EDITOR'S INTRODUCTION: NEW TOPICS IN SENTENCING THEORY

*Jacob Bronsther**

Two questions have dominated the intellectual history of the criminal law: *What acts or omissions should the state criminalize?* and *Why is the state entitled to punish someone—that is, to intentionally harm them—when they commit an offense?* However, since the decline of the rehabilitative ideal in the 1970s,[1] and the subsequent rise of a racialized mass incarceration in the United States, a third question has officially joined the corpus: *How much (and what sort of) harm should the state inflict on someone when they commit an offense?* The reasons that inform our answers to this trinity of questions may overlap to a degree, but it is likely that as we journey from a theory of criminalization to a theory of punishment to a theory of sentencing, we will lose, gain, and refashion principles along the way. For instance, the (crude) beliefs that the criminal law ought to enforce interpersonal morality and that those who offend against interpersonal morality deserve to suffer do not imply very much about what sort of suffering—or, perhaps, mercy—might be in order. This special issue of the *New Criminal Law Review* seeks to contribute to the still young field of sentencing theory, and to help discover the set of reasons that ought to calibrate and constrain state punishment. Given that the state in its capacity as punisher is at its most burdensome, with the dignity of offenders and their families often in the balance, the stakes are very high. Indeed, we might say that a reasonably liberal and just society depends for its existence—as a *liberal* society, as

*Climenko Fellow & Lecturer on Law, Harvard Law School; Assistant Professor of Law, Michigan State University College of Law (starting Fall 2021).

1. Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (1981).

New Criminal Law Review, Vol. 24, Number 3, pps 271–274. ISSN 1933-4192, electronic ISSN 1933-4206. DOI: https://doi.org/10.1525/nclr.2021.24.3.271.

a *just* society, and, possibly, as a *society* at all[2]—on getting the right answer to the *How much?* question.

There are seven articles in this special issue. In the first piece, Kiel Brennan-Marquez and Vincent Chiao develop a novel argument about criminal sentencing and machine learning. Their primary inquiry concerns which interpretative tasks should be delegated to machines. They argue that when human beings *disagree* about the purposes of such a task, as they do with criminal sentencing, that should be prima facie grounds for delegating the decision to a machine. Without the presence of an algorithm to provide a normalized sentence, they argue, an offender's punishment is unpredictable, random, and unfair—a product of the lottery of who happens to decide their case.

In the second piece, I present an internal critique of "limiting retributivism." Within the vague range of retributively "not undeserved" punishments, limiting retributivists argue that nonretributivist considerations—like deterrence and incapacitation—should determine the choice of punishment. However, I argue that retributivism can justify only the *least harmful* sentence within such a range. To impose a sentence beyond this minimum would be cruel from a retributive perspective. It would harm an offender to a greater degree without thereby increasing the realization of our retributivist ends. Thus, if our nonretributive policy aims required a harsher sentence, the offender's retributive desert could not provide the rationale, and we would need another theory that explains why, if at all, harming an offender as a means of realizing the desired nonretributive good is permissible.

In the third piece, Lee Kovarsky reconsiders American mercy. He first develops the moral case for mercy, arguing that sentence reductions limit human suffering without impeding our consequentialist penal aims. Kovarsky then argues that state and federal governments should concentrate sentence reduction powers in *local prosecutors*. Doing so would have various democratic benefits, he explains; it would enhance local political participation, allow sentencing practices to reflect local preferences, and enable communities to dissent from carceral norms in ways that may engender broader reform. Amongst local officials, prosecutors are best positioned to

2. *See* Jacob Bronsther, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227, 242–48 (2021).

transmit a community's punishment ideals, Kovarsky argues, given their public stature, electoral accountability, and institutional role.

In the fourth piece, Paul Robinson and Muhammad Sarahne argue that post-offense conduct ought to impact an offender's treatment in certain cases. They identify four types of offenders who merit special recognition: the responsible offender, who cooperates with the process leading to conviction; the "debt-paid" offender, who has already been punished enough by the state according to principles of justice; the reformed offender, who affirmatively acts to leave their criminality behind; and the redeemed offender, who has worked to atone for their offense. Robinson and Sarahne argue that such offenders might be entitled to an alternate set of sanctions, preferential access to educational and rehabilitative programs, and a reduction in the collateral consequences of their conviction.

In the fifth piece, W. Robert Thomas considers the promise and pitfalls of "expressive" corporate punishment. He explains that expressive punishment offers a pathway around two foundational objections to corporate criminal law; first, that corporations lack moral personality and thus cannot deserve punishment, and second, that civil enforcement actions can deter corporations effectively. Thomas argues that corporations need not be full-fledged moral agents to merit expressive condemnation, and further, that condemnatory treatment may deter harmful corporate activity more than civil penalties. However, he demonstrates that our current corporate sentencing practices—focused on monetary sanctions and corporate probation—fail to stigmatize corporations effectively. Thomas then assesses a number of possible solutions, such as reinvigorating corporate shaming sanctions and, more radically, evolving our existing conventions about criminal punishment writ large.

In the sixth piece, John Vorhaus presents an account of punishment that is *impermissibly degrading* and therefore in violation of Article 3 of the European Convention on Human Rights. He argues that degradation is a *symbolic dignitary harm* whereby victims are treated as if they do not possess the status owed to human beings. Further, he explains that degradation is relational, in the sense that those who are degraded are brought down in eyes of others. Although gross humiliation is a common feature of impermissible degradation, Vorhaus argues that its presence is neither necessary nor sufficient; if gross humiliation degrades a person, it does so not because it humiliates them but because it violates their dignity. Vorhaus then considers a number of objections related to the meaning of

"dignity" and "status" as well as to the symbolic nature of degradation on his account. Finally, Vorhaus applies his theory by considering when prison sentences without the possibility of release might degrade an offender.

In the seventh piece—to appear in the following issue of this journal—Antje du Bois-Pedain explains that fixing the problem of American mass incarceration requires the mass release of prisoners. But she raises the question of who, exactly, should be released. She answers: Black individuals serving long sentences. These individuals are the worst casualties of the penal attitudes that have driven our racialized mass incarceration. In this way, Du Bois-Pedain argues, the *collective* wrong committed against Black people by the American criminal justice system impacts the permissibility of continued punishment at the *individual* level. If the aim of mass release is to reduce injustice, she concludes, then Black individuals serving long sentences are the people most deserving of the attention of clemency decision makers.