenced Atdom Mikels Patsalis to 292 years in prison for a string of burglaries (none of which resulted in physical injury), thus sending a deterrent "message" to others.[37] These sentences are not the result of one outlier statute or one extreme jurisdiction; they are the result of routine sentencing practices that allow utilitarian goals to drive sentencing decisions above the limits of desert.

This Article proposes a safeguard against such undeserved and unjust penalties. Rather than abandoning or marginalizing desert,[38] as critics have suggested, sentencing courts should make desert the first and foremost question they address. The discretionary sentencing process should begin with a determination of how much punishment the defendant deserves.[39] The sentencing court should state the upper bound of deserved punishment on the record, thereby fixing the ceiling of just punishment. Only after establishing the upper bound of deserved punishment should the judge go on to decide what specific penalty—not to exceed the deserved maximum—would best serve the full range of statutory sentencing goals (usually including not only retribution but also utilitarian goals such as deterrence, incapacitation, and rehabilitation).[40]

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37 Patsalis v. Shinn, 47 F.4th 1092, 1096, 1095 (9th Cir. 2022) (quoting Patsalis v. Att'y Gen., 480 F. Supp. 3d 937, 956 (D. Ariz. 2020)); *see id.* at 1110 (Christen, J., dissenting) ("[T]he sentence Patsalis received was multiples of the sentences imposed for murderers or rapists, yet Patsalis did not injure anyone and there is no indication that any violence or weapons were involved in any of his offenses."). Patsalis's sentence was far above the minimum penalty of fifteen years that the judge could have imposed after trial, and much more than the "twenty years or less" he would have faced had he accepted a plea deal offered by the state. *See id.* at 1102.

38 Abandoning desert is not a practical option for the foreseeable future, even if it were desirable. *See* RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 86 (2012) (noting that purely retributive or purely utilitarian theories "have never been adopted and probably never will be" because "they cannot achieve consensus and win broad support"); John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & HUM. BEHAV. 659, 675 (2000) (finding that people are generally unwilling to send morally blameless offenders to prison).

39 *See infra* Section III.A. This sequence will expressively affirm desert as a threshold requirement and will reduce the sentencer's temptation to exaggerate desert in the hope of future benefits. Though beginning with desert may create some increased risk that utilitarian judgments will be influenced by an earlier assessment of desert, this does not invite unjust distortion. In fact, the future utility of punishment will often turn on how closely it mirrors desert, as scholars have shown that the criminal law garners more respect and compliance when sentences match what people believe defendants deserve. *See infra* note 116 and accompanying text. Furthermore, miscalculation of the utility of a sanction may be easier to correct than improper assessment of desert, because claims about future harms and benefits can be subjected to empirical testing and contradiction is at least possible. Claims about desert, by contrast, depend on subjective value judgments that are less subject to future falsification.

40 *See infra* Section I.B (describing common statutory provisions).

The proposed reforms would operationalize a widely endorsed sentencing paradigm called "limiting retributivism." This model, most famously advocated by Norval Morris,[41] treats desert as an absolute limit on sentencing severity, but allows sentences to be tailored to utilitarian goals within the limits set by desert.[42] Limiting retributivism has wide appeal and many proponents; Richard Frase describes it as the "consensus" model for sentencing in the United States today.[43] The sentencing provisions of the influential *Model Penal Code* published by the American Law Institute are explicitly modeled on the work of Norval Morris and adopt desert as a "constraint[] on utilitarian sanctions."[44] By enforcing desert as a constraint on sentencing severity, the reforms proposed in this Article would align sentencing practice with recognized principles of justice.

More broadly, the proposed reforms would foster greater deliberation about how much punishment individual defendants deserve.[45] Legislatures have strong political pressures to enact harsh penalties that exceed the desert of many offenders.[46] These penalties include mandatory minimum sanctions designed for drug "kingpins" that end

41 Norval Morris explicated and advocated the model of limiting retributivism in various influential works. *See, e.g.*, NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 192, 198 (1982) [hereinafter MORRIS, CRIMINAL LAW]; NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 60, 77–79 (1974) [hereinafter MORRIS, IMPRISONMENT].

42 The model of limiting retributivism explicitly embraces crime-control goals for criminal punishment. To some wholehearted retributivists, the idea that sentences must be both deserved and useful is not a "retributivist" position at all. *See, e.g.*, Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 180 (Ferdinand Schoeman ed., 1987) ("Retributivism has no room" for arguments that "[o]ther reasons—typically, crime prevention reasons—must be added to moral desert . . . for punishment to be justified.").

43 FRASE, *supra* note 38, at 81.

44 MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 24 (AM. L. INST., Proposed Final Draft 2017). In creating the current sentencing provisions of the *Model Penal Code*, the American Law Institute explicitly "borrow[ed] from the theoretical writings of Norval Morris." *Id.* at 23.

45 *Cf.* SULLIVAN & FRASE, *supra* note 29, at 171 (arguing that courts should "clearly and consistently explain their decisions" as to when government measures are disproportionate and excessive, "so that these decisions are accepted by citizens and officials and can provide clear guidance for future government action").

46 *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 37–38 (2012) ("Because voters are badly misinformed, they clamor for tougher sentences, three-strikes laws, and mandatory minima across the board." *Id.* at 38.); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 505, 507 (2001) (explaining that "[p]athological [p]olitics of [c]riminal [l]aw," *id.* at 505, lead "all change in criminal law . . . to push in the same direction—toward more liability," *id.* at 507); ALBERT W. DZUR, PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY 140 (2012) ("The often highly politicized public opinion that influences sentencing statutes reflects general beliefs about crime, criminals, and current patterns of sentencing, frequently distorted by media emphasis on the worst crimes.").

up applying equally to far less culpable street peddlers,[47] and prison penalties designed to confine dangerous recidivists, which end up being applied to nonviolent repeat offenders. As the late William Stuntz and Robert Scott remarked, "If the same legislators . . . were to vote on sentences case by case, many defendants who qualify for habitual criminal sentencing would get far less."[48] If judges exposed the disparity between these harsh sanctions and the lesser culpability of many defendants, legislatures and the voting public could not as easily ignore their unjust excesses.[49] Even though judges may not on their own ignore mandatory minimums, express judicial determination of desert could thus bolster the case for statutory repeal or restraint of these excessive penalties.

Critics might object that a greater focus on desert will invite greater bias. Utilitarian goals, however, can just as easily become vehicles for bias and discrimination.[50] For example, predictions of future violence—used to justify criminal sanctions for the purpose of incapacitation—can be infected with racial stereotypes. In a recent capital case, the Supreme Court invalidated a death sentence because an expert's testimony had invoked the "powerful racial stereotype . . . of black men as 'violence prone,'"[51] skewing the jury in favor of execution

47 *See* United States v. Kupa, 976 F. Supp. 2d 417, 422, 422–23 (E.D.N.Y. 2013), *aff'd*, 616 F. App'x 33 (2d Cir. 2015); *see also id.* at 448 ("No one, not even the government, wanted those [low-level] defendants to receive their sentences."); BARKOW, *supra* note 6, at 36 ("The mandatory minimum sentences are almost always set with the worst offenders in mind.").

48 Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1963 (1992); *see also* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 123 (1998).

49 *Cf.* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 499 (1999) (noting that when norms that impact criminal law policies are obscured, "it makes the influence of such norms less salient and thus deprives norm reformers of opportunities to expose and critique them"); Marc Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 BEHAV. SCIS. & L. 3, 21 (1989) ("A practice of sentencing opinions will allow judges to address (explicitly or in the course of daily practice) difficult issues of theory. This practice will allow for a much more careful and powerful set of theoretical arguments and will, in return, provide fairer individual sentences and a more principled system.").

50 *See* Ristroph, *supra* note 19, at 1350 ("Other sentencing theorists have described what we might call the elasticity of deterrence."); *id.* at 1351 ("Like desert and deterrence, rehabilitation and incapacitation prove elastic and opaque in practice.").

51 Buck v. Davis, 137 S. Ct. 759, 776 (2017) (quoting Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion)); *see also* Michael Tonry, *Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again*, *in* 48 AMERICAN SENTENCING—WHAT HAPPENS AND WHY? 439, 458 (Michael Tonry ed., 2019) ("Blacks are much more likely than whites to be mislabeled as dangerous and, if this is reflected in sentencing, to be punished more severely than they otherwise would be. Conversely, whites are much more likely than blacks to be mislabeled

as a means of incapacitating the allegedly dangerous Black defendant.[52] A utilitarian focus on prior convictions as a marker of likely recidivism, moreover, can have a disproportionate racial effect on minorities who are more likely to have been convicted in the past.[53] And conscious or unconscious devaluation of minority lives can make the suffering of minority defendants easier to justify for the sake of other benefits to society. Ignoring desert would not avoid these racial injustices.

In fact, ignoring desert could worsen racial inequities. From a purely utilitarian perspective, the social disadvantages suffered by many minority defendants[54] could be seen to justify harsher penalties, because such disadvantages might suggest that defendants are likelier to reoffend.[55] The disadvantages may include lack of educational or career opportunities, pressure from others to commit crime, lack of a stable and supportive family environment, and victimization from abuse, neglect, or crime. Such destabilizing biographical factors could be argued to make greater punishment necessary for incapacitation or deterrence. Yet these same factors might well suggest harsh punishment to be undeserved.[56] Forgoing consideration of desert as a constraint could thus augment the harms of past disadvantages for minority defendants.[57]

This Article focuses on reforms to discretionary judicial sentencing procedure because this sentencing regime is most widespread, least

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as 'not dangerous' and, if this is reflected in sentencing, to benefit from a mistaken prediction that they would not reoffend.").

52 *See Buck*, 137 S. Ct. at 767, 776–77.

53 Many retributivists believe that prior convictions have little or no relevance to desert. *See* JULIAN V. ROBERTS, PUNISHING PERSISTENT OFFENDERS: EXPLORING COMMUNITY AND OFFENDER PERSPECTIVES 51 (2008) ("[R]etributive sentencing theorists fall into one of two camps: advocating a flat-rate approach in which prior convictions play no role, or espousing the very limited use of priors in a way consistent with the principle of the progressive loss of mitigation.").

54 *See, e.g.*, Sung S. Park, Emily E. Wiemers & Judith A. Seltzer, *The Family Safety Net of Black and White Multigenerational Families*, 45 POPULATION & DEV. REV. 351, 351 (2019) ("One of the most striking and persistent features of the American socioeconomic landscape is the disadvantaged position of African Americans relative to Whites."); *id.* at 372 (noting that "Blacks are much less likely to have at least one family member in their extended kin network who has access to permanent economic resources such as a college degree or homeownership . . . than Whites").

55 *See, e.g.*, Xia Wang, Daniel P. Mears & William D. Bales, *Race-Specific Employment Contexts and Recidivism*, 48 CRIMINOLOGY 1171, 1191 (2010) (finding that "among Black exprisoners, reentry to areas where the Black male unemployment rate is higher is associated with a greater probability of violent recidivism").

56 *See, e.g.*, ROBERTS, *supra* note 53, at 71 (noting that social deprivation can reduce culpability).

57 *See infra* subsection II.B.2 (explaining how less focus on desert could increase racial inequities).

constrained, and easiest to change. Judges need not wait for legislative approval to implement the proposed reforms: they already have the freedom to disentangle desert and utility, to explicitly record a sentencing ceiling based on maximum desert, to restrain their own sentencing choices within that upper bound, and to expose the injustice of undeserved mandatory minimums. Additional study, as well as statutory reform, will be needed to prevent undeserved penalties in other sentencing regimes—such as jury-sentencing regimes, determinate (mandatory guidelines) sentencing regimes, and indeterminate (parole) regimes. Further research into these systems may illuminate creative and effective ways to enforce the principle of desert. (A hybrid sentencing model that employs both juries and judges could be a powerful and legitimate way to prevent undeserved incarceration, for example, as this author argues elsewhere.)[58] By reforming discretionary sentencing procedure, judges can take a straightforward first step toward such broader reforms.

Most importantly and most feasibly, judges should implement these reforms in sentencing proceedings after trials. These reforms are less essential in sentencing proceedings based on plea bargains. Tried cases present the greatest risk of undeserved excess because defendants found guilty at trial routinely face a "trial penalt[y]" that plea-bargaining defendants do not receive.[59] Because plea deals usually reduce defendants' sentencing exposure, applying the reforms to plea-bargained cases would be less important.[60] Creating a desert-

58 *See* Marah Stith McLeod, *A Democratic Restraint on Incarceration*, 76 FLA. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4531087 [https://perma.cc/L49R-TVBZ]. The sentencing model proposed in this forthcoming article employs the democratic voice of the jury to restrain individual injustice and mass incarceration by having the jury establish the maximum term that an individual defendant deserves and by confining judicial sentencing discretion within that upper bound. The judge would then balance all statutory sentencing goals in order to select the final sentence. *Id.*

The reforms proposed to judicial sentencing procedure in the present Article differ from the hybrid jury-judge model just described. While that hybrid model may offer a more effective way to prevent penalties from exceeding desert, as well as offer laypeople a direct role in perceiving and restraining punitive excesses, jury participation would require statutory approval. By contrast, judges can change their discretionary sentencing procedure and adopt the reforms proposed in this Article on their own.

59 RICHARD L. LIPPKE, THE ETHICS OF PLEA BARGAINING 5 (2011); THEA JOHNSON, AM. BAR ASS'N, 2023 PLEA BARGAIN TASK FORCE REPORT 17 (2023) (objecting to a substantial increase "between the sentence offered prior to trial and the sentence received after trial" and arguing that "[t]his differential, often referred to as the trial penalty, should be eliminated").

60 *See infra* Section III.F (explaining why the reform is most important in tried cases and noting ways in which judges could further narrow the reform while guarding against the greatest unjust excesses).

delimiting sentencing procedure in pleaded cases would also be more complicated, as plea deals may restrict what judges learn about the nature and seriousness of offenses. Reforming post-trial sentencing, moreover, would in itself help guard not only against undeserved trial penalties but also against plea-bargaining injustices. Prosecutors could much less easily threaten defendants with undeserved punishments if they should choose to go to trial.

The Article proceeds as follows: Part I describes the American legal and cultural commitment to punishing offenders no more than they deserve. Part II explores why, notwithstanding our commitment to the principle of desert, sentencing courts still impose some sentences that exceed any fair assessment of offender culpability. Although desert critics blame the principle of desert itself for being too stretchable to serve as a meaningful limit, a closer look reveals that sentencing procedures are much to blame, because they fail to focus judges on desert as a constraint. Part III argues that these sentencing practices must change in order to prevent undeserved punishments. Sentencing judges should make desert the first and foremost question in sentencing, and treat maximum desert as an absolute cap on final sentences. This reform would transform the principle of desert from a weak limit into a potent safeguard against undeserved excess.

I. THE LIMITING PRINCIPLE THAT PUNISHMENT MUST BE DESERVED

At the foundation of criminal law and sentencing law in America lies a commitment to punishing offenders no more than they deserve. This commitment undergirds the theory of the criminal law itself, inspires the substantive law of sentencing, animates rules governing the review of sentencing proportionality by appellate courts, and is embodied in the widely endorsed sentencing paradigm of limiting retributivism. While the law occasionally transgresses this principle of desert by permitting punishment without culpability, those transgressions conflict with principles of justice and have garnered broad condemnation.

A. Criminal Law Is Premised on Desert

Criminal law rests at its core on the notion of desert, which serves as both a prerequisite to the imposition of punishment and an important limiting principle.[61] Only certain acts deserve criminal conviction and the "ineradicable connotation of moral condemnation and

61 *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 66 (1968) ("I see an important limiting principle in the criminal law's traditional emphasis on blameworthiness as a prerequisite to the imposition of punishment.").

personal guilt"[62] it carries. To meet the threshold requirement of desert, a person must not only commit a wrongful act (actus reus) but must do so with culpable intent (mens rea).[63]

When either dimension of desert is missing—either wrongfulness of action or culpability of offender—the law traditionally withholds criminal condemnation. Thus, for example, the law absolves defendants who lack culpability for committing crimes due to insanity, youthful immaturity, or duress.[64] It mitigates the criminal liability of defendants who lack some (but not all) rational agency—such as a defendant who acts in a heat of passion upon grave provocation by his victim.[65] The same requisite of culpable choice underlies "rules that prohibit punishment without fair notice that the conduct is criminal" and that forbid crimes based on a status that a person may not be able to control.[66] The law also deems persons undeserving of criminal condemnation if their otherwise illegal acts were justified or excused under the circumstances—as when a defendant acted out of necessity[67] or in reasonable defense of self or others.[68]

These doctrines and defenses manifest a fundamental precept of the criminal law: that people deserve legal condemnation and punishment only insofar as they culpably choose to commit criminal wrongs.

B. Sentencing Law Emphasizes Desert as a Key Concern

Desert also plays a prominent role in case and statutory law regarding sentencing. An "emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence."[69]

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62 Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 424 (1958).

63 *See* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 71 (1976); *see also* United States v. U.S. Gypsum Co., 438 U.S. 422, 436 (1978) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." (quoting Morissette v. United States, 342 U.S. 246, 250 (1952))).

64 *See* JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES & MATERIALS 617–712 (9th ed. 2022).

65 *See* Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1027 (2011).

66 SULLIVAN & FRASE, *supra* note 29, at 115; *see also* Robinson v. California, 370 U.S. 660, 667 (1962) (invalidating a statute criminalizing narcotics addiction, explaining that such addiction is "apparently an illness which may be contracted innocently or involuntarily").

67 *See, e.g.*, Nelson v. State, 597 P.2d 977, 979 (Alaska 1979); DRESSLER & GARVEY, *supra* note 64, at 589–600.

68 *See* DRESSLER & GARVEY, *supra* note 64, at 524–79.

69 California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

However, in sentencing codes, desert usually appears both as a constraint and as a justification.

First, desert establishes that upper bound on sentencing severity already discussed above. Just punishment must be limited by the seriousness of an offense and the culpability of an offender; a defendant may not be subjected to unlimited punishment simply because he is guilty of *some* criminal act. "It is rare that proportionality in punishment is not set out in a sentencing code as at least an implied—or potential—limit on sentence severity in pursuit of utilitarian objectives."[70] Statutes often include provisions stating, for example, that sentences should be "commensurate with the nature and extent of the harm caused by the offense, taking into account factors that may diminish or increase an offender's culpability."[71] Other provisions require sentencers to "differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties"[72] for each to ensure that sentences are "justly deserved in relation to the seriousness of the offense."[73] Sentencing laws thus depict desert as a limiting principle and precept of justice.

Second, desert serves as an affirmative rationale for imposing punishment—namely, to achieve "vindication of public norms by the imposition of merited punishment."[74] In this second capacity, desert (sometimes called "retribution") is usually only "one important objective alongside a number o[f] others, including one or more of the

70 MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 23 (AM. L. INST., Proposed Final Draft 2017).

71 ARK. CODE ANN. § 16-90-801(a)(1) (2006).

72 ARIZ. REV. STAT. ANN. § 13-101(4) (2020); *see also* ALA. CODE § 13A-1-3(4) (2015); N.Y. PENAL LAW § 1.05(4) (McKinney 2009); WASH. REV. CODE § 9A.04.020 (2023). Other statutes similarly speak of the need to impose penalties that are "proportionate" or "proportional" to the "seriousness" of each offense. *See* ARK. CODE ANN. § 16-90-801(b)(1) (Supp. 2019); CAL. PENAL CODE § 1170(a)(1) (West Supp. 2023); COLO. REV. STAT. § 18-1-102(c) (2023); CONN. GEN. STAT. § 54-300(c)(2) (2023); GA. CODE ANN. § 16-1-2(4) (2019); 720 ILL. COMP. STAT. 5/1-2(c) (2022); MD. CODE ANN., CRIM. PROC. § 6-202(1) (West 2023); N.D. CENT. CODE § 12.1-01-02(3) (2023); OR. REV. STAT. § 161.025(1)(f) (2021); TEX. PENAL CODE ANN. § 1.02(3) (West 2021); UTAH CODE ANN. § 76-1-104(3) (LexisNexis 2017); WASH. REV. CODE § 9.94A.010(1) (2023); *see also* N.H. CONST. pt. 1, art. 18 ("All penalties ought to be proportioned to the nature of the offense."); HAW. REV. STAT. § 706-606(2)(a) (2022) (requiring courts to consider "the seriousness of the offense" and "provide just punishment for the offense"). Other laws focus on ordinal proportionality. *See, e.g.*, IND. CODE § 35-32-1-1(8) (2023) (urging courts to "maintain proportionality of penalties across the criminal code, with like sentences for like crimes").

73 TENN. CODE ANN. § 40-35-102(1) (2019); *see also* ARIZ. REV. STAT. ANN. § 13-101(6) (2020) (similar); COLO. REV. STAT. § 18-1-102.5(1)(a) (2023) (similar); DEL. CODE ANN. tit. 11, § 201(4) (2015) (similar).

74 N.D. CENT. CODE § 12.1-01-02(1) (2023).

crime-reductive utilitarian purposes."[75] Many sentencing statutes embrace all four traditional purposes of punishment, including not only retribution but the utilitarian goals of deterrence, incapacitation, and rehabilitation.[76] Sentencing laws here depict desert as legitimate and important, but do not make retribution the primary or sole concern.[77]

Desert thus imposes an upper limit on punishment, beneath which a range of retributive and utilitarian objectives may be consulted to select a particular sentence. That is why Richard Frase has described American sentencing laws, quite reasonably, as reflecting the basic model of "limiting retributivism"[78]—meaning that retribution or desert is a limitation on, not just a reason for, punishment. In these ways, desert serves not only as the bedrock predicate for criminal liability per se, but as a constant penal aim both constraining and justifying sentencing decisions.

C. Constitutional Review of Sentences Focuses on Desert

Constitutional review of criminal sentences by appellate courts likewise tends to focus on the desert of offenders to determine the propriety of penalties.[79] Such review is especially strict in the capital context, where it has led to significant constraints on the use of the death penalty. Stating that the death penalty should "be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of

75 MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 22 (AM. L. INST., Proposed Final Draft 2017).

76 *See* ALA. CODE § 13A-1-3 (2015); COLO. REV. STAT. § 18-1-102.5 (2023); DEL. CODE ANN. tit. 11, § 201 (2015); HAW. REV. STAT. § 706-606 (2022); MASS. GEN. LAWS ch. 211E, § 2 (2020); NEB. REV. STAT. § 29-2322 (2016); N.C. GEN. STAT. § 15A-1340.12 (2021); N.D. CENT. CODE § 12.1-01-02 (2023); N.J. STAT. ANN. § 2C:1-2 (West 2015); N.Y. PENAL LAW § 1.05 (McKinney 2009); OHIO REV. CODE ANN. § 2929.11 (LexisNexis 2023); OKLA. STAT. tit. 22, § 1514 (2021); TENN. CODE ANN. § 40-35-102 (2019); TEX. PENAL CODE ANN. § 1.02 (West 2021); *see also* State v. Klinetobe, 958 N.W.2d 734, 741 (S.D. 2021) ("Courts should consider the traditional sentencing factors of retribution, deterrence—both individual and general—rehabilitation, and incapacitation.").

77 As explained later in this Article, *see infra* note 224 and accompanying text, American law reflects greater concern with avoiding undeserved punishment than with ensuring that deserved punishment be imposed. One state sentencing statute does appear to embrace desert to establish a punishment *floor*. *See* FLA. STAT. § 921.002(1)(b)–(c) (2023) (stating that "[t]he primary purpose of sentencing is to punish the offender" and that sentences are to be "commensurate with the severity of the primary offense and the circumstances surrounding the primary offense"). That approach appears to be uncommon. *See* MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 24 (AM. L. INST., Proposed Final Draft 2017) ("The theory of retribution as the controlling principle for the distribution of criminal sanctions has not been widely adopted in American criminal codes.").

78 *See* FRASE, *supra* note 38, at 81, 86.

79 *See* Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1851 (2012).

execution,"[80] the U.S. Supreme Court has barred execution for offenses and offenders that it has deemed not to deserve the ultimate sanction. Thus the Court has forbidden the death penalty for rape, on the ground that execution would be grossly disproportionate to the gravity of rape,[81] and for young offenders, the latter on the ground that the "susceptibility of juveniles to immature and irresponsible behavior" makes their conduct "not as morally reprehensible as that of an adult."[82] In the context of proportionality review, then, the principle of desert has played a crucial role in "tak[ing] death off the table for a host of defendants."[83]

The Supreme Court more recently has invoked desert to restrict the use of juvenile life imprisonment without parole. Reasoning that juveniles are categorically less culpable than adults, it has barred states from imposing mandatory sentences of life without parole on juvenile offenders.[84] It has explained that "in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence."[85] Here, too, lack of desert has been dispositive.

The Court has tended to leave judgments about the propriety of lesser noncapital sentences to state and lower federal courts,[86] but lower courts often apply similar proportionality doctrines. Several state constitutions and statutes require proportionality between offense gravity and punishment severity, and empower state appellate courts to invalidate sentences that exceed desert.[87]

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80 Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)); *see also* Miller v. Alabama, 567 U.S. 460, 475–76 (2012) (requiring the consideration of mitigating evidence "so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses," *id.* at 476 (first citing Sumner v. Shuman, 483 U.S. 66, 74–76 (1987); then citing Eddings v. Oklahoma, 455 U.S. 104, 110–12 (1982); and then citing Lockett v. Ohio, 438 U.S. 586, 597–609 (1978) (plurality opinion))).

81 Coker v. Georgia, 433 U.S. 584, 592 n.4 (1977) (plurality opinion).

82 Roper v. Simmons, 543 U.S. 551, 570 (2005) (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)). It has likewise prohibited capital punishment for intellectually disabled offenders, reasoning that they are "categorically less culpable than the average criminal." Atkins v. Virginia, 536 U.S. 304, 316 (2002).

83 Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1187 (2009).

84 *See* Graham v. Florida, 560 U.S. 48, 68–74 (2010).

85 *Id.* at 72.

86 *See* Barkow, *supra* not 83, at 1188 ("[N]oncapital defendants have received almost none of the benefits that the Court has bestowed in capital cases.").

87 *See* Samuel Weiss, Note, *Into the Breach: The Case for Robust Noncapital Proportionality Review Under State Constitutions*, 49 HARV. C.R.-C.L. L. REV. 569, 577–78 (2014) (noting that "[t]en states have either explicit provisions requiring proportionate penalties or have interpreted other provisions as mandating the same," *id.* at 577, but that few states enforce such

D. Limiting Retributivism Is Broadly Endorsed as a Sentencing Paradigm

Not only does the principle of desert animate many aspects of governing criminal law, but it is embodied in the leading paradigm for sentencing. Richard Frase describes limiting retributivism as the "consensus" model for sentencing in the United States today.[88] This model, most famously explicated by Norval Morris, forbids punishment that exceeds what an offender deserves, but allows sentences to be tailored to utilitarian goals within the limits of desert.[89] Morris believed desert should be used to establish a "range of deserved (or *not undeserved*) penalties"[90] within which specific sentences could be chosen for instrumental or other reasons. The limiting retributivism model for sentencing contrasts with a monolithic theory of retribution,[91] which would treat consequentialist goals as irrelevant, while also rejecting a purely utilitarian approach that would allow undeserved punishment simply for future benefits.[92]

Limiting retributivism, as a framework for sentencing, already enjoys wide support. When the American Law Institute drafted the current sentencing provisions of the influential *Model Penal Code*, it based them on the model of limiting retributivism, explicitly "borrow[ing] from the theoretical writings of Norval Morris."[93] The drafters of the Code noted that this approach aligned with principles in existing state and federal sentencing regimes, which almost always embrace desert "as at least an implied—or potential—limit on sentence severity."[94]

Even critics such as Alice Ristroph acknowledge that "[l]imiting retributivism . . . is probably a roughly accurate description of the way most people think about sentencing";[95] critics like Ristroph simply

provisions rigorously); *id.* at 580 ("Michigan is uncommon in explicitly stating an aggressive proportionality standard . . . ."); SULLIVAN & FRASE, *supra* note 29, at 153–60 (explaining that most state constitutions prohibit excessive punishments and discussing the varying rigor with which state courts enforce these limitations).

88 *See* FRASE, *supra* note 38, at 81.

89 *See supra* note 41 and accompanying text; *see also* Richard S. Frase, *Norval Morris's Contributions to Sentencing Structures, Theory, and Practice*, 21 FED. SENT'G REP. 254, 255 (2009).

90 FRASE, *supra* note 38, at 82.

91 *See* Moore, *supra* note 42, at 180 ("Retributivism has no room" for arguments that "[o]ther reasons—typically, crime prevention reasons—must be added to moral desert . . . for punishment to be justified.").

92 *See* MORRIS, IMPRISONMENT, *supra* note 41, at 77–79.

93 MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 23 (AM. L. INST., Proposed Final Draft 2017).

94 *Id.*

95 Ristroph, *supra* note 19, at 1337; *see also id.* at 1306 ("Retribution—renamed as desert, softened to accommodate utilitarian concerns, and legitimized by empirical evidence of community preferences—is central to modern sentencing.").

doubt that desert can serve in practice as a meaningful constraint on criminal sanctions.[96]

E. Exceptions to the Desert Requirement Generate Controversy

Although current law thus manifests a strong commitment to desert as a prerequisite for criminal liability and a constraint on punishment severity, some laws appear to transgress that important commitment. These laws include strict liability offenses that do not require proof of culpability and mandatory minimum penalties that may exceed the individual desert of some offenders. These laws warrant mention, but they do not imply a larger legal or cultural rejection of the principle of desert.

Strict liability offenses allow conviction and punishment of persons who acted reasonably and may not even have known of the prohibitions that they violated.[97] Critics argue that these offenses invite "the stigma of a criminal conviction" for acts that are not "morally blameworthy."[98] The *Model Penal Code* bars strict liability except for minor "violation[s]" that do not count as crimes and cannot lead to incarceration.[99] In some ways, however, critics of strict liability may exaggerate the conflict between these statutes and the precept of desert. Many strict liability offenses "regulate potentially harmful or injurious items," and persons who know that they are dealing with such risky items "should be alerted to" the possibility of strict rules for their safe handling.[100] Other strict liability offenses govern conduct that usually entails some culpability. Statutory rape, for example, is often a strict liability offense, and one might argue that persons who have sex with young partners are at least minimally culpable for taking the risk that their partners are underage. As Darryl Brown explains: "Strict liability,

96 *See id.* at 1297 ("A study of the actual deployment and operation of the concept of desert suggests that, contrary to many theorists' hopes, democratic conceptions of desert are too malleable to serve as a meaningful limiting principle.").

97 *See, e.g.*, Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL'Y 1065, 1072–77 (2014).

98 Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109; *see also id.* (describing a "consensus" among commentators as to the impropriety of strict liability offenses); Elonis v. United States, 575 U.S. 723, 734 (2015) (invoking "the basic principle that 'wrongdoing must be conscious to be criminal'" (quoting Morissette v. United States, 342 U.S. 246, 252 (1952))).

99 *See* MODEL PENAL CODE § 2.05(2) (AM. L. INST. 1985) (providing that any offense subject to strict liability is a "violation"); *id.* § 1.04(5) ("A violation does not constitute a crime . . . ."); MODEL PENAL CODE: SENT'G § 6.06(1) (AM. L. INST., Proposed Final Draft 2017) (permitting a sentence of incarceration only for "a crime").

100 Staples v. United States, 511 U.S. 600, 607 (1994); *see also* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 328–29 (2012) (explaining how strict liability offenses in this context do require at least some aspect of culpability).

in the context of such offenses, does not signal a rejection of culpability's justifying role; instead it represents a trade-off of the costs for proof of culpability that is inferable in most such cases even without that proof requirement."[101]

Mandatory minimum penalties violate the principle of desert insofar as they authorize at least some undeserved punishments. These penalties "prevent[] judges from calibrating punishment to suit the person or the crime."[102] Scholars, judges, and legal commentators have denounced mandatory minimums as a major source of undeserved excesses.[103] These mandatory penalties, however, do not cast doubt on our legal system's commitment to desert. Rachel Barkow explains that "mandatory minimum sentences are almost always set with the worst offenders in mind."[104] Sloppy drafting may be to blame for their reach to less culpable offenders. Legislatures also have political incentives to phrase criminal statutes broadly and to leave the scope of their enforcement to prosecutors.[105] Prosecutors, for their part, have an incentive to use mandatory penalties to "bludgeon defendants into effectively coerced plea bargains";[106] if defendants refuse, prosecutors must insist on the penalties to retain their credibility.[107] William Stuntz

101 Brown, *supra* note 100, at 330.

102 Alison Siegler, *End Mandatory Minimums*, BRENNAN CTR. FOR JUST. (Oct. 18, 2021), https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums [https://perma.cc/G325-WNZP].

103 *See, e.g.*, United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (objecting to mandatory penalties "so excessively severe they take your breath away"), *aff'd*, 616 F. App'x 33 (2d Cir. 2015); *id.* at 420–21 ("[M]any powerful arguments have been advanced in favor of the repeal of mandatory minimums entirely, and I agree with them." (footnote omitted)); United States v. Rivera-Ruperto, 884 F.3d 25, 26 (1st Cir. 2018) (Barron, J., concurring in denial of rehearing en banc) ("Despite the force of Rivera's argument that this mandatory sentence is so grossly disproportionate as to be unconstitutional under the Eighth Amendment, I am not permitted to conclude that it is. Other federal judges have expressed their dismay that our legal system could countenance extreme mandatory sentences . . . .").

104 BARKOW, *supra* note 6, at 36; *see also Kupa*, 976 F. Supp. 2d at 419 ("When it enacted [mandatory penalty provisions for recidivists under 21 U.S.C.] § 851 in 1970, Congress had in mind the world that DOJ asked it to create, in which federal prosecutors would carefully cull from the large number of defendants with prior drug felony convictions the hardened, professional drug traffickers who should face recidivism enhancements upon conviction." (footnote omitted)), *aff'd*, 616 F. App'x 33 (2d Cir. 2015).

105 *See* Stuntz, *supra* note 46, at 509–10.

106 Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ [https://perma.cc/RK9Q-AGWF].

107 Consider as an example the (in)famous case of *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59 (1978). The defendant in that case had forged a $88.30 check and the prosecutor offered him a deal: "[p]lead guilty . . . and take a five-year prison sentence," or face an additional habitual offender charge carrying a mandatory sentence of life in prison.

described these incentives as the "[p]athological [p]olitics of [c]riminal [l]aw."[108] One should not mistake the excesses that result from these perverse incentives for deliberate rejection of the bedrock principle that punishment must be deserved.

It is worth noting that incentives of legislators and prosecutors to overlook the limits of desert to achieve perceived benefits are not unlike the temptations of sentencing judges to exaggerate or ignore desert—temptations that this Article will address at length—although the legislative process and the exercise of prosecutorial discretion may be harder to regulate than sentencing procedure.[109] These temptations must be resisted with utmost vigor in order to avoid undeserved sanctions that feed our current plague of mass incarceration.

II. WHY DESERT AS A LIMIT MUST BE STRENGTHENED IN PRACTICE

Our criminal legal system thus embraces desert as a predicate for criminal condemnation and a constraint on punishment severity. When laws are enacted that violate this constraint, they impose unjust excesses.

But many critics of mass incarceration and America's punitive policies do not agree that desert now serves as an effective limiting principle. They point out that two million people reside behind bars,[110] serving sentences often "so excessively severe they take your breath away."[111] Not only do such sentences prove, they contend, that our focus on desert has not limited punishment in practice, but they show that in practice desert becomes a license for excess. These critics believe that such severity is inevitable: desert is simply too amorphous and

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William J. Stuntz, Bordenkircher v. Hayes*: Plea Bargaining and the Decline of the Rule of Law*, *in* CRIMINAL PROCEDURE STORIES 351, 352 (Carol S. Steiker ed., 2006). When the defendant refused the deal, the prosecutor filed the additional charge, and the defendant ended up sentenced to life without parole. *Id.* at 353, 355; *see also id.* at 370–71 ("The only possible explanation is that [the prosecutor] thought five years was the right sentence, and threatened the habitual criminal charge solely in order to induce a plea. Once the threat was made, it had to be carried out.").

108 *See* Stuntz, *supra* note 46, at 505.

109 Constitutional provisions might be enacted to regulate the process of criminal law creation. Rather than simply forbidding disproportionate penalties (and empowering judges to invalidate them), a constitution could specify that no criminal statute would be valid unless the legislature first made a threshold finding that the codified crime or punishment complied with the bedrock principle that punishment must be deserved. Though legislators might lie when making such a finding, this procedural mandate could encourage deeper consideration and legislative discussion of the desert question. Constitutional regulation of the legislative process is beyond the scope of this Article, however.

110 *See supra* note 2 and accompanying text.

111 United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013), *aff'd*, 616 F. App'x 33 (2d Cir. 2015).

malleable, too easy to stretch to justify harsh sentences. The notion of desert is also ill-defined and can mask racial bias and animus with a false cloak of moral legitimacy. Harsh sentences based on claims of desert, moreover, cannot be empirically falsified or easily critiqued. These features of desert make desert not only a weak and ineffective constraint on sentences, but a source of punitive excess.

This Part explores these important practical objections to desert as a punishment principle. The reform proposed in this Article is needed precisely in order to meet and mitigate them. This Part also outlines the alternative proposal, made by desert's critics, that we simply abandon desert as a central sentencing principle, revealing this counterproposal to be impractical and unwise. Desert is too deeply embedded in American law to be easily displaced, and even if it could be, casting desert aside would eliminate a crucial safeguard against excess and open the door to fresh injustices.

Before we even consider abandoning desert based on our system's punitive excesses, moreover, we should make sure that the principle of desert is in fact to blame. A closer look reveals a different cause of punitive excess: sentencing procedures that allow the bounds of desert to be exaggerated or ignored. These procedures debilitate desert as a limiting principle. Critics thus err in blaming desert for excesses fostered by a sentencing process that does not enforce desert as a constraint.

A. Desert Claims Are Indeterminate and Stretchable

Critics of the limiting principle of desert argue that in practice, desert claims are imprecise and elastic—readily manipulated to justify draconian sanctions and to hide the biases of sentencers. These objections warrant attention by detractors and proponents of desert alike. If the precept of desert in practice introduces injustice, rather than prevents it, we may need to look elsewhere to rein in punishment excesses.

1. Desert Claims Are Indeterminate

According to some critics, desert cannot serve as a meaningful and principled constraint on sentences because it is indeterminate and "inevitably arbitrary."[112] When seeking a proportionate penalty, the only seemingly "equal" response to a crime is "eye for eye" justice, whereby an assault is punished by an assault, a murder by a murder, and so forth. To avoid the problems (and potential unconstitutionality) of this approach, one might try to achieve an equal measure of pain or

112 Thomas Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37, 72 (1983).

suffering (rather than repeat the offender's same act).[113] But looking only to equivalent suffering would ignore difference or even absence of culpable intention (mens rea), a core aspect of desert. A sadist who deliberately carves out his neighbor's eye could have to pay the same penalty as a batter who accidentally hits a foul ball into a spectator's eye, despite the obvious contrast in their intentions. It therefore remains important to take both the physical harm and the mental aspect of desert into account,[114] but this now requires us to balance incommensurable concerns. According to many critics of desert, any effort to achieve such a balance is "anchored in irrationality,"[115] because it ultimately depends on nothing more than intuition or fiat as to what sanction "equals" a particular wrong. If a judge's intuitions favor harsh punishment, there is no way to contradict her moral claim.

Several scholars have responded to this criticism by seeking to show that claims about desert can be empirically verified. Coining the phrase "empirical desert," Paul Robinson and other scholars argue that most people share common perspectives about desert, and that these perspectives can be studied and empirically ascertained.[116] In particular, they claim that laypeople usually agree about which offenders deserve more punishment than others along a given punishment spectrum, and that criminal sanctions can be pegged to such shared conceptions.[117] According to these scholars, empirical evidence of

113 *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 233–34 (1968) ("The simple equivalencies of an eye for an eye or a death for a death seem either repugnant or inapplicable to most offences, and even if a refined version of equivalence in demanding a degree of suffering equivalent to the degree of the offender's wickedness is intelligible, there seems to be no way of determining these degrees. Hence, instead of equivalence between particular punishments and particular crimes, modern retributive theory is concerned with proportionality.").

114 *See* SULLIVAN & FRASE, *supra* note 29, at 161 ("[T]he offender's blameworthiness for an offense is generally assessed according to two elements: the nature and seriousness of the harm foreseeably caused or threatened by the crime and the offender's culpability in committing the crime (in particular, the offender's degree of intent (*mens rea*), motives, role in the offense, and mental illness or other diminished capacity).").

115 Weigend, *supra* note 112, at 72.

116 *See* Paul H. Robinson, Joshua Samuel Barton & Matthew Lister, *Empirical Desert, Individual Prevention, and Limiting Retributivism: A Reply*, 17 NEW CRIM. L. REV. 312, 313 (2014); PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH 175–212 (2008); Paul H. Robinson, *Empirical Desert*, *in* CRIMINAL LAW CONVERSATIONS 29, 29 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009). This theory has spawned a lively debate among desert believers and skeptics. *See generally* CRIMINAL LAW CONVERSATIONS, *supra* (presenting twelve scholarly essays regarding empirical desert as a distributive principle).

117 Robinson, *supra* note 116 ("[U]nlike moral philosophy's deontological desert, empirical desert can be readily operationalized—its rules and principles can be authoritatively determined through social science research into people's shared intuitions of justice."); *see also* Cass R. Sunstein, *On the Psychology of Punishment*, 11 SUP. CT. ECON. REV. 171, 178–80

shared public norms about desert can be used to transform the principle of desert into a fair and practical metric for allocating punishment.[118]

Empirical desert theory seeks to render desert concrete by deferring to the informed moral judgments of laypeople rather than insisting on a theory of "deontological desert."[119] In our liberal democracy, this deference to lay moral norms is defensible. But empirical desert still does not make desert fully determinate, because it does not tell us *how much* punishment is deserved for any offense. Specifying which defendants deserve greater punishments than others does not tell us what penalty any one of them deserves. Deciding the quantum of deserved punishment still depends on moral judgments and may vary depending on the normative perspective of the sentencer.

Limiting retributivists respond to the indeterminacy of desert by arguing that even if one cannot establish that some precise amount of punishment is deserved, it *is* quite frequently possible to conclude that certain punishments are clearly *undeserved*.[120] As Justice Powell once explained, using an extreme example, "A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice."[121] Even if desert cannot be translated into one specific penalty, it remains a crucial limiting principle against the worst excesses. The sentencing reforms proposed in this Article seek to enforce that critical constraint.

2. Claims About Desert May Be Biased

Critics argue that the indeterminacy and opacity of desert claims can hide racial discrimination and bias. Ristroph explains that "it is difficult to know or control which particular details of an offender or offense inform a decision-maker's assessment of desert. Racial bias, fear, disgust, and other arbitrary factors can shape desert assessments, but they do so under cover of a seemingly legitimate moral judgment."[122] Such discrimination may be unconscious: to a racist, a

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(2004) (finding that, when asked to rank a number of scenarios in order of moral blameworthiness, people were almost uniform in how they ranked the scenarios).

118 *See, e.g.*, ROBINSON, *supra* note 116, at 178–84.

119 *See* Robinson, *supra* note 116.

120 *See* MORRIS, CRIMINAL LAW, *supra* note 41, at 148–49 ("Desert defines a range of punishments. One can say that this punishment is too severe, that too lenient, but within the range desert will not define to a precise point the socially necessary, wise, or desirable punishment.").

121 Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting).

122 Ristroph, *supra* note 19, at 1296; *see also* Julian Lamont, *The Concept of Desert in Distributive Justice*, 44 PHIL. Q. 45, 49 (1994) ("When people make desert-claims they are not

criminal act may appear less accidental and more culpable when done by a minority offender, because of an unreflective stereotype that certain minorities (for example, the Roma) tend to commit crimes.[123] Claims about desert also may be intentionally exaggerated in order to impose more punitive suffering on a disfavored defendant. Desert judgments thus can provide moral cover for invidious biases and wrongfully invite the sting of societal blame on marginalized minorities. Rather than limiting punishment, the principle of desert can become a license for excess. We must do our best to assure that it does not.

3. A Great Temptation Exists to Exaggerate Desert

The indeterminacy of desert claims also makes them easy to stretch when additional punishment seems useful or desirable.[124] "When utilitarian concerns prompt increases in criminal penalties, perceptions of desert seem to catch up quite quickly,"[125] writes Alice Ristroph. She offers proof: "[T]he remarkable consistency with which people speak of punishments as deserved, even as those punishments expand in scope and severity, suggests that the concept of desert is quite elastic."[126] Pointing to habitual offender laws as an example, she observes: "We punish recidivists more severely today than we did fifty years ago, but this is not because we have abandoned desert. Rather, conceptions of desert have adjusted to accommodate the severe sentences dictated by other, non-retributive sentencing goals."[127] Ristroph is not the only critic to raise such objections to desert; "[i]t is often said among American criminal-justice professionals that legal doctrines of 'proportionality' and 'desert' are too amorphous and contestable to

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simply telling us what desert itself requires. They unwittingly introduce external values, and make their desert-judgments in light of those values.").

123 *See* Ristroph, *supra* note 19, at 1331 ("[T]he substitution of desert judgments for racial animus, xenophobia, or other bases of dislike almost certainly operates subconsciously most of the time. This subconscious substitution is one of the perverse consequences of the opacity of desert." (footnote omitted)).

124 *See id.* at 1297 ("A study of the actual deployment and operation of the concept of desert suggests that, contrary to many theorists' hopes, democratic conceptions of desert are too malleable to serve as a meaningful limiting principle.").

125 *Id.* at 1312.

126 *Id.* at 1308.

127 *Id.* at 1318. This trend does not always hold true, however. Long sentences that were imposed years ago for marijuana offenses, for example, now spark outrage. *See* Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 401 (2020); *see also* Douglas A. Berman & Alex Fraga, *How State Reforms Have Mellowed Federal Enforcement of Marijuana Prohibition*, 49 FORDHAM URB. L.J. 675, 685–86 (2022) (recounting significant decreases over the last ten years in prosecution and punishment for federal marijuana offenses).

provide a genuine systemic constraint on overly harsh . . . sentences."[128]

The "elasticity" of desert claims presents a particular concern in cases where strong utilitarian reasons support harsher sentences than fair assessment of desert would allow. In such cases, exaggeration of desert brings unjust moral condemnation as well as undue suffering. An example illustrates this harm: suppose that a sentencing judge selects a high sentence for a relatively low-culpability theft offense in order to deter others, but then asserts that the high sentence is not only useful but also deserved. This overstatement of desert will invite undue moral condemnation from the public, which will not realize the defendant is being overpunished for the sake of perceived good effects. (Even if the judge does not explicitly assert that the sentence is deserved, the public may assume that it is, because the norm of desert is so established in our legal culture.) In this way, the malleability of desert can transform this limiting principle into an illusory constraint and a source of unjust moral condemnation.

Critics might not worry about the malleability of desert if desert were as often understated as exaggerated. Theoretically, desert could be distorted in either direction—not just toward undeserved punishment and condemnation but sometimes toward undeserved leniency and approbation. For example, lack of adequate prison space, or cost considerations in general, might lead a judge to minimize or ignore desert in the face of utilitarian needs. But critics argue that the malleability of desert is a one-way ratchet toward severity. Ristroph warns that desert is "easily stretch[ed] to accommodate and approve increasingly severe sentences,"[129] and that "we seem to be much more concerned about the risks of under-punishing than we are about the risks of over-punishing."[130] In sentencing, judges may feel strong pressure to protect public safety by imposing stiff sentences, even if such sentences exceed desert. By contrast, judges may feel little pressure to withhold deserved punishment to save costs if the costs of expensive punishments like incarceration are borne by the state as a whole rather than by the local community where the crime was committed—as is

128 MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 25 (AM. L. INST., Proposed Final Draft 2017).

129 Ristroph, *supra* note 19, at 1293.

130 *Id.* at 1313. Appellate review of sentences may cut in another direction. *See, e.g.*, State v. McGraw, 201 So. 3d. 987, 989 n.1 (La. Ct. App. 2016) ("This court . . . is not required to correct an illegally lenient sentence." (first citing State v. Brown, Nos. 47,580-KA, 47,581-KA, 47,582-KA, 2013 WL 163759 (La. Ct. App. Jan. 16, 2013); and then citing State v. Young, 73 So. 3d 473 (La. Ct. App. 2011))).

usually the case.[131] These factors make the malleability of desert bend toward excess. Sentencing practices must change in order to combat this unjust skew toward severity.

B. Abandoning the Principle of Desert Is No Solution

Some scholars argue that our best response to the indeterminacy and elasticity of desert is to abandon or marginalize desert as a sentencing principle. In order to unwind mass incarceration and prevent draconian punishments, such critics argue, we must shift our attention away from desert and instead "focus primarily on the effects of punishment."[132] Yet even if this paradigm shift were feasible (which in the near future it surely is not),[133] discarding desert as a sentencing principle would not prevent bias, arbitrariness, or excess in sentencing decisions. To the contrary, it might make bias and arbitrariness *worse*, and would leave defendants exposed to severe excesses.

1. The Utility of Sanctions Is Also Often Indeterminate

Desert critics often claim that moral assertions about blameworthiness are simply contestable value judgments and therefore have no place in reasoned sentencing decisions. But the value-laden nature of desert does not make it arbitrary or irrelevant; many core principles, including assertions about human dignity and equality, depend on normative claims that cannot be proven by empirical evidence.

Furthermore, assessments of the utility of punishment are often indeterminate as well,[134] due to "the shortfall in quality research on the

131 *See* John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong, and Where We Can Go from Here*, 26 FED. SENT'G REP. 265, 267 (2014) ("Jails and probation offices are funded by counties, prisons by states."); W. David Ball, *Why State Prisons?*, 33 YALE L. & POL'Y REV. 75, 79 (2014) ("[M]aking prisons free to local governments encourages their overuse.").

132 *See* Yankah, *supra* note 18, at 185.

133 As a practical matter, desert cannot be easily ignored. Our criminal law rests on the notion of moral culpability as both a justification and a constraint for criminal punishment. *See* Berman, *supra* note 21, at 374. "Deontological concerns of justice or 'desert' place a ceiling on government's legitimate power to attempt to change an offender or otherwise influence future events." MODEL PENAL CODE: SENT'G § 1.02(2) cmt. at 4 (AM. L. INST., Proposed Final Draft 2017). The *Model Penal Code*, designed both to reflect and to rationally codify prevailing legal norms, makes desert *the* central limiting principle for sentencing and an explicit "constraint[] on utilitarian sanctions." *See id.* reporters' note at 24. Furthermore, "retributivism is probably now more popular than any other philosophical theory." Vincent Geeraets, *The Enduring Pertinence of the Basic Principle of Retribution*, 34 RATIO JURIS 293, 296 (2021). If we want to improve contemporary penal practices, therefore, we must work with—not against—the principle of desert.

134 *See, e.g.*, Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCH. 284,

effectiveness of criminal sanctions in reducing crime."[135] Claims about the deterrent value of a penalty—especially the penalty for a specific defendant—can be vague and speculative.[136] The American Law Institute has emphasized that "[t]he feasibility of general deterrence through marginal increases in the severity of criminal punishments is especially in doubt."[137] Even for the death penalty, decades of scrutiny and study have not established whether execution deters future capital offenses.[138] Predictions of future dangerousness may be uncertain as well.[139] Indeed, utilitarian predictions may be unreliable even when life itself is at stake. After decades on death row, some defendants sentenced to death based on findings of future dangerousness—supposedly made "beyond a reasonable doubt"[140]—have ultimately turned out to be nonviolent, model prisoners.[141] (Refusing to acknowledge and correct the predictive errors, state authorities have executed these prisoners anyway.)[142]

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293 (2002) ("[W]hen asked to respond like a deterrist . . . [study participants'] response was to ratchet up the punishment regardless of . . . manipulation. Deterrence theory, to them, seems to be synonymous with a simple, general increase in punitiveness.").

135 MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 27 (AM. L. INST., Proposed Final Draft 2017).

136 The problem is not unique to sentencing effects; many empirical questions of great moment to public welfare remain unanswered. The impact of minimum wage laws on rates of employment, for example, continues to be unclear despite years of sophisticated research by experts. *See* Katharine G. Abraham & Melissa S. Kearney, *Explaining the Decline in the US Employment-to-Population Ratio: A Review of the Evidence*, 58 J. ECON. LITERATURE 585, 627 (2020). The author thanks Prof. Paul Mahoney for pointing to this example of the challenges of assessing real-world effects even with extensive empirical study.

137 MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 27 (AM. L. INST., Proposed Final Draft 2017).

138 *See, e.g.*, Glossip v. Gross, 576 U.S. 863, 930 (2015) (Breyer, J., dissenting) ("Many studies have examined the death penalty's deterrent effect; some have found such an effect, whereas others have found a lack of evidence that it deters crime.").

139 Even where research has been carefully conducted regarding recidivism, its implications may be unclear. *See, e.g.*, Sawyer & Wagner, *supra* note 2 (noting that recidivism is "[a] slippery statistic" because it can be measured in so many different ways).

140 Marah Stith McLeod, *The Death Penalty as Incapacitation*, 104 VA. L. REV. 1123, 1161 (2018) (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(c) (West 2006)).

141 *See id.* at 1160–61; *see also* Marah Stith McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525, 531–32 (2016) (describing evidence that death-sentenced prisoners actually tend to be less violent than other offenders in maximum-security institutions, even after being integrated into the general prison population).

142 *See* McLeod, *supra* note 140, at 1160–61; *see also* Evans v. Muncy, 498 U.S. 927, 929–30 (1990) (Marshall, J., dissenting from denial of certiorari) (objecting to the Court's refusal to stop the execution of Wilbert Evans despite "clear error of the jury's prediction of Evans' future dangerousness," *id.* at 929, and noting that "[t]he only difference between Wilbert Evans' case and that of many other capital defendants is that the defect . . . has been made unmistakably clear for us even before his execution is to be carried out," *id.* at 930);

2. Utilitarian Claims May Invite Greater Bias

Utilitarian justifications for punishment are also at least as likely to be skewed by racial stereotypes. In fact, a utilitarian focus could compound the harms of social disadvantage suffered by many minority defendants.

Predictions of future dangerousness—critical to tailoring sentences to the goal of incapacitation—are notoriously prone to the taint of implicit bias. This problem has been exposed perhaps most clearly in capital sentencing procedure, which often requires sentencing juries to make explicit findings regarding the future dangerousness of offenders. Here, the "powerful racial stereotype . . . of black men as 'violence prone'"[143] has likely led to the executions of many defendants who would not have been sentenced to death on grounds of heightened culpability.[144] Though the harm of the racial stereotype of Black dangerousness has raised particular concerns in capital sentencing, such harmful stereotypes permeate and infect sentencing decisions far more broadly. Indeed, any sentence based on a prediction that the defendant will commit future violence or crimes will tend to invite the taint of racial bias.

General deterrence is another utilitarian rationale that can be skewed by racial or socioeconomic bias. Punishment is justified on deterrence grounds if its harm is outweighed by the benefit it provides in discouraging other people from committing similar offenses. This rationale treats the defendant as a means to an end: his suffering is justified by its effects on others. To the extent that the lives of the disadvantaged—who are more likely to be poor and minorities—are devalued, sentencing judges may be more willing to impose harsh punishments on disadvantaged defendants for the sake of deterring others and protecting general public safety. Again, to the degree that crime is seen mainly as a problem of minority offenders, punishing minority defendants especially severely may seem to result in a particularly focused and thus useful sort of deterrence.

Jurek v. Texas, 428 U.S. 262, 274–75 (1976) (plurality opinion) (acknowledging that "[i]t is, of course, not easy to predict future behavior," *id.* at 274, but nonetheless permitting death sentences to be based on findings of future dangerousness).

143 Buck v. Davis, 137 S. Ct. 759, 776 (2017) (quoting Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion)); *see also* Tonry, *supra* note 51, at 457–58 ("Blacks are much more likely than whites to be mislabeled as dangerous and, if this is reflected in sentencing, to be punished more severely than they otherwise would be. Conversely, whites are much more likely than blacks to be mislabeled as 'not dangerous' and, if this is reflected in sentencing, to benefit from a mistaken prediction that they would not reoffend." *Id.* at 458.).

144 *See* Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 168 (2008).

Perversely, a focus on utility can lead to *greater* punishment for defendants who deserve *less* punishment. Many circumstances of disadvantage can make a defendant both more likely to reoffend and less personally culpable. These circumstances may include lack of education or employment, lack of a stable family structure, or trauma from crime or abuse. For example, if a defendant has grown up in a neighborhood plagued by gangs and been pressured to join in gang activity, this factor may mitigate his blameworthiness for participating in a gang crime (as compared to a defendant who faced no such pressures). If a judge considers only the utility of punishment, by contrast, these same environmental pressures might suggest that a longer prison term is needed for incapacitation. In other words, circumstances of disadvantage can make punishment of underprivileged defendants seem less deserved while simultaneously suggesting punishment would be more useful. For disadvantaged defendants, abandoning desert would strip them of a key safeguard against draconian sanctions.

3. Desert Is an Irreplaceable Constraint

Desert's critics argue that we do not need desert to constrain sentences, because other principles offer sufficient protection from punitive excess. The proposed alternative principles, however, would neither avoid the problems that critics see in desert nor match the limiting power of the principle of desert.

A few examples of proposed alternative safeguards illuminate their inadequacy. For example, Alice Ristroph suggests that a principle of "political proportionality" and "broader political principles of utility, individual rights, or human dignity" could limit punishment more effectively than attention to desert.[145] But moral notions such as human dignity are just as subjective as claims about desert, and assessments of utility can be malleable and biased, as Ristroph herself admits.[146] There is no reason to think that replacing the limiting principle of desert with these amorphous alternative ideas would prevent harsh penalties.[147]

145 *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 271, 330–31 (2005) (emphasis omitted).

146 *See* Ristroph, *supra* note 19, at 1350 ("[M]y critique of desert should not be read as a call to reinvigorate deterrence or other professed punishment goals as better sources of criminal law reform. Other sentencing theorists have described what we might call the elasticity of deterrence. If deterrence and desert are both elastic, so are rehabilitation and the notions of dangerousness that underlie incapacitation." (footnote omitted)).

147 The fact that utilitarian claims may also be indeterminate does not suggest that they are unimportant or should be rejected—any more than we should reject desert as a constraint because it may be indeterminate. Some countries, such as Germany, treat utilitarian proportionality as "an unwritten constitutional rule" under which, "[a]ccording to the high

Other scholars have suggested that proportionality can be defined in utilitarian terms and invoked to constrain sentences. Richard Frase argues that a utilitarian notion of proportionality would forbid sanctions that are "excessively intrusive relative to their supposed benefits, and/or . . . much more intrusive than equally effective, alternative measures."[148] This utilitarian principle of proportionality, however, would not create a strong and determinate safeguard against excess. Assessing the costs of sanctions, their future benefits, and the feasibility of alternatives would turn on complex (and perhaps humanly impossible) calculations. As noted earlier, even the intensively studied question of whether the death penalty deters capital offenses has not received a clear answer.[149] A focus on utilitarian proportionality, moreover, would not avoid the need for value judgments; sentencing judges would have to decide which costs and benefits to consider, and how much value to accord to incommensurate goods (such as public sense of security versus the psychic and physical suffering of the punished individual).

Utilitarian principles, moreover, would not offer the same protection as desert.[150] Several capital cases illustrate this point. In *Graham v. Florida*, the Supreme Court ruled that juveniles who commit capital murder may not receive the death penalty because they are inherently "less culpable" than adult capital offenders.[151] Had the *Graham* Court instead focused on utilitarian proportionality, it might not have prohibited the death penalty for juvenile murderers. Although violence tends to decrease through age,[152] juveniles who kill may remain very dangerous for many more decades than would much older offenders.[153] A similar point can be made for the Court's prohibition of the

court of Germany, any government interference with basic rights must be suitable and necessary for reaching the ends sought." SULLIVAN & FRASE, *supra* note 29, at 28.

148 Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 647 (2005).

149 *See* Glossip v. Gross, 576 U.S. 863, 930 (2015) (Breyer, J., dissenting) (describing conflicting research on the question).

150 *See* SULLIVAN & FRASE, *supra* note 29, at 127 (noting that principles of retributive proportionality and principles of utilitarian proportionality "each guard against distinct forms of excess").

151 560 U.S. 48, 72, 68 (2010) (quoting Roper v. Simmons, 543 U.S. 551, 571 (2005)).

152 *See* Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, *in* THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY 377, 378 (Kevin M. Beaver, J.C. Barnes & Brian B. Boutwell eds., 2015).

153 *See* David P. Farrington, *Age and Crime*, 7 CRIME & JUST. 189, 236 (1986) ("An early age of onset seems to be followed by a long criminal career, but whether it is followed by a higher incidence rate is not clear. The residual length of criminal careers may peak at age thirty to forty."); *id.* at 236–37 ("That the age-crime curve primarily reflects changing prevalence has major implications for policy. A court faced with an offender aged twenty-five,

death penalty for intellectually disabled offenders.[154] In *Atkins v. Virginia*, the Court reasoned that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[155] This same ground, diminished moral agency, could increase the likelihood of a repeat offense and could *favor* their execution for purposes of incapacitation.[156] "Baldly put, the incapacitative theory is at its strongest for those who, in retributive terms, are the least deserving of punishment."[157] A focus on utilitarian proportionality cannot replicate the constraints on punishment set by desert.

If the principle of desert were enforced more broadly, it could curb other injustices of our present legal system. As Rachel Barkow notes, "Mandatory punishments proliferate with no attention to an individual's particular culpability, sentences are frequently disproportionate given the actual conduct and culpability of the offender, and arbitrariness abounds."[158] The Court has forbidden execution of juvenile offenders and intellectually disabled offenders, but has permitted them to be locked in prison for life. American prisons and jails hold thousands of persons with severe mental illness.[159] Even defendants

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for example, cannot necessarily assume that that person's criminal behavior will decline in the next few years as the aggregate curve does.").

154 *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

155 *Id.* at 306.

156 A strong argument can be made that the inevitable delay between sentencing and execution—now averaging over twenty years in America—undercuts and defeats the incapacitation rationale for execution. *See* McLeod, *supra* note 140, at 1128 (addressing these arguments). However, the Supreme Court majority in *Atkins* simply ignored incapacitation as a rationale for the death penalty (though the dissenters addressed it). *See* 536 U.S. at 350 (Scalia, J., dissenting) ("The Court conveniently ignores a third 'social purpose' of the death penalty—'incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.'" (citation omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 183 n.28 (1976) (plurality opinion))). In any event, the point here is that the principle of desert constrains where a principle of utilitarian proportionality would not—and this same point applies in noncapital cases, too.

157 PACKER, *supra* note 61, at 50–51. The Supreme Court has recognized that utilitarian purposes and desert may be at odds; when it deemed the death penalty in *Coker v. Georgia* to be "an excessive penalty for the rapist who, as such, does not take human life," 433 U.S. 584, 598 (1977) (plurality opinion), it said this was true "even though it may measurably serve the legitimate ends of punishment," *id.* at 592 n.4. The Court almost had to make this admission, since Coker himself was clearly dangerous: he raped his victim while on the lam after escaping the prison where he was confined for raping and killing another woman. *Id.* at 605 n.1 (Burger, C.J., dissenting).

158 Barkow, *supra* note 83, at 1146.

159 OFF. OF RSCH. & PUB. AFFS., TREATMENT ADVOC. CTR., SERIOUS MENTAL ILLNESS (SMI) PREVALENCE IN JAILS AND PRISONS 1 (2016) ("Serious mental illness has become so prevalent in the US corrections system that jails and prisons are now commonly called 'the

who are found to be mentally ill at the time of the offense may be convicted and face the same or worse sentences as they would without a finding of mental illness.[160] If we set aside the principle of desert, we lose our best defense against such unjust excesses, our best hope for greater justice and humanity for those with diminished capacity and culpability. Critics of American criminal justice would do better to propose *additional* constraints based on utility (as do Sullivan and Frase)[161] rather than to forego the crucial protection that desert provides.

Rather than being weak and replaceable, desert is a uniquely powerful constraint. For some people, it may seem even too powerful; they may fear the release of dangerous but nonculpable offenders. A person with a destabilizing mental illness, for example, might have limited culpability, but present a serious and ongoing threat to others. The principle of desert would forbid undeserved incarceration of this defendant solely to protect others. This reminder of the impropriety of criminal sanctions without desert should prompt us to condemn the carceral warehousing of undeserving mentally ill defendants.[162] It should prompt us to seek alternative social responses to the scourge of mental illness and its criminal consequences. David Garland contends that America is reliant on incarceration to counter social violence because it lacks a large-scale social welfare system.[163] Enforcing the principle of desert could push our society to develop nonpenal alternatives. Where social supports fail to restrain the mentally ill from violence, society should have more humane and just alternatives to undeserved

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new asylums.'"). Mentally ill defendants are often permitted to plead guilty, sometimes without any evaluation of their mental capacity at the time of the crime. To accept a guilty plea, the trial court must ascertain that the defendant is competent and that he is entering his guilty plea knowingly, voluntarily, and understandingly. *See* Godinez v. Moran, 509 U.S. 389, 400–01 (1993). This standard does not require evaluation of the defendant's state of mind at the time of the offense, though a good defense attorney should look into any evidence that a defendant may have suffered a mental impairment that could keep the prosecution from proving required mens rea.

160 Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 518 (1985).

161 *See* SULLIVAN & FRASE, *supra* note 29, at 127 ("Where multiple proportionality principles apply to an issue of criminal liability, we believe they should be applied independently . . . [because] each guard[s] against distinct forms of excess, and criminal liability should not be imposed in violation of any of them. However, we also believe that retributive proportionality is the most important of these principles . . . .").

162 *See* H. Richard Lamb & Linda E. Weinberger, *Persons with Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCHIATRIC SERVS. 483, 490 (1998) ("The criminal justice system should not be viewed as an appropriate substitute for the mental health system. Moreover, it has been our experience that an enormous stigma is attached to people who have been categorized as both mentally ill and an offender, and it is thus extremely difficult to place them in community treatment and housing.").

163 *See* Garland, *supra* note 33, at 56.

incarceration.[164] If civil commitment brings the same terrors and deprivations as criminal confinement, civil-commitment facilities should be humanized[165] and supplemented or replaced by halfway houses and community supervision, to better align with the limited culpability of such defendants.[166] The powerful implications of enforcing the principle of desert are not a reason to back away, but rather more fully to embrace desert as a lodestar for just reforms.

C. Current Sentencing Procedure Obscures the Role of Desert

As we have seen, critics of desert who consider desert malleable and stretchable doubt that desert can meaningfully limit punishment in practice. They worry that desert instead will be used as a vehicle for expressing bias and legitimating draconian sanctions. We need not give up on desert as a limiting principle, however, to address their concerns. Closer study reveals that prevailing sentencing procedures needlessly foster the exaggerations and distortions of desert that critics have decried. Prevailing sentencing procedures allow courts to give only cursory attention to desert, to blur the questions of desert and utility, to prioritize utilitarian goals over the limits of desert when the two conflict, and to retrospectively exaggerate their assessments of desert in order to rationalize harsher sanctions for utilitarian purposes. Fortunately, these flawed sentencing procedures can be changed, as Part III of the Article will explain.

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164 Civil commitment is often one alternative, though it is not necessarily humane. The process of civil commitment requires a determination that the person sought to be involuntarily admitted for treatment satisfies certain conditions. In Connecticut, for example, a person may be committed on grounds of dangerousness if a court finds by clear and convincing evidence "that the [person] has psychiatric disabilities and is dangerous to himself or herself or others," defined to require "a substantial risk that physical harm will be inflicted" by the person on himself or others. CONN. GEN. STAT. ANN. §§ 17a-498(c)(3), 495(a) (2023).

165 Civil commitment is not designed to bear moral stigma, and may—or at least ought to—offer more opportunities for self-betterment and rehabilitation. Society may still stigmatize persons subjected to civil commitment, as manifested in the discriminatory scorn sometimes visited on disabled persons, or as reflected in the revulsion society feels towards persons who are deemed sexually dangerous to children. But these social reactions are not embodied or invited by the law itself, which designates civil commitment as a nonpenal process and, at least in theory, designs such commitment not only for protection of society but for treatment and rehabilitation of the impaired person.

166 *See* Darley et al., *supra* note 38, at 675 (revealing that when an offender has no moral culpability, people strongly prefer noncriminal punishment responses to harmful acts, such as institutionalization with immediate release upon the danger posed by the individual subsiding).

1. Statutes Prescribe Pluralism Without Prioritization

Most states embrace both desert and utility as legitimate sentencing concerns, with desert serving "as at least an implied—or potential—limit on sentence severity in pursuit of utilitarian objectives."[167] In practice, however, sentencing laws do not protect against undeserved punishment, because they do not require sentencing judges to treat desert as an absolute constraint. As discussed earlier, desert can play two roles in the sentencing process—as an upper limit on sentencing severity, and, separately, as a sentencing factor (exacting just retribution for an offense). The relevance of desert as a constraint is, however, quite different from its relevance as a reason for punishment: the former cannot be traded off against other concerns, whereas the latter is usually only "one important objective alongside a number of others, including . . . crime-reductive utilitarian purposes."[168]

By failing to instruct judges to treat desert as a fixed constraint on punishment, sentencing laws invite judges to treat desert as a discretionary concern, a consideration that may be less important than utilitarian goals.[169] Sometimes, indeed, sentencing laws strongly imply that judges may impose useful punishments even if they are undeserved. One such statute authorizes incarceration either if "the defendant deserves to be imprisoned" *or* if "imprisonment is necessary to protect

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167 MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 23 (AM. L. INST., Proposed Final Draft 2017); *see also supra* notes 69–70 and accompanying text.

168 MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 22 (AM. L. INST., Proposed Final Draft 2017); *see also supra* note 76 (listing statutes that embrace all four aims without prioritizing).

169 *See, e.g.*, CAL. R. CT. 4.410 (instructing the sentencing court to choose on its own "which objectives are of primary importance" if, in a particular case, statutory sentencing goals "suggest inconsistent dispositions"); *see also* Marah Stith McLeod, *Communicating Punishment*, 100 B.U. L. REV. 2263, 2296 (2020) (explaining tensions among sentencing objectives that may arise).

Although determinate sentencing schemes are not the focus of this Article, it is worth mentioning that laws empowering sentencing commissions to establish punishment guidelines tend to suffer from the same ambiguity. *See* MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 25 (AM. L. INST., Proposed Final Draft 2017) ("Nearly all existing guidelines systems incorporate proportionality in sentencing as one important aim of the guidelines, usually stated alongside a number of utilitarian goals."); CONN. GEN. STAT. § 54-300(c) (2023) ("In fulfilling its mission, the commission shall recognize that . . . sentencing should have as an overriding goal the reduction of criminal activity, the imposition of just punishment and the provision of meaningful and effective rehabilitation and reintegration of the offender . . . ."); VA. CODE ANN. § 17.1-801 (2020) ("The Commission shall develop discretionary sentencing guidelines to achieve the goals of certainty, consistency, and adequacy of punishment with due regard to the seriousness of the offense, the dangerousness of the offender, deterrence of individuals from committing criminal offenses and the use of alternative sanctions, where appropriate.").

the public from further harm by the defendant."[170] These sentencing laws may not be intentionally designed to repudiate desert as a constraint on punishment. But they leave judges with discretion to treat desert as merely one "important objective alongside a number o[f] others,"[171] rather than as a threshold requirement and limiting principle. Thus, their effect is to allow sentences that exceed desert.

2. Sentencers Blend and Blur Desert and Utility

Sentencing statutes also undermine desert as a limit on punishment by failing to establish a sequence for the consideration of desert and utility. As a result, judges frequently consider desert alongside utilitarian objectives for punishment. Studies have shown that when people receive increasing amounts of information, they tend to latch onto select pieces of information that align with their preexisting values or inclinations.[172] Asking judges to consider desert and multiple utilitarian objectives at once, based on an array of evidence of varying relevance to each goal, may lead judges to emphasize certain aims and facts over others—particularly those that affirm judges' own biases. A judge who believes utility is most important may give only cursory consideration to desert.

Even if a judge does try to carefully consider desert, simultaneous attention to utility may incline her to exaggerate desert in order to justify useful punishment. For example, if a sentencing judge feels that a long sentence is needed to incapacitate the offender or to deter others, she may feel tempted to say that the steep penalty is also deserved—even if a forthright and focused analysis of the defendant's desert would show insufficient culpability. Since this stretching of desert may be unconscious, it can be difficult to avoid.

As critics have recognized, desert can be a malleable concept. Studies have in fact shown that people's perspectives on moral desert are affected by information about future risks.[173] According to Christopher Slobogin and Lauren Brinkley-Rubinstein, "[U]tilitarian concerns can change [the] ranking [of the gravity of crimes and corresponding punishments] in ways inconsistent with desert."[174] A

170 ALASKA STAT. § 12.55.015(b)(1)–(2) (2022); *see also* FLA. STAT. § 921.002 (2023); ME. STAT. tit. 17-A, § 1602 (2023).

171 MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 22 (AM. L. INST., Proposed Final Draft 2017).

172 *See infra* notes 217–19 and accompanying text (addressing how narrowing the questions and evidence before a decisionmaker could address this concern).

173 *See* Slobogin & Brinkley-Rubinstein, *supra* note 19, at 87 (noting that lay choices about ordinal desert can change "when risk-related factors are thrown into the mix").

174 *Id.* at 119.

pluralistic approach to punishment that asks judges to simultaneously consider both desert and utility weakens desert as a constraint.[175]

Unstructured and simultaneous consideration of desert and utility also allows judges to be sloppy in their analysis of either or both concerns. For example, in sentencing a defendant to life imprisonment for an offense, one judge explained that the sentence was "proportional to [the defendant's] crime" because the defendant was "a danger to society and deserving of punishment as a murderer."[176] Another judge explained in sentencing:

> You know, the Court—it probably sounds like a broken record, but there's two things I look at. One is rehabilitation, can I rehabilitate [the defendant] with the sentence. The other one is punishment. And by punishment, sometimes at least I keep you off the streets so you can't sell drugs again; you can't hurt people that supposedly love you.[177]

These statements illustrate how simultaneous assessment of desert and utility can blend and confuse the distinct concerns.

Addressing multiple questions at once makes a judge more likely to overlook important aspects of desert. A sentencing judge, faced with diverse concerns, may, for example, consider desert only in deciding whether the defendant is or is not culpable, paying little attention to the severity of the punishment. Yet culpability is only half of the equation. It is not enough to say that a defendant deserves some punishment; a sentencing judge must determine *how much* punishment the defendant deserves. And that question of quantity depends not only on the duration of punishment (such as years in prison), but also on the deprivations it will bring (such as isolation from family and friends, loss of privacy, exposure to violence, intimidation, and fear). If asked to address many sentencing considerations at once, judges may neglect these key aspects of the desert inquiry.

Though sentencing judges in theory could conduct separate analyses of desert and of utility, they have no duty to do so. Nor do they have much incentive to do so, because they are rarely required to provide meaningful explanation for their sentencing decisions.[178] Even

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175 Simultaneous consideration of desert and utility may also lead to *less* punishment than an offender deserves—for example, where the deserved punishment would be very costly. For positive retributivism, which asserts a duty to exact minimum deserved penalties, this undeserved leniency would be a problem, but not for the negative (limiting) retributivism embraced in this Article.

176 State v. Shafer, 789 S.E.2d 153, 163 (W. Va. 2015).

177 People v. Reed, 875 N.E.2d 167, 171 (Ill. App. Ct. 2007) (quoting the district court's comments in sentencing the defendant to twelve years imprisonment for selling two grams of cocaine for $120 within ninety feet of a school).

178 *See* McLeod, *supra* note 169, at 2267.

when judges are required to offer some explanation, they usually can discharge this duty by stating that they have considered all relevant statutory provisions.[179] Such minimal explanation does not reveal, for example, whether a sentence reflects the maximum deserved punishment or only a useful portion thereof (which our principle of "limiting retributivism" permits). Such ambiguity impairs the understandability and moral salience of punishment. Consider, as an example, a case of assault for which a judge assigns a low penalty that she claims reflects proper attention to both desert and utility. How can the victim, offender, or public know how this sentence relates to the offender's desert? Perhaps the judge found the defendant quite culpable but deemed the full scope of deserved punishment too costly. Perhaps the judge deemed the defendant not very culpable. Perhaps the judge deemed the defendant barely culpable at all and thought that he deserved an even *lower* sentence—but decided that future safety justified incarcerating him longer than he deserved. The point is simple: Without explicit determination of how much punishment is deserved, observers cannot tell whether sentences fall within or beyond the bounds of desert.[180]

Absence of any express determination of individual desert presents particularly serious concerns when mandatory minimum penalties are involved. Such mandatory penalties may far exceed the desert of individual offenders.[181] If such penalties are imposed without open juxtaposition with the assessed individual desert of offenders, legislatures and the public may too easily ignore their undeserved brutality.

3. Judges May Stack Sentences Without Assessing Total Desert

Cases involving multiple offenses also can lead to undeserved punishments because the judges may not consider whether the cumulative sentence is deserved. When a defendant is convicted of multiple offenses in a single case, judges must impose individual sentences for each of these offenses. In most cases, judges then have "unfettered discretion" to decide whether the defendant must serve these

179 *See id.* at 2266–67.

180 Similarly, a low sentence without a determination as to the scope of desert could suggest low culpability, whereas in fact the sentencer may have chosen to extend mercy (perhaps because the defendant had a particularly hard life and the sentencer felt sorry for him). Although the problem addressed in this Article is that of effectively preventing undeservedly excessive punishment, a judge should also feel free to comment upon any undeserved (but statutorily permitted) leniency that has affected his final sentence.

181 *See, e.g.*, United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013), *aff'd*, 616 F. App'x 33 (2d Cir. 2015); STITH & CABRANES, *supra* note 48, at 123.

sentences at the same time (concurrently) or back-to-back (consecutively).[182] This choice can have a massive impact on the total sentence.

Rather than enforcing the principle of desert by requiring sentencing judges to ensure that consecutive sentencing is premised on close scrutiny of total desert, most states simply allow judges free rein to decide whether to stack the sentences—and judges may do so for reasons of utility, not desert. Several states do restrict judicial discretion by requiring judges to make "certain predicate factfindings" to support consecutive sentences,[183] but these facts do not ensure adequate total desert. For example, Oregon trial courts may impose consecutive sentences "[i]f a defendant is simultaneously sentenced for criminal offenses that do not arise from the same continuous and uninterrupted course of conduct"[184] or if the offenses do arise from the same course of conduct but each offense is an "indication of defendant's willingness to commit more than one criminal offense" or "caused or created a risk of causing greater . . . loss, injury or harm to the victim."[185] Though these facts may be relevant to culpability, they may not indicate that a defendant deserves the extreme magnification of the penalty that may result.

As an illustration, consider the case of Atdom Patsalis. Patsalis was convicted by an Arizona jury of committing twenty-five theft-related offenses (mostly residential burglaries) over a three-month period when he was twenty-one years old.[186] At sentencing, Patsalis received a term of fifteen years or less in prison for each of his twenty-five offenses.[187] Rather than exercise his discretion to sentence Patsalis to concurrent sentences (for a total of fifteen years in prison), the sentencing court then chose to make Patsalis serve "all but two of [the] 25 sentences consecutively"—and just like that, what could have been a life-altering fifteen-year penalty became a life-annihilating 292-year sentence.[188] The judge did not even suggest that this penalty was proportionate to Patsalis's desert; instead, the court emphasized that the "fairly harsh"

182 Oregon v. Ice, 555 U.S. 160, 163 (2009). Even under mandatory federal sentencing guidelines—designed to reduce judicial discretion—judges often retained discretion to choose between consecutive or concurrent sentencing. *See, e.g.*, United States v. Gonzales, 520 U.S. 1, 11 (1997).

183 *Ice*, 555 U.S. at 164 (first citing ME. STAT. tit. 17-A, § 1256 (2006) (repealed 2019); then citing State v. Keene, 927 A.2d 398 (Me. 2007); then citing TENN. CODE ANN. § 40-35-115(b) (2006); then citing State v. Allen, 259 S.W.3d 671 (Tenn. 2008); and then citing OR. REV. STAT. § 137.123 (2007)).

184 OR. REV. STAT. § 137.123(2) (2021).

185 *Id.* § 137.123(5)(a)–(b).

186 Patsalis v. Shinn, 47 F.4th 1092, 1095 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 107 (2023) (mem.).

187 *Id.* at 1102 (Christen, J., dissenting).

188 *See id.* at 1096.

and "incomprehensible"[189] penalty was designed to send a "message" to others.[190] When Patsalis challenged the harshness of this penalty on appeal, the state courts held that none of his individual sentences was excessive, and let his cumulative penalty stand without ever assessing whether Patsalis deserved the *total* sanction.[191] On habeas review, federal courts deemed the state courts' approach not unreasonable.[192] Patsalis now sits in prison for the rest of his life, though no court has determined that he deserves forever to lose his liberty and civic existence. Consecutive sentencing without attention to proportionality flouts the principle of desert and invites extreme overpunishment.

III. HOW SENTENCING COURTS CAN MAKE DESERT AN EFFECTIVE LIMIT

Rather than turning away from desert in sentencing, we should enforce this limiting principle more vigorously. Critics are right that desert claims can be stretched or distorted to rationalize draconian sanctions, but sentencing procedure can be changed to counter this danger. Critics are also right that desert may be hard to translate into a single, precise penalty, but that indeterminacy is no excuse for allowing penalties that are *certainly* undeserved. As limiting retributivists like Norval Morris have argued, judges can ascertain at least a range of punishment beyond which any greater penalty would be undeserved and unjust.

This Part will outline how courts can implement the paradigm of limiting retributivism in order to guard against undeserved excesses. In discretionary sentencing regimes, judges can make these changes on their own, without awaiting legislative approval.

The key reform lies in disentangling desert and utility. Rather than addressing desert and utility at the same time, courts should address desert first and alone. They should state the maximum amount of deserved punishment on the record. This focused assessment of desert will help judges avoid the temptation and tendency to exaggerate desert for utilitarian reasons. Only after determining desert and recording its upper limit should judges turn to the utility of lawful sanctions in order to select a sentence that best serves all statutory

189 State v. Patsalis, No. 1 CA-CR 15-0409, 2016 WL 3101786, at *4 (Ariz. Ct. App. June 2, 2016) (quoting the trial court).

190 *Patsalis*, 47 F.4th at 1096 (quoting the trial court).

191 *See id.* at 1109 (Christen, J., dissenting) ("It was Patsalis's *cumulative* 292-year sentence that was grossly disproportionate to the crimes he committed, and that was the sentence that the Arizona Court of Appeals declined to consider.").

192 *See id.* at 1096–97, 1102 (majority opinion) (deeming the Arizona court's decision not unreasonable).

sentencing goals. Final sentences may be tailored to utilitarian sentencing objectives within the upper limit of maximum desert.

By thus changing their sentencing practices, courts can prevent undeserved punishment and help unwind our present scourge of mass incarceration.[193]

A. Courts Should Assess Desert First

Sentencing procedure should be changed to avoid the simultaneous assessment of desert and utility. When a single judge must evaluate both desert and utility, she should look first at only one concern before turning to the other. The first issue then is whether to consider desert first or utility first. It seems fair to expect that whichever comes first will be more likely to influence analysis of the second. For both theoretical and practical reasons, judges should begin by addressing desert.

One reason to assess desert first is simply to affirm that desert is a threshold requirement. Desert is widely endorsed as a bedrock principle of justice. When desert is ignored or exaggerated, excessive punishment can undermine the moral legitimacy of the law and of the state.[194] It can invite not only unjust suffering but also unjust stigma. Beginning with desert can counteract the temptation of sentencers to ignore the limits of desert in order to achieve significant utilitarian benefits. If desert is treated as a peripheral consideration or one of many valid concerns, it may be tempting to trade it away for future benefits. If states wish to enforce the limits of desert, they should require the sentencing process to begin with that moral inquiry.[195]

A second reason for addressing desert first is that desert analysis may be relevant to utility, but not the opposite. Citizens are more likely to respect the criminal legal system—and comply with its rules—if punishments accord with their conceptions of culpability.[196] Thus, "[i]f the legal system imposes more, or less, punishment on some crimes

193 More significant reforms will likely be needed to unwind our scourge of mass incarceration. Elsewhere, this author has argued that juries should play a part in restraining carceral excesses. *See* McLeod, *supra* note 58. But these more radical reforms may take more time. While we seek to pursue such larger reforms, judges should be prepared to take a smaller and easier first step of structuring their sentencing decisions to guard against punitive excess.

194 Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 499 (1997) (arguing that "when the just desert principle is violated, . . . each such instance erodes the criminal law's moral credibility and, thus, its power to protect us all").

195 States that care almost entirely about utility could leave desert for last—but should not expect so late an inquiry to ensure clear-eyed assessment of proportionality.

196 *See* Robinson & Darley, *supra* note 194 (arguing that the law's moral credibility depends on its alignment with desert norms, creating "a powerful utilitarian argument for the adoption of a desert-based criminal law").

than citizens believe is deserved, the system seems unfair; it loses its credibility and, eventually, its effectiveness."[197] By determining desert first, sentencers can then conduct a more thorough assessment of punishment's future benefits.[198] Although they will be bound only by the maximum they have determined to be deserved, judges might wish publicly to mention how a range of desert or minimum desert has entered into their final sentences.[199]

A third reason for measuring desert first lies in the ease of correcting distortions. If desert assessments influence utilitarian claims, such taint, at least in theory, may be rooted out through testing and verification. Utility is an empirical prediction susceptible to proof or disproof, either immediately or in the future. Desert, by contrast, is a moral claim. If a sentencer's assessment of future risk was unduly influenced by the depravity of the offender's crime, an objective reassessment of his risk should at some point in time be possible by reference to objective factors. The inverse would not be so easy. If a sentencer's assessment of desert was tainted by an earlier judgment that the

197 BARKOW, *supra* note 6, at 41 (quoting STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 53 (2012)). It is worth noting that if desert matters even to utility, or if people's instinctive desire for retribution is irrepressible (as some evidence suggests, *see, e.g.*, Carlsmith et al., *supra* note 134, at 293 (finding that, when asked to think solely like a utilitarian when determining punishment, people simply gave the punishment they felt the crime "deserve[d]" with extra on top for "deterrence")), then utilitarian analysis cannot supplant the consideration of desert, and utilitarian theorists should spend more time thinking about how desert can be most forthrightly and fairly addressed.

198 To achieve what Paul Robinson calls "the utility of desert," Robinson, *supra* note 116, judges would need to consider *public* conceptions of desert, not their own moral perspectives on desert. To the extent that judges act on behalf of their community, their desert decisions will also be more democratically legitimate if they mirror community conceptions of desert. However, to the extent that a judge does not know how the community as a whole (or other members of the community) would view the individual desert of an offender, she will necessarily have to rely on her own moral judgment rather than "the community's notion of justice." *Id.* Robinson and Darley contend that members of the public can be surveyed to determine their desert perspectives. *Id.* (contending that "empirical desert can be readily operationalized—its rules and principles can be authoritatively determined through social science research into peoples' shared intuitions of justice"). But this approach would not be feasible on a case-by-case basis.

199 Such explanation can make sense of penalties both to the public and to the offender as a reasoning moral agent. *See* McLeod, *supra* note 169, at 2267 (arguing that "the failure to expressly connect punishment with its purposes has devastating moral and practical effects" and urging judges to explain their sentencing rationales); *id.* at 2311 ("In the case of a defendant who receives leniency in exchange for cooperation, the judge can explain that the sentence does not reflect the full measure of the offender's desert but instead a balance of competing interests. Had the offender not had information against others, he would have faced additional time. That kind of sentencing explanation would help make sense of his lighter sentence when compared to other defendants who may have committed the same crime but lacked such valuable information.").

defendant seemed likely to commit future violence, we have no empirical means by which to review that determination of desert. If a fresh analysis of desert yields a different answer, it may simply reveal a different opinion, not a deficiency in the first desert decision. One cannot tell. For this reason as well, desert should come first.

B. Courts Should Assess Desert Alone

Discretionary sentencing procedure leaves judges with wide latitude to decide to structure and sequence their sentencing decision as they see fit. If persuaded that desert should be analyzed first and separately from the utility of potential sanctions, judges may operationalize this reform immediately. They can do so by restricting their initial focus to evidence and arguments that bear on culpability and the corresponding amount of fair and proportional punishment. Perfectly independent analysis of desert may, of course, be cognitively difficult. In other contexts, however, we rely on judges to focus only on certain evidence, or to consider evidence only for certain purposes. We have no reason to assume that judges cannot conduct a similarly focused analysis when considering desert.[200] A continuing risk of distraction, moreover, does not justify foregoing any effort to separate the crucial and incommensurate concerns of desert and utility.

While analyzing an offender's deserved punishment, a judge should not focus on the *prospective* effects of punishment. Instead, the judge should conduct a *retrospective* analysis of "the nature and seriousness of the harm foreseeably caused or threatened by the crime" and

200 Interestingly, Maine already establishes a multipart sentencing procedure that suggests such sentencing separation is possible. For crimes punishable by imprisonment, Maine requires the sentencing judge first to select a "basic term of imprisonment" that reflects "the particular nature and seriousness of the offense as committed by the individual." ME. STAT. tit. 17-A, § 1602(1)(A) (2023). The court then must establish the maximum term of imprisonment based on "all other relevant sentencing factors, both aggravating and mitigating," including "the character of the individual, the individual's criminal history, the effect of the offense on the victim and the protection of the public interest." *Id.* § 1602(1)(B). Finally, for crimes other than murder, the judge must decide "what portion, if any, of the maximum term of imprisonment . . . should be suspended." *Id.* § 1602(1)(C); *see id.* § 1602(2). Though this sentencing scheme may represent a thoughtful effort to clarify and enforce desert, it is insufficient. The first step focuses only upon some aspects of desert—for the limited purpose of establishing a basic or minimum prison term, in a sort of positive retributivism—and even so does not require a full analysis of the individual's desert. The second step focuses on both desert and utility to set the maximum penalty. Here, relevant evidence includes factors that might bear both on utility and on desert, such as a defendant's "character," his "criminal history," and "protection of the public interest." The critical second step of limiting punishment may taint desert judgments with the goal of future public safety. Nonetheless, Maine's statute is a laudable example of legislative desire to ensure reasoned and structured punishment analysis.

"the offender's degree of culpability in committing the crime—namely, his or her intent (mens rea), motive, role in the offense, possible diminished capacity to obey the law, and so forth."[201] The judge must then decide what penalty would be proportionate to the offender's desert.

To help discipline her analysis of desert and reduce the risk of distraction by evidence pertaining only to future utility, a judge might prohibit any evidence or arguments regarding future consequences during the desert inquiry.[202] She should admit evidence pertaining to desert, however, including evidence regarding:

- The extent of the defendant's ability to control his actions
- The extent of the defendant's ability to understand the wrongfulness of his act
- The extent of the defendant's awareness of the risk of harm from his actions
- Whether the defendant committed the offense with unnecessary cruelty
- The defendant's motive in committing the crime
- Whether the defendant acted deliberately or in passion
- Any external pressures or impairments, for which the defendant was not to blame, that influenced his criminal choice
- The severity of the potential punishment

Courts or legislatures might create formal lists of factors bearing on desert, much as they do for capital sentencing procedure. A compilation of such factors could help courts and the parties ensure that they have addressed desert in a focused and thorough manner.

Some evidence will be relevant to both desert and utility, and judges must be careful to focus at first only on the relevance of the evidence to desert. Prior convictions, for example, may have some, limited relevance for culpability (though scholars debate this point).[203] Earlier convictions will likely have greater relevance to whether an offender is dangerous and in need of incapacitation and to whether severe punishment is needed to deter others. When considering prior convictions, courts must be careful not to exaggerate their relevance to desert.

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201 Richard S. Frase, *Excessive Relative to What? Defining Constitutional Proportionality Principles*, *in* WHY PUNISH? HOW MUCH?: A READER ON PUNISHMENT 263, 264 (Michael Tonry ed., 2011).

202 *See* Slobogin & Brinkley-Rubinstein, *supra* note 19, at 87–93 (observing that "when risk-related factors are thrown into the mix," *id.* at 87, people in their study ranked the seriousness of crimes differently than when they were told only about factors relating to desert).

203 *See supra* note 53 (noting divergent retributive views about the relevance of prior convictions).

Judges should also consider taking proactive measures to guard against subconscious exaggeration of desert for the sake of future utility. They may choose to exclude categorically certain types of evidence that might tempt them to impose harsh and undeserved penalties. Victim impact evidence, for example, may have a strong emotional impact, but be largely irrelevant to desert—because actual harm to the victim may not have been foreseeable to a defendant and therefore may not affect culpability.[204]

During the desert inquiry, judges must take care to consider not only facts relating to culpability but also facts relating to the severity of potential sanctions. If the judge only considers blameworthiness, that will not be enough to decide how much punishment is appropriate. The judge must also consider what penalty would be proportionate or fair in light of that blameworthiness. By requiring judges to make a decision on desert in terms of punishment, the proposed reform would ensure that judges assess *both* halves of the desert equation before turning to the utility of punishment.[205] Today, prison sentences have become routine, and scrutiny of carceral harms—not just the blameworthiness of offenders—is urgently needed.

In cases involving multiple offenses, judges must be sure to assess the *total* punishment a defendant deserves for *all* of his offenses, not merely what punishment he deserves for each offense. When deciding whether to order a defendant to serve multiple sentences concurrently

204 Leading retributivist scholars Kimberly Ferzan and Larry Alexander explain that desert turns on "insufficient concern for others," which is demonstrated when defendants "choos[e] to unleash a *risk of harm* to others for insufficient reasons." Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 376 (2008) (emphasis added); *see also* Payne v. Tennessee, 501 U.S. 808, 860–61 (1991) (Stevens, J., dissenting) (arguing in a capital case that "aspects of the character of the victim unforeseeable to the defendant at the time of his crime are irrelevant to the defendant's 'personal responsibility and moral guilt' and therefore cannot justify a death sentence" (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982))).

205 Too often, sentencing courts can become inured and habituated to punishments and cease to think about their crippling burdens. The proposed reform will prompt judges to think more closely about the deprivations and harms that punishment will entail. For incarceration, for example, the harms will include loss of the constitutional right to a reasonable expectation of privacy, loss of sustained or frequent contact with family or friends, reduced options for medical care and religious services, potential violence by others, and exposure to unwanted light, noise, or stench. The judge need not speculate, however, about very uncertain harms that the defendant might suffer (such as rape or assault by other inmates or guards), at least in the absence of data. *Cf.* HUM. RTS. WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 131 (2001) (noting challenges to gathering data on prison rape, in part because the "terrible stigma attached to falling victim to rape in prison . . . discourages the reporting of abuse"). *But see* BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 304753, PREA DATA COLLECTION ACTIVITIES, 2022, at 1 (2022) (recounting that 4.0% of adults confined in U.S. prisons were victimized in prison from 2011 to 2012).

or consecutively, a judge may be tempted to focus on the utility of consecutive sentences, rather than on their proportionality to total desert. That seems to be what happened, for example, in Atdom Patsalis's case, where the judge imposed a 292-year sentence that he acknowledged was "fairly harsh" and even "incomprehensible," because that sentence would send a "message" to others.[206]

Assessing total deserved punishment can be admittedly complex. Especially when offenses overlap to some degree, a defendant who deserves the sentence he receives for each offense may not deserve to face the sum of all these sentences. The American Law Institute has noted that although most people believe some increase in punishment to be appropriate if the defendant has committed multiple crimes,[207] there is also "widespread agreement that an offender convicted of two similar offenses, or three, should not as a general rule receive a simplistic additive punishment of two times, or three times, the penalty that would be handed down for a single offense."[208] The sum of all individual sentences may be excessive for two reasons: first, because an offender's wrongdoings (and culpability for each) may not be entirely distinct, and second, because the sum of the sanctions may differ in *kind*, not merely in degree. For example, a young female offender sentenced to five years in prison may have to wait many years to have children. Multiplying this term by five could mean she will never be a mother. Before imposing consecutive sentences, judges must therefore wrestle with this complicated question of proportionality. A judge must never assume that simply because she has decided what penalty a defendant deserves for each offense, the combined total of the individual penalties is deserved.

C. Courts Should Record the Maximum Deserved Penalty

Judges should make a record of the *maximum* punishment that the defendant deserves, as a recognition and reminder that greater

206 *See* notes 190–91 and accompanying text.

207 MODEL PENAL CODE: SENT'G § 6B.08 cmt. at 381 (AM. L. INST., Proposed Final Draft 2017) (noting a "strong intuition that the multiple offender should not generally receive a sentence identical to that appropriate for a single crime"). In drafting the sentencing provisions of the *Model Penal Code*, the Institute decided that judges should have discretion to decide whether concurrent or consecutive sentences were more appropriate and to "develop a principled framework through the common-law process," but strongly urged states to make concurrent sentencing the default rule and to establish a heavy presumption against carceral terms exceeding twice the highest statutory penalty for any individual offense. *See id.*

208 *Id.*

punishment would be undeserved and unjust.[209] In cases involving multiple offenses, judges should record the maximum *total* punishment the defendant deserves for *all* offenses put together, as well as the maximum deserved penalty for each offense. Making an explicit record of maximum desert is critically important to promote careful consideration of desert as a constraint, to enable public understanding of desert determinations and ultimate sentencing decisions, and to inform legislatures when mandatory penalties exceed desert.[210]

Establishing a record of maximum desert will help judges guard against any later temptation to exaggerate the upper limit of deserved punishment in order to achieve utilitarian goals. If a judge has already stated on the record the maximum amount of deserved punishment, it will be harder for the judge later to change that assessment. At a minimum, she may feel the need to explain why that assessment was too low—perhaps because she learned new facts about the culpability of the offender. If the judge makes a determination of desert only privately and without recording the maximum deserved penalty, she may be more tempted to second-guess her desert determination or exaggerate it in light of the potential benefits of greater punishment.

Express articulation of the deserved maximum may also guard against implicit bias. Studies have shown that implicit racial bias can be resisted and reduced when decisionmakers engage in deliberate, reasoned analysis and seek to explain their decisions to others.[211] A sentencing process that allows judges to consider desert only in vague terms, and to impose sentences either without explanation or with perfunctory explanations that reference both desert and utility, makes bias both more likely and harder to detect. By contrast, a sentencing process that requires analysis and express explanation of how much punishment is deserved and a separate analysis of utility will make it harder for such bias to take root.

An explicit determination of the upper bound of deserved punishment will be valuable even in a case where the judge ultimately chooses a sentence that falls well below the deserved maximum (and which therefore does not conflict with the limiting principle of desert). Utility or simple mercy might lead a judge to impose a sentence that is

209 To make clear that the amount is the *maximum* deserved penalty, the record should reflect a judicial determination that "*certainly no more than* [specified penalty] is deserved in the case."

210 *Cf.* SULLIVAN & FRASE, *supra* note 29, at 171 (arguing that courts should "clearly and consistently explain their decisions" as to when government measures, more broadly, are disproportionate and excessive, "so that these decisions . . . can provide clear guidance for future government action").

211 *See* McLeod, *supra* note 169, at 2281–82, 2281 nn.93–95 (discussing research on deliberation and reasoned explanation as debiasing techniques).

less than a defendant may be said to deserve. If judges make an explicit determination of the maximum deserved punishment, their choices will be more transparent. A community that embodies limiting retributivism in its law should understand when as well as how that principle operates.

Explicit determination of the deserved maximum will also offer important information to legislatures and to the public when judges are obligated by law to impose sentences that *exceed* the maximum penalties that they deem defendants to deserve. In such cases, the recorded mismatch between deserved punishment and the more severe mandatory penalty will give the legislature important feedback that its mandatory penalty may be excessively severe. If courts simply impose mandatory penalties without an explicit determination of desert, legislatures may not even realize that these blunt and often draconian penalties lead frequently to great injustice. The proposed reform will also help the lay public gain a better understanding of individual desert, and perhaps make voters less likely to demand inflexibly harsh penalties.[212]

One potential objection to creating a record of maximum deserved punishment could be that judges might feel pressure (perhaps from victims) to impose this maximum amount, regardless of the costs it will entail. Judges are almost always required by statute, however, to consider utilitarian goals as well as retribution. Furthermore, judges routinely accept plea agreements that allow defendants to reduce their punishment exposure, even when victims may prefer greater punishment. Judges facing docket pressures have powerful incentives to exercise such leniency and not to impose maximum penalties simply because victims or the members of the public might want them. Creating a record of maximum desert would not alter those institutional incentives. Judges can still recognize the interests and concerns of victims and the public by explaining how their sentencing decisions are designed to advance multiple legitimate objectives—including not only retribution but also utilitarian goals (such as rehabilitation and restitution)—and to preserve public funds for the advancement of other valid social goods. Judges can also explain that the amount of punishment that a defendant deserves rarely can be defined as a single specific amount, and that the recorded ceiling of desert is the extreme limit of possible desert. It is not the only sentence that reflects desert.[213]

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212 Information about an offender's circumstances can mitigate the amount of punishment the public believes a crime deserves. *See, e.g.*, Darley et al., *supra* note 38, at 675 (finding that respondents preferred less or no punishment when told an offender had a brain tumor).

213 Norval Morris defended limiting retributivism because he believed that desert was too imprecise a concept to dictate a particular sentence and that utility properly could be

D. Courts Should Consider Utility Only After Desert

Only after determining the scope of deserved punishment and stating the maximum deserved penalty on the record should the sentencing court turn to the potential costs and benefits of permissible sanctions. Sentencing laws typically instruct judges to consider potential penal benefits in terms of general and specific deterrence, incapacitation and prevention of further offenses, and rehabilitation of the defendant.[214] Shifting gears to address these instrumental goals, the judge will now need to set aside her prior determination of desert and focus on future effects. Sometimes, it may be hard for a judge now to ignore an offender's desert. If a judge has determined that a defendant committed a crime with special cruelty, for example, the judge may be predisposed to decide that a long sentence would also be useful. To reduce the risk that calculations of utility will be skewed by prior determinations of desert, judges should tether their utilitarian calculations as much as possible to concrete data and evidence.[215]

Different evidence will be relevant to the prospective analysis of punishment benefits than was relevant to desert. For example, parole rules may be critically important.[216] If a judge wants to send a deterrent message to would-be offenders, she may want to preclude the defendant from becoming parole eligible until after he has served a substantial prison sentence, for example (though she must never impose any prison term that exceeds desert).

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considered to select a specific sentence from within the band of "not undeserved" punishments. *See* MORRIS, CRIMINAL LAW, *supra* note 41, at 198; Frase, *supra* note 89, at 255. It is hard to tell from sentencing statutes whether state legislatures, in enacting forms of limiting retributivism, viewed desert as a vague concept as did Morris (in which case utility might simply aid in selecting specific deserved sentences), or instead as a fairly concrete metric (in which case limiting retributivism meant sentences could depart below desert). Either approach would look to desert to set an upper bound on punishment severity and be consistent with pursuing retribution and utility as legitimate sentencing objectives.

214 *See supra* note 76 and accompanying text.

215 To the extent that judges lack data to support a prediction as to punishment's utility, they should be exceedingly hesitant to punish someone for an instrumental purpose. The reform proposed in this Article would at least ensure that such instrumental purposes were not used to justify *undeserved* punishment.

216 This Article does not focus on fully indeterminate sentencing regimes, in which judges must impose wide sentencing ranges and are not authorized to specify particular sentences. Discretionary sentencing procedures, however, are compatible with parole. Indeed, some states do combine them by authorizing judges to choose particular penalties within statutory ranges but also providing that a defendant becomes parole eligible after serving a statutorily specified portion of the judicially selected term. *See, e.g.*, MO. REV. STAT. § 557.011 (2016) (granting judicial sentencing discretion); MO. REV. STAT. § 217.690 (Supp. 2022) (specifying minimum terms after which defendants become parole eligible).

By thus disentangling the question of desert from assessment of utility, judges can analyze these incommensurate concerns more clearly, forthrightly, and carefully. Judges also may be able to reach more uniform decisions across cases, because in each phase they will be asked to focus on a narrower set of facts. Psychological research has shown that when decisionmakers with different perspectives review a wide panoply of evidence, their perspectives usually become more polarized.[217] Because of "confirmation bias,"[218] each person tends to latch onto whatever facts bolster his preexisting political or normative perspectives. If judges, who naturally will have different viewpoints, must decide sentences based on a wide range of sentencing goals—including not only retribution but various utilitarian aims—they may focus on evidence bearing on their preferred objective. Thus, a judge concerned with retribution will focus on evidence suggesting a particular penalty is deserved; a judge seeking deterrence will focus on evidence that a certain sanction will send a warning message to others; a judge pursuing incapacitation will tailor the penalty to the offender's future dangerousness; and a judge hoping for rehabilitation will calibrate punishment based on the defendant's amenability to reform. If evidence suggests that a different penalty is warranted for another reason, a judge may simply overlook or sidestep it. "Confronted with information that produces [cognitive] dissonance, people tend to ignore it[.]"[219] Asking judges to assess all desert and utility at once may thus lead to "ideologically motivated reasoning"[220] and increase the risk of inconsistent sentencing decisions. If judges focus first only on desert-related evidence in determining a maximum sanction, punishment may be capped in a more uniform manner.

Of course, even judges who focus on the same exact information may still reach different decisions about how much punishment is deserved. The possibility of discrepancies in desert determinations is inevitable in a diverse society with plural moral perspectives. Judges as a group may tend to have more homogeneous views, given that they have all received a high degree of education and usually have enjoyed a substantial amount of privilege, but even among judges, moral and ideological differences exist. The predictable result of inconsistent

217 *See* Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65, 66 (2014).

218 *See, e.g.*, Bharath Chandra Talluri, Anne E. Urai, Konstantinos Tsetsos, Marius Usher & Tobias H. Donner, *Confirmation Bias Through Selective Overweighting of Choice-Consistent Evidence*, 28 CURRENT BIOLOGY 3128, 3131 (2018) (describing people's "selective mechanism of confirmation bias: preferentially sampling the evidence that confirms one's prior belief" (emphasis omitted)).

219 Glaeser & Sunstein, *supra* note 217, at 71.

220 Kahan, *supra* note 217, at 420.

judgments can best be addressed not by hiding these inconsistencies, but by subjecting each judge's determinations to public scrutiny and contestation. Transparency is essential to that public scrutiny.

E. Final Sentences Should Never Exceed Desert

After calculating the utility of authorized penalties, the judge should choose a final sentence based on all statutory sentencing goals. This sentence should never exceed the maximum penalty that the judge has determined the defendant to deserve. Judges should never use their sentencing discretion to impose undeserved penalties. If a judge is compelled to impose a mandatory minimum penalty that exceeds her determination of the defendant's maximum desert, she should clearly state that this penalty is being imposed solely due to statutory mandate and she should note by how much the mandatory sanction exceeds desert. This record will offer legislatures and the public crucial insight into the unjust effects of mandatory minimum penalties, and may become relevant should the legislature later repeal or narrow the mandatory minimum and permit the defendant to apply for a reduction of his sentence.[221]

In selecting a particular sentence within the upper bound of maximum desert, the court will need to balance competing statutory objectives. In this sense, the proposed reform would not change the traditional task of judges in discretionary sentencing procedure, which is to assess and prioritize among statutory retributive and utilitarian goals.[222] The proposed reform would simply ensure that judges conduct more focused inquiries and treat maximum desert as an absolute limit on sentencing severity.

The proposed reform would not require courts to impose a *minimum* amount of deserved punishment if statutes do not require courts already to do so. States may mandate that a minimum amount of deserved punishment be imposed, but this Article is not designed to ensure such retribution. Its aim is to avoid undeserved punishment, not to preclude undeserved leniency.

This asymmetrical approach to limiting retributivism—forbidding undeserved severity but tolerating undeserved leniency—reflects the approach of many leading limiting retributivist scholars who have

221 *See, e.g.*, MODEL PENAL CODE: SENT'G § 305.6(1), (4) (AM. L. INST., Proposed Final Draft 2017) (proposing that states allow any defendant who has served fifteen years of a carceral sentence to seek reduction of his prison term based on reconsideration of the principles of sentencing and the *Code*'s lodestar concern of retributive proportionality).

222 *See, e.g.*, CAL. R. CT. 4.410 (instructing the sentencing court to choose on its own "which objectives are of primary importance" if, in a particular case, statutory sentencing goals "suggest inconsistent dispositions").

argued for a "softer down than up" approach to desert's boundaries.[223] Not only is this more lenient kind of retributivism prudent amid a crisis of mass incarceration, but it is principled in light of the greater injustice of undeserved punishment than of undeserved leniency. Harsher sanctions convey greater condemnation and "heightened stigma."[224] Failure to impose a deserved penalty, by contrast, may displease positive retributivists and anger victims, but it does not condemn or stigmatize.[225] The greater importance of avoiding undeserved severity than avoiding undeserved leniency is already reflected in other aspects of our law. As the great English jurist William Blackstone wrote, "[I]t is better that ten guilty persons escape, than that one innocent suffer."[226] This principle undergirds the presumption of innocence and the requirement of proof beyond a reasonable doubt. Each of these rules favors protecting people from undeserved condemnation over ensuring deserved punishment.

Furthermore, whereas states act unjustly when they impose undeserved penalties, they may act with moral virtue when they withhold them. Mercy can be an act of humanity and healing, which sets aside, but does not ignore, the wrongdoing and culpability of the offender. Our existing legal system recognizes the value and good of mercy by endowing executive officials with powers to pardon and offer clemency.[227]

Even if one recognizes retribution as a social good, moreover, retribution is not the *only* social good for which the state may expend its limited resources. A principled legal system may choose to spend its finite funds on building parks, schools, or hospitals, for example,

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223 *See* Richard S. Frase, *Limiting Retributivism*, *in* WHY PUNISH? HOW MUCH?: A READER ON PUNISHMENT, *supra* note 201, at 255, 260 (defending a "softer down than up," asymmetrical approach to the upper and lower limits of desert (quoting Andrew von Hirsch, *Sentencing Guidelines and Penal Aims in Minnesota*, CRIM. JUST. ETHICS, Winter/Spring 1994, at 39, 45)); FRASE, *supra* note 38, at 92–94 (explaining that many scholars and model laws emphasize the need for strict adherence to the *upper* bounds of desert but accept looser adherence to its *lower* bounds).

224 Apprendi v. New Jersey, 530 U.S. 466, 495 (2000).

225 If punishment is withheld for malicious or discriminatory reasons, of course, that would send a demeaning message—yet it would not be the fact of underpunishment, but the reason for underpunishment, that conveyed the affront.

226 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

227 *See 50-State Comparison: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT (Oct. 2023), https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/ [https://perma.cc/M7DZ-Z56A] (demonstrating that all states grant their executives powers of pardon and clemency); *see also Ex parte* Wells, 59 U.S. (18 How.) 307, 310 (1856) ("Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy.").

rather than on filling its prisons with deserving defendants. Our legal system already allows prosecutors to prioritize different social goods over retribution. Unlike Germany, for example, American law does not embrace a principle of mandatory prosecution.[228] American prosecutors enjoy wide discretion to decline charges, even when they have enough evidence to win at trial. Prosecutors may decline to prosecute simply to save resources for other cases that they deem more important. Even if a prosecutor has declined to prosecute for impermissible reasons—such as racial favoritism (prosecuting people who harm White victims but not those who harm Black victims, for example)[229]—courts will at most *dismiss* the charges filed against the disfavored (but quite probably guilty) defendant, not require charges against the favored (but also probably guilty) other persons.[230] Although withholding deserved punishment raises justice concerns, our society and law already accept such omissions for the sake of other valid goals. If it is acceptable to give prosecutors discretion in their charging decisions, it seems similarly acceptable to allow judges to withhold some measure of deserved incarceration for the sake of other social benefits.

None of this suggests that judges should be arbitrarily lenient. Judges have moral and practical reasons for imposing at least a minimum amount of deserved punishment in most cases. As Paul Robinson and other scholars have explained, the legitimacy of the law depends, at least in part, on the coherence between penalties and community conceptions of desert.[231] Though judges may often consider it valuable to impose less incarceration than the maximum

228 *See* Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468, 470 (1974) ("Compulsory prosecution, except where otherwise provided by law, is regarded as a German constitutional requirement based on the equal rights clause."); John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 440 (1974). *But see* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 19, 2013, 133 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 168 (Ger.) (upholding the constitutionality of statutory provisions allowing plea bargaining in certain cases).

229 *Cf.* McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987) (noting that "sophisticated statistical studies," *id.* at 286, of 2,000 murder cases in Georgia in the 1970s revealed that "prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims," *id.* at 287).

230 *See* Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 615–16 (1998) (discussing dismissal as a remedy for successful prosecution claims); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 378–79 (2d Cir. 1973) (deeming the court without power to order prosecution of accused state officials even if evidence showed that the nonprosecution decision was selective and discriminatory).

231 *See* Robinson & Darley, *supra* note 194, at 471–74.

amount the defendant deserves, that does not suggest they should or will allow culpable offenders to get off scot-free.

In the selection of a final sentence, judges will need to take all of these considerations into account. They may also take into account the consistency of sentences across cases. Statutes frequently state that sentencing courts should seek to impose consistent penalties for similar offenses by similarly situated offenders.[232] If a judge sees that her assessment of desert or utility differs significantly from penalties imposed by other judges in similar cases, she may decide to adjust the sentence so that penalties appear fair and consistent across cases. But judges must be careful not to overemphasize consistency over individualized assessment of desert or to copy without rational deliberation the penalty imposed in another case. Such emulation would be exceedingly dangerous in a time when judges have become habituated to imposing harsh penalties and long terms of incarceration. Judges should never select a penalty that they consider undeserved, no matter how many times that penalty has been imposed before.[233]

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232 *See, e.g.*, NEV. REV. STAT. § 176.0131(1) (2021); OHIO REV. CODE ANN. § 2929.11(B) (LexisNexis 2023); 12 R.I. GEN. LAWS § 12-19.3-1 (2023).

233 Although the proposed reforms do not directly apply to indeterminate (parole) sentencing regimes, or to fully determinate (mandatory guidelines) regimes, it is worth noting that an independent and initial determination of the scope of deserved punishment would also be beneficial in such regimes. In indeterminate sentencing regimes, the maximum amount of deserved incarceration would indicate the maximum permissible term of incarceration. Parole systems could thus enforce the principle of desert and align with a model of limiting retributivism that treats the desert only as an absolute upper bound on punishment. Other authors have addressed the proper role of retributive judgments in parole systems (see, for example, W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi, *Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 935–43 (2009) (explicating the retributive components and utilitarian components of indeterminate sentencing decisions and offering suggestions for their principled and constitutional consideration)), and further study would be valuable.

In sentencing-guidelines regimes, judicial determination of desert would be valuable to illuminate whether mandatory guidelines are unjustly severe. However, this author does not share the optimism of some other scholars that sentencing-guidelines regimes will be conducive to limiting punishment based on desert. *E.g.*, SULLIVAN & FRASE, *supra* note 2929, at 167 (citing Minnesota as "a particularly strong example of a successful guidelines-based limiting retributive system in operation"). Rather than ensuring thoughtful consideration of desert, guidelines regimes invite habituation and routinization of punishment. *See* Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 71 (2005) (objecting to the "mechanical imposition" of guidelines sentences that exceed individual desert). Strict guidelines preclude a truly individualized and direct human assessment of desert—one that must be in person and cannot be achieved by general rules. *See* McLeod, *supra* note 169, at 2295–99. Discretionary sentencing is a much more defensible way to ensure that sentences do not exceed individual desert.

F. Scope of the Reform

In a principled and just system, no sentence would be accepted without a deliberate and forthright determination that the penalty is deserved. However, because the proposed reforms would make judicial sentencing procedure somewhat more complex and burdensome, judges could limit the range of cases in which they implement these reforms, at least at first. Implementing the reforms only in tried cases would be reasonable. Plea bargains by their nature tend to reduce punishment exposure. Defendants who insist on trial, by contrast, face a well-known and widely criticized "trial penalt[y]."[234] A recent American Bar Association report found, for example, that in federal felony cases "a defendant's sentence after a plea is on average seven years shorter than the sentence resulting from trial" and that in "drug trafficking cases, the average difference . . . is nine years."[235] The injustice of an undeserved trial penalty is magnified by the fact that trials are "designed for sending messages, both about the system's care not to punish the undeserving and about the deserved nature of the punishment the system imposes."[236] Judges must be especially careful, in these morally communicative cases, to avoid undeserved penalties. By focusing the reforms on tried cases, judges could address the most likely excesses.[237] This limited reform would be both feasible and effective, guarding directly against unjust trial penalties and, indeed, guarding indirectly against excessive prosecutorial pressure to plead guilty in order to avoid trial. The use of anticipated draconian trial penalties as a prosecutorial tool to threaten defendants into guilty pleas would diminish.[238]

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234 LIPPKE, *supra* note 59, at 5.

235 JOHNSON, *supra* note 59, at 17.

236 William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1882 (2000).

237 If judges consider it infeasible to implement the reforms in all tried cases, they could apply the reforms only in felony cases that bring a risk of incarceration. Most cases involve misdemeanor charges (typically punishable by no more than a year in jail), and limiting the reform to felony cases could lighten its burdens considerably while still guarding against unjust prolonged incarceration.

238 The existence of a significant trial penalty has such "a powerfully coercive impact on the defendant's decision to plead guilty or proceed to trial" that "[e]ven innocent defendants may make the rational choice to avoid the risk of a large post-trial sentence when a much lower sentence is on the table." JOHNSON, *supra* note 59, at 17. Unfortunately, judges could not on their own eliminate or avoid unjust mandatory penalties. Mandatory penalties exceeding individual desert would remain a serious problem and a tool for prosecutorial oppression. In a forthcoming article, this author argues that juries should be permitted to reduce mandatory penalties that exceed their assessment of what an individual defendant deserves. *See* McLeod, *supra* note 58 (manuscript at 27–28).

CONCLUSION

American law and culture embrace the principle of desert both as a punishment justification and as a punishment constraint. Faced with an epidemic of mass incarceration and the scourge of racial discrimination, some academics have come to see desert primarily as a vehicle for the promotion of sentencing excesses. Claiming that ideas about desert are often arbitrary, discriminatory, and illegitimate, they have urged us to set desert aside and reorient our law toward objective, empirical goals instead.

Yet even if our society could be persuaded to uncouple its punishment choices from the principle of desert, this divorce would be tragic. We would lose a critical limit on sentencing severity—a limit that courts have invoked to restrain the brutal penalties of death and juvenile life without parole. We would lose our strongest argument for rethinking incarceration of the mentally ill. We would lose the moral basis for objecting to wrongful convictions imposed for useful ends and to undeserved brutality designed for salutary consequences. Giving up such a potent sentencing safeguard is the last thing we should do in the face of mass incarceration and punitive excess.

The central goal of this Article is to show that we have an alternative, far better way to respond to the legitimate objections of desert's critics. Our answer lies in structuring sentencing procedure to prevent desert from being either exaggerated or ignored. Current law does not forbid judges from engaging in careful and independent analysis of desert. It simply does not promote such study. Thoughtful judges may and should right now engage in more thorough scrutiny of desert. They should make desert the first question they address at sentencing, and they should assess desert alone. Courts should also make a public record of the upper bound of desert, so as to constrain their own temptations to impose greater punishment and to expose how mandatory penalties may violate a core principle of justice. Legislatures can formally mandate this sentencing sequence, but trial judges do not need to wait for legislative approval to implement this crucial procedural safeguard.

The sentencing process in America has become a one-way ratchet toward severity. Plural sentencing objectives have become optional considerations that can be cited to justify excessive punishment, with none serving as a fixed and immutable restraint upon it. Though America retains a strong legal and cultural commitment to the principle of desert as a penal limitation, existing sentencing procedures betray that commitment. The answer is not to abandon desert, but to reform our procedures in order to enforce the limits that desert already establishes in principle.