

A Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity

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I. INTRODUCTION

It is a core principle of liberal societies that individuals may not be deprived of their liberty unless the reasons for doing so respect their status as autonomous persons. This principle puts stringent limits on the use of preventive detention.¹ I argue here that one use of preventive detention that is consistent with those limits is the long-term preventive detention (LTPD) of people who have been convicted either of a very serious crime or of a string of serious crimes.² These people can justifiably be subjected to LTPD because a justifiable part of their punishment is loss, for some period of time, of the normal immunity to LTPD. If this period of time extends beyond whatever period of time they have lost their liberty as a matter of punitive detention, then they may be subject to LTPD for the remainder of that period.

What makes stripping certain criminals of their immunity to LTPD for a period of time morally acceptable is that such a punishment fits their crimes. If they show sufficient disrespect for the law, then they no longer deserve to receive one of the benefits that normally flow from being an autonomous and accountable person. In particular, they no longer deserve to have the status of a person who must be presumed to be law-abiding. A state must normally accord its autonomous and accountable citizens³ this presumption as a matter of basic respect for

1. These limits are not absolute. I do not deny the theoretical possibility that some actors could be so dangerous that they need to be preventively detained even though they have not been convicted of a crime. But I have argued elsewhere that this possibility is very unlikely to arise in practice, unless the conditions for suspending habeas corpus apply, in which case these people can be detained in accordance with the model articulated below. See Alec Walen, *A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871, 930–33 (2011); see also *infra* notes 39–40 and accompanying text. Importantly, I would expect such cases, if ever there were any—again, outside of conditions like those in which habeas can be suspended—to be *much* rarer than the cases of people who pose a “vivid danger” to others, who some have argued can be detained in excess of what a proportionate punishment would allow. See Anthony E. Bottoms & Roger Brownsword, *Dangerousness and Rights*, in DANGEROUSNESS: PROBLEMS OF ASSESSMENT AND PREDICTION 9, 17–21 (John W. Hinton ed., 1983).

2. This Article develops an idea I first put forward in Walen, *supra* note 1, at 905–13.

3. The restriction to citizens reflects the thought that although the state has a duty to police its own dangerous citizens, it does not owe that duty to dangerous aliens. Aliens, even if legally resident, may be deportable on grounds that fall short of criminal acts, such as visa violations. See *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001). Moreover, if they are deportable but no state is willing to take them, then they may justifiably be subjected to LTPD if there is sufficient evidence that they are sufficiently dangerous. See *id.* at 696 (allowing LTPD for “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security”). Indeed, the *Zadvydas* Court may go too far in implying that only extremely

their autonomous moral agency. Rather than treat them as potentially dangerous animals,⁴ the state must treat them as free agents who can be trusted enough to do what is right to have the liberty to move freely in the society,⁵ and who can and should be held accountable if they choose instead to commit criminal acts. If, however, particular actors demonstrate by their criminal acts that they do not deserve the presumption that they will be law-abiding, then they have, at least for a while, lost the moral basis for claiming the right to benefit from the respect that grounds the immunity to LTPD. They remain autonomous moral actors who can be held accountable for their future criminal choices, but they lose their status as persons who must be given the freedoms that come with the presumption that they will obey the law. For brevity, I will refer to this lost status account of the lost immunity to LTPD as the “lost status view.”

To be clear, the presumption that a person will be law-abiding is not absolute. One obvious manifestation of the limits of the presumption of law-abidingness is the fact that the state has an obligation to police its residents, arresting and prosecuting them if it finds sufficient evidence of criminal activity. The modern state also has good reason to engage in more intrusive activities, such as screening passengers at airports and

dangerous aliens—those who pose a national security threat—may be subject to LTPD. This is not to deny that resident aliens have due process rights that are the same as citizens. See Lucia Zedner, *Security, the State, and the Citizen: The Changing Architecture of Crime Control*, 13 *NEW CRIM. L. REV.* 379, 392–93 (2010) (citing DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 7 (2003)). But due process rights should not be confused with a substantive right to be allowed to stay in and move freely about the country. Their liberty should be as great as possible, consistent with the security of others, but they do not benefit from the same basic rights as citizens to be released and policed rather than subjected to LTPD. See Walen, *supra* note 1, at 922–24.

4. See Stephen J. Morse, *Neither Desert nor Disease*, 5 *LEGAL THEORY* 265, 268 (1999) (discussing how we could “simply treat each other like bacteria, as potentially beneficial or harmful objects, and act accordingly”).

5. Some would extend this principle of trust to hold that it is inappropriate to criminalize action as long as there is some opportunity for an actor to turn away from the criminal path. They would not allow criminal liability for attempts until an actor “has actually unleashed [the] risk of harm [to others].” See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 198–99 (2009). I think that takes this principle too far. See generally Alec Walen, *Criminalizing Statements of Terrorist Intent: How To Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention*, 101 *J. CRIM. L. & CRIMINOLOGY* 803 (2011) (stating that the choice to form and act on criminal intentions can be treated as criminal in its own right).

prohibiting them from taking objects on airplanes that would normally be harmless but that could be used to disguise bombmaking material.⁶ It may create inchoate and preparatory crimes that allow the state to arrest and punish people for criminal activities that are more or less remote from acts that would actually cause an unjustifiable harm.⁷ I believe that it may even hold people in short-term preventive detention (STPD) to protect others from harm.⁸ But there are limits to the preventive activities a state may undertake, among them being that the state has to leave its citizens the basic freedom to pursue life plans that are not overly harmful to others.⁹ Long-term detention is qualitatively unlike the other restrictions on liberty just canvassed; it more radically undermines or limits one's ability to pursue one's own reasonable life plans. Accordingly, what the presumption of law-abidingness requires is that a state not deprive its autonomous and accountable citizens of the fundamental freedom from detention or imprisonment for a long period of time without a criminal conviction.¹⁰

In practice, then, the presumption of law-abidingness implies that even if there is good reason to *predict* that certain citizen-actors will choose to break the law, and even if the best course of action, from a utilitarian point of view, would be to subject them to LTPD, the state may not do so unless they have lost their status as people who must be presumed to be law-abiding. The point of this Article is not to argue for that principle but to argue that the presumption that an actor will be law-abiding, like the right to liberty itself, can be forfeited by criminal actions. In other words, the point is to argue that a just punishment could involve loss of the status of being a beneficiary of this presumption just as much as it could involve the loss of liberty.

There are two practical reasons for embracing the lost status view as part of a punishment regime. First, it allows a state to address the risk posed by certain dangerous criminals who might otherwise be released

6. The merits and risks of these and other forms of "preemption" are discussed by Daniel Rosenthal, *Assessing Digital Preemption (and the Future of Law Enforcement?)*, 14 NEW CRIM. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1735479.

7. See generally Andrew Ashworth & Lucia Zedner, *Just Prevention: Preventive Rationales and the Limits of the Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 279 (R.A. Duff & Stuart P. Green eds., 2011) (discussing how these sorts of laws can go too far).

8. See Walen, *supra* note 1, at 913–16.

9. This idea of freedom to pursue one's own life plans traces back at least to John Rawls's idea that a just society provides a fair structure in which people can rationally pursue their own conceptions of the good, while reasonably seeking and supporting fair terms of cooperation with others. See JOHN RAWLS, POLITICAL LIBERALISM 48–52 (1993).

10. See *infra* Part II.

into society where it would be hard to prevent them from committing further violent acts.¹¹ Second, it does a better job of addressing that problem than the current criminal regime in which predictions of dangerousness are factored into criminal sentences,¹² confusing the deprivation of liberty that people deserve as a matter of punishment with the lost immunity from LTPD that they deserve, which may or may not call for lost liberty. It is also better than a number of alternatives that I discuss below.

Before concluding this introduction, one more clarification is called for. The idea that one could lose the benefit of the presumption that one is law-abiding may seem to imply not only that one could lose one's immunity to LTPD but also that one could lose the presumption of innocence at trial for a new crime. But that would not be a sound inference. The presumption at issue is the presumption that an actor *will* obey the law, not the presumption that an actor *has* obeyed the law. It might be objected that if conviction for a sufficiently serious crime justifies loss of the one presumption, it should justify loss of the other. In response, I must admit that as a purely formal matter, the two could be lost together. Nevertheless, there is reason to retain the presumption that an actor *has* obeyed the law even when his actions could justifiably cause him to forfeit the presumption that he *will* obey the law. Punishment is fitting only if the state can prove beyond a reasonable doubt that an actor *has* broken the law.¹³ If one were to lose the presumption that one *has* obeyed the law in virtue of having broken the law in the past, then one would be subject to additional punishments even if the state cannot carry the normal burden of proof concerning one's supposed additional crimes. At least outside of the context of

11. See Walen, *supra* note 5, at 821–24 (discussing the limited effectiveness of measures that stop short of detention as a means of establishing security).

12. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429–31 & n.6 (2001) (asserting that “the justice system’s focus has shifted from punishing past crimes to preventing future violations through the incarceration and control of dangerous offenders” and listing various criminal laws that place significant emphasis on the prevention of future crimes).

13. See *In re Winship*, 397 U.S. 358, 363 (1970) (reasoning the reasonable doubt standard “provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law’” (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895))).

enforcing discipline in prisons or revoking parole,¹⁴ allowing new punishments for new crimes that have not been proved beyond a reasonable doubt would make a convict who has served prison time vulnerable to undeserved and hence unjust punishments. In contrast, the preventive detention that may be warranted if the convict has lost immunity to LTPD is not an *extra* punishment. The punishment is the loss of the immunity to LTPD, not the actual loss of liberty. This distinction may seem dubious if one focuses only on the loss of liberty itself. But if one accepts that a defining characteristic of punishment—an essential feature that distinguishes it from other losses that may be inflicted on a person—is that it expresses or communicates censure for wrongs done,¹⁵ then one can say that the actual loss of liberty in LTPD is not punishment because it does not have that expressive value. A person who has lost immunity to LTPD should be subjected to LTPD only if there is good reason to believe that detaining him is the best way to satisfy the interests of all parties involved. These forward-looking considerations should not be tainted or distorted with punitive motives. The punishment, again, is fully captured in the lost *immunity* to LTPD.

I proceed as follows: In Part II, I introduce a basic framework for detention consistent with respect for autonomy and locate the lost status view within that framework.¹⁶ In Part III, I spell out the lost status view in more detail and contrast it with other similar practices or positions, including the indefinite sentencing scheme defended by Christopher Slobogin in this issue.¹⁷ In Part IV, I illustrate it by applying it to some

14. The need to discipline prisoners who commit new offenses in prisons has to allow for a more flexible response than a full-blown new trial for every new offense. *See Sandin v. Conner*, 515 U.S. 472, 485 (1995). But there are limits to the punishments prisoners can receive without a new trial. It has been argued, I believe persuasively, that punishments that extend prisoners' time in prison on the basis of new violations must be based on new criminal trials with all the due process rights normally afforded criminal defendants. *See* Erin Kae Cardinal, Comment, *Bray v. Russell: The Constitutionality of the "Bad Time" Statute*, 35 AKRON L. REV. 283, 284–85 (2002) (discussing the due process violations inherent in allowing a parole board to extend a prisoner's sentence for violations committed in prison and established by clear and convincing evidence); Stephanie D. Weaver, Note, *Will Bad Times Get Worse? The Problems with Ohio's Bad Time Statute*, 17 N.Y.L. SCH. J. HUM. RTS. 341, 353 (2000) (discussing the same). Revocation of parole is a different matter. *See infra* note 56 and accompanying text.

15. *See* R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY, at xv (2001) (discussing the connection between the aim of expressing censure and punishment); ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 17–21 (2005). Importantly, not all aspects of punishment have to be directly expressive of censure. *See infra* Part V.

16. I introduced this framework and defended it in the context of a discussion of the preventive detention of suspected terrorists in Walen, *supra* note 1.

17. Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127 (2011).

familiar cases in which the lost status view would make a difference. And in Part V, I defend the justice of the proposal by defending its retributive bona fides, arguing in particular that retributivism can be mixed with a concern for preventing future harms, and discussing how a notion of proportionality could limit this dimension of punishment.

II. INTRODUCTION TO AUTONOMY-RESPECTING DETENTION

As the Supreme Court wrote in *Hamdi v. Rumsfeld*, “‘In our society liberty is the norm,’ and detention without trial ‘is the carefully limited exception.’”¹⁸ Unfortunately, the Court has not been particularly good at articulating a coherent principle governing the space of “carefully limited exception[s].” As a result, some have argued that the range of exceptions shows that “American law eschews [preventive detention] *except* where legislatures and courts deem it necessary to prevent grave public harms.”¹⁹ In other words, some think that our law has only a presumption against preventive detention, one that can be overcome whenever the consequences for security clearly call for doing so. However descriptively accurate this sort of utilitarian account of the law may be, it is nonetheless morally indefensible. It gives short shrift to the right to liberty of autonomous actors.

The question is, What would a principled account of the right to liberty of autonomous actors look like, and under what conditions would it allow preventive detention? One simple suggestion is that only the mentally incompetent can justifiably be subjected to preventive detention.²⁰

18. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

19. Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, HARV. NAT’L SEC. J. 85, 88 (2011), http://www.harvardnsj.com/wp-content/uploads/2011/01/Vol.-2_Klein-Wittes_Final-Published-Version.pdf; see also BENJAMIN WITTES, LAW AND THE LONG WAR 34 (2008); BENJAMIN WITTES & COLLEEN A. PEPPARD, GOVERNANCE STUDIES AT BROOKINGS, DESIGNING DETENTION: A MODEL LAW FOR TERRORIST INCAPACITATION (2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0626_detention_wittes/0626_detention_wittes.pdf.

20. See, e.g., Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 96 (1996) (“In the absence of mental illness sufficiently serious to preclude criminal responsibility, predictive confinement violates the first principle of limited government—to treat every mentally competent adult as a free and autonomous person responsible for his chosen actions—and only for his chosen actions.”); Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 785 (1998) (“[T]hose able to . . . choose [to comply with the law] should have their liberty and their autonomy respected by being treated as rational

Although I agree that mental incompetence is *one* morally sound condition that could justify LTPD—for those who are also a danger to themselves or others²¹—the problem is that it is *merely* one of the conditions in which people can sometimes justifiably be preventively detained. Other conditions include:

- Being a defendant awaiting trial,²²
- Being a material witness for a trial,²³
- Being a juror subject to sequestration at a trial,²⁴
- Being a deportable alien,²⁵
- Being a prisoner of war (POW),²⁶
- Being a suspected terrorist (ST),²⁷

beings—and thus prosecuted pursuant to the criminal law should they choose to do wrong.”).

21. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (noting the state’s “power to protect the community from the dangerous tendencies of some who are mentally ill”).

22. See Bail Reform Act, 18 U.S.C. § 3142(e)(1) (2006 & Supp. III 2010); see also *Salerno*, 481 U.S. at 755 (holding that the Bail Reform Act does not violate the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment). The maximum length of pretrial detention is limited by the Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (2006 & Supp. III 2010). Under the Speedy Trial Act, the trial of a detained person who is being held in detention solely because that person is awaiting trial must, unless certain exceptions apply, commence not later than ninety days following the beginning of such continuous detention. *Id.* § 3164(b). There are, however, many exceptions or conditions allowing detention for longer than ninety days. *Id.* § 3161(h). These include:

Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

Id. § 3161(h)(7)(A).

23. See 18 U.S.C. § 3144 (2006) (allowing the detention of material witnesses “in accordance with the provisions of section 3142 of this title”).

24. See, e.g., CAL. PENAL CODE § 1121 (West 2004); see also *United States v. Brown*, 250 F.3d 907, 917 (5th Cir. 2001) (noting that sequestration may be used to protect “the jury from trial publicity, extraneous influences and harassment”).

25. See *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (upholding the Immigration and Nationality Act and holding that it allows detention of deportable aliens at least for six months if there is a “significant likelihood of removal in the reasonably foreseeable future”).

26. See Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (stating that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities,” which implies that they may be detained until that time); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–20 (2004) (allowing the military detention of a U.S. citizen with reference to Article 118).

27. This is one of the most controversial entries on the list. Courts have held that the President is authorized by the Authorization for the Use of Military Force (AUMF) to hold suspected terrorists associated with al Qaeda in LTPD. See Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)). See, for example, the opinions

- Having a contagious and possibly deadly disease,²⁸
- Having the intention to commit serious crimes against others,²⁹
- Having the intention to inflict serious harm upon oneself,³⁰ and
- Being a dangerous recidivist.³¹

authored by judges Traxler, Williams, and Wilkinson in *Al-Marri v. Pucciarelli*, 534 F.3d 213, 253, 284, 293 (4th Cir. 2008) (en banc), *vacated sub nom.* *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.). I have argued, however, that that authority should be limited to use on those aliens who come from countries that cannot be relied on to police them and for whom no other country can be found that would reliably police them. See generally Walen, *supra* note 1.

28. See *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997) (“A State could hardly be seen as furthering a ‘punitive’ purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease.”); see also *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902) (“[S]tate quarantine laws and state laws for the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution . . .”).

29. See generally Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, MINN. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1839844; see also Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 790 n.60 (1996) (“I cannot imagine a more basic right of the community than to use the instrument of the law to restrain those who currently intend—in the strong sense of ‘intend’ which imports the beginning of an effort to harm—to commit a crime.”); Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT’L SEC. L. & POL’Y 1, 15 (2009) (discussing the use of administrative detention to disrupt terrorist plots or schemes).

30. Arguably, the intention to commit suicide is insufficient grounds for detention, except when combined with a mental illness. “Every state statute authorizing confinement for a suicidal individual requires also that the individual evidence indicia of mental illness.” Kate E. Bloch, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty To Report Suicide Threats*, 39 STAN. L. REV. 929, 934 n.36 (1987) (citing statutes). However, indicia of an intent to commit suicide is almost certainly *prima facie* evidence of mental illness. As Bloch notes, “The medical profession is slowly coming to recognize the existence of a *small fraction* of rational suicides.” *Id.* at 938 n.63 (emphasis added). By implication, the vast majority of instances in which a person intends to commit suicide are irrational and, at least in that regard, are grounded in a mental illness. In addition, given that third parties are unlikely to be able to immediately distinguish rational intentions to commit suicide from intentions based on mental illness, a short period of detention for the purpose of psychiatric evaluation is presumably legally justifiable. See *id.* at 952 n.153 (citing Norman L. Cantor, *A Patient’s Decision To Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 256 (1973)).

31. See, e.g., *Ewing v. California*, 538 U.S. 11, 15–16 (2003) (upholding California’s three-strikes law, which requires that a defendant convicted of a felony receive “an indeterminate term of life imprisonment” if that defendant had two or more prior serious or violent felony convictions (quoting CAL. PENAL CODE § 667(e)(2)(A) (West 1999))); see also Robinson, *supra* note 12, at 1430 nn.2–3, 1431 & n.4.

I am not suggesting that anyone who fits into any of these categories can be subject to LTPD. I am suggesting that people who fit into these categories can justifiably be subject to some amount of preventive detention for reasons having to do with what it means to fit into those categories.

What kind of coherent principle would (1) justify the use of preventive detention for people who fall into this wide range of categories and (2) respect the liberty rights of autonomous individuals? The answer, which I have argued for elsewhere, is what I call the Autonomy-Respecting Model of Detention.³² It articulates six ways in which detention can be reconciled with respect for autonomy. These are based on the following distinctions. First, those who can be detained fall into two basic categories—those subject to punitive detention, and those subject to preventive detention. The former can justifiably be detained because they brought their time in prison upon themselves by their autonomous choice to commit a crime. The latter can be subdivided into those who may be subject to STPD and those who may be subject to LTPD.

Those subject to STPD may justifiably be detained for the sake of the general welfare because the burden on them is not too great, and we may ask reasonably small sacrifices of people for the sake of the general welfare.³³ Those who fit in this category include defendants detained pretrial, material witnesses, jurors subject to sequestration, STs and other suspected serious criminals detained for the purposes of investigation,³⁴ those who seem to have the intention to commit criminal acts or to inflict serious harm on themselves,³⁵ and most deportable aliens.³⁶

32. See Walen, *supra* note 1, at 879.

33. The line between short-term and long-term detention is necessarily vague but not completely arbitrary. I argued elsewhere for a dividing line of six months. See *id.* at 915–16.

34. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (holding that “indefinite detention for the purpose of interrogation is not authorized” by the AUMF, implying that STPD for interrogation is authorized by the AUMF); see also John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227, 1246 (2006) (proposing a three-month interrogation warrant for STs); Waxman, *supra* note 29, at 35 (mentioning that “short-term detentions [of STs] might satisfy most information-collection requirements”).

35. See *supra* notes 29–30 and accompanying text. It is worth noting here why the intention to harm others cannot be the basis of a long-term detention policy. Once persons have been detained on the basis of having illicit intentions of some sort, they can then deny that they have, or even had, those intentions. If the state puts the burden of proving that they no longer have an illicit intention on the detainee, the state may indeed be able to detain them for a long time, despite their denials. But then the state will have effectively stripped them of their immunity to LTPD on the basis of something far less than a criminal conviction, and that would violate their rights as autonomous persons. If, however, the state retains the burden of showing that detainees continue to harbor illicit intentions, it will have great trouble doing so, as any even half-witted detainee who wishes not to be detained will cease saying or doing anything that indicates still harboring

The toughest category to justify is the remaining category of LTPD. People may be subject to LTPD only if they fall into one of four subcategories:

- (1) They lack the normal autonomous capacity to govern their own choices—paradigmatically, the mentally ill;³⁷
- (2) They have lost their immunity to LTPD—paradigmatically, recidivists and those who commit very serious crimes (the topic of this Article);
- (3) They have an independent duty to avoid contact with others because such contact would be impermissibly harmful, and LTPD simply reinforces this duty—paradigmatically, those with contagious and deadly diseases but also those who cannot control certain violent impulses towards others;³⁸ and
- (4) They are incapable of being adequately policed and held accountable for their choices—paradigmatically, anyone threatening security during a time of rebellion or invasion when the writ of habeas corpus can be suspended,³⁹ POWs, and some STs.⁴⁰

illicit intention. This limits the utility of Ferzan’s suggestion as a means of neutralizing the threat posed by dangerous individuals, such as terrorists. *See* Ferzan, *supra* note 29.

36. The Immigration and Nationality Act requires that aliens be detained during a ninety-day removal period after receiving a final removal order, 8 U.S.C. § 1231(a)(2) (2006), but they may be detained longer than that, 8 U.S.C. § 1231(a)(6) (2006). However, as the Court in *Zadvydas v. Davis* made clear, if the postremoval detention lasts longer than six months, the government must show that it will terminate in the “reasonably foreseeable future.” 533 U.S. 678, 701 (2001).

37. *See* *Addington v. Texas*, 441 U.S. 418, 426 (1979) (noting the state’s “power to protect the community from the dangerous tendencies of some who are mentally ill”).

38. *See supra* note 28; *see also* Walen, *supra* note 1, at 916–22. One might also argue that this category could also be used to justify LTPD of those who cannot avoid acting on violent self-destructive impulses. On the one hand, that makes sense because self-destructive *impulses* are different from self-destructive choices that the actor reflectively endorses. An irresistible impulse is not susceptible to rational reflection. On the other hand, if the actor would rather live a life free from detention, running the risk that the actor will succumb to an irresistible self-destructive impulse, it is hard to justify taking a paternalistic attitude towards that choice. I would support the second hand and believe the law does too. *See supra* note 30 for a discussion of the need for STPD to ensure that an intention to kill oneself is rational or, in other words, one that the actor would reflectively endorse.

39. U.S. CONST. art I, § 9.

40. *See supra* notes 26–27 and accompanying text; *see also* Walen, *supra* note 1, at 922–27.

The first and third of these categories are straightforwardly consistent with respect for autonomy. Those who lack the normal capacity for autonomously making choices are not autonomous individuals, and thus they are not disrespected if they are not treated as autonomous individuals. And those who have a duty to avoid contact with others because they cannot help but endanger them if they have contact with them cannot complain that their autonomy is being disrespected if they are involuntarily subjected to LTPD for as long as their condition lasts. They should voluntarily subject themselves to such detention, and if they do not, subjecting them to such detention involuntarily would merely enforce on them a duty they already have.

The problematic categories are the second and fourth categories. The fourth I explore at length elsewhere.⁴¹ I argue that those who cannot be adequately policed if released—those who are a threat to security during a period of rebellion or invasion, when the normal policing powers are not functioning or are overwhelmed, as well as most POWs and those STs who would be released to countries where the police cannot provide adequate security—are extrinsically unaccountable. That is to say that because of circumstances external to them, they cannot be held accountable in anything like the way that we think people should be held accountable. And I argue that being extrinsically unaccountable is analogous to being intrinsically unaccountable—as the mentally ill are. Either way, one is unaccountable.

What I will focus on here is the second category: the one that covers serious recidivists and those who commit very serious crimes. I will further defend and articulate the view that one element of a justified punishment can be the temporary loss of the normal immunity to LTPD. I will argue that it is rational and morally justifiable to add loss of this immunity to the standard deprivation of liberty as a possible mode of punishment. And I will argue that this immunity may be lost for a period of time proportional to a combination of the severity of the crime and the pattern of recidivism. One who has lost immunity to LTPD may, then, be subjected to LTPD if the security interests of society outweigh his interest in liberty.

It is important to be clear how the lost status view differs from an older move in the criminal justice literature. A number of people have been critical of the admixture of preventive detention into a criminal justice system that claims it is depriving people of their liberty as punishment for past crimes.⁴² These critics typically call for distinguishing the part of the criminal justice system that is essentially preventive and

41. See Walen, *supra* note 1, at 922–27.

42. See, e.g., Robinson, *supra* note 12, at 1429–32; Steiker, *supra* note 20, at 806–07.

setting up a parallel scheme for justifying preventive detention, rather than smuggling it into criminal punishment. I respect their call for clarity regarding which portion of a sentence can be justified as a loss of liberty based on past criminal acts and which portion cannot. But I reject the idea that preventive detention can be justified independently, except insofar as it is justified using the framework just described. The thesis I am arguing for here is that in many of the cases that concern these critics, the only possible justification for preventive detention is that the person has committed a crime, the just punishment for which includes loss of immunity to LTPD.

A final word of qualification is called for. What I am discussing here is long-term *detention*. Other limitations on liberty, limitations more serious than screening passengers at airports and other generally applied limitations but less serious than long-term detention—limiting travel, limiting persons with whom one can have contact, requiring one to submit to random searches, and even requiring one to report to another on a regular basis—are arguably morally justifiable without a criminal conviction as a prerequisite.⁴³ They are arguably justifiable, on the model of certain civil protection orders, upon a showing of dangerousness based on a preponderance of the evidence or clear and convincing evidence.⁴⁴ These lesser infringements may be justifiable in the way that

43. British control orders, established by the Prevention of Terrorism Act, 2005, c. 2 (U.K.), available at http://www.legislation.gov.uk/ukpga/2005/2/pdfs/ukpga_20050002_en.pdf, have all of these features *and* something approximating parttime house arrest. See Lucia Zedner, *Preventive Justice or Pre-Punishment? The Case of Control Orders*, 60 CURRENT LEGAL PROBS. 174, 179–80 (2007).

44. See, e.g., *Bryant v. Walker*, 78 P.3d 148, 151 (Or. Ct. App. 2003) (noting that the standard for a stalking protection order in Oregon is proof by a preponderance of the evidence of five things, including “that the contacts, cumulatively, caused [the petitioner] reasonably to fear for her personal safety”); see also Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 14 n.32 (2006) (“The required standard of proof [for obtaining civil protection orders] in many jurisdictions is a preponderance of the evidence, but the majority of statutes are silent on the standard of proof.”). Meanwhile, the standard for depriving the mentally ill of their liberty is clear and convincing evidence that they are a danger to others or themselves. See *Addington v. Texas*, 441 U.S. 418, 431–33 (1979). The bases for restrictions that fall short of the LTPD approved of in *Addington*, but that apply to the mentally competent and that are greater than those imposed by a protective order, arguably should be established by clear and convincing evidence as well. Astonishingly, British control orders do not require even a preponderance of the evidence. They may be issued if the Secretary of State has “‘reasonable grounds for suspecting’ that the individual is or has been involved in terrorism-related activity.” Zedner, *supra* note 43, at 176 (quoting section 2(1)(a) of the Prevention of Terrorism Act).

STPD is: as something that even innocent people may have to endure for the sake of the common good.⁴⁵ This is not to deny that these lesser intrusions can be serious; nor is it to deny that adequate procedures must be developed to ensure that these limitations are imposed on people only when there is good reason to believe that doing so is necessary for the protection of the common good. It is simply to say that lesser intrusions into liberty *may* be justifiable even when LTPD is not.⁴⁶

III. DESCRIBING THE LOST STATUS VIEW AND CONTRASTING IT WITH RELATED POSITIONS

According to the lost status view, one aspect of a punishment, on a retributive theory of punishment, can be the temporary or even the permanent loss of the normal immunity from LTPD. I call this a “lost status” view because the immunity, as explained in the introduction, is grounded on a kind of status that liberal societies must normally recognize in their autonomous and accountable citizens: that of benefitting from the presumption that they will abide by the law. Autonomous and accountable actors may nonetheless deserve to lose their immunity from LTPD if they have committed and been convicted of criminal acts that show that they do not deserve to benefit from the presumption that they will be law-abiding citizens. Actors may, as punishment for those criminal acts, deserve to be treated for some period of time as though they merely have an *interest* in being free, rather than the normal *right* to be free. Their interests can then be weighed against the interests of others who are put at risk by their freedom. If the balance of utilities

45. Of course, a certain percentage of those punished for crimes are also innocent. The difference is that when establishing criminal guilt, we use what is ostensibly the highest standard of proof that could be used consistently with making positive findings: proof beyond a reasonable doubt. When the state uses a lesser standard of proof, it is essentially saying that more than the minimal number of false positives can be accepted in order to promote a particular good.

46. It is important to note that if these lesser infringements go on long enough, they become more oppressive than detention for periods that would count as long term. For example, when faced with the choice between a three-year intensive supervision probation program and one year in prison, about one-third of a group of nonviolent offenders in Oregon chose the prison sentence. Joan Petersilia, *Probation in the United States*, in 22 CRIME AND JUSTICE 149, 187–88 (Michael Tonry ed., 1997) (citing Joan Petersilia & Elizabeth Piper Deschenes, *Perceptions of Punishment: Inmates and Staff Rank the Severity of Prison Versus Intermediate Sanctions*, 74 PRISON J. 306 (1994)). Similarly, “[w]hen Minnesota inmates and corrections staff were asked to equate a variety of criminal sentences, they rated three years of intensive supervision probation as equivalent in punitiveness to one year in prison.” *Id.* at 188. In that case, a precondition for imposing these lesser infringements for a long time may be a criminal conviction for a sufficiently serious crime.

would call for them to be detained, then they can justifiably be detained for as long as they have lost their immunity from LTPD.

A proportionate loss of immunity from LTPD might overlap completely with the prison sentence of a convict. In that case, it would make no practical difference. But as I will explore in more detail in the next Part, there are cases in which it makes sense for the loss of immunity to LTPD to be somewhat longer than whatever loss of liberty the person may suffer as a matter of punishment. Consider the following schematic example: Jones might, as a punitive matter, lose his liberty for ten years but lose his immunity from LTPD for an additional ten years. In such cases, his loss of status would make a practical difference during those second ten years.

Again, whether it would be appropriate to detain him in the second of these ten-year periods would depend on the balance of his liberty interest and the security interests of others. Because his punishment in this latter period would consist in his susceptibility to LTPD, not the detention itself, he should be detained only if the security needs of others call for that drastic a measure. If a less restrictive loss of liberty would produce a sufficient gain in security to warrant imposing it, and the extra gain in security from detention would not outweigh the extra loss of liberty to the detainee, then he should not be detained.

At this stage, the most helpful way to clarify what the lost status view holds may be to contrast it with some similar positions and practices. I consider here four: the practice of parole; R.A. Duff's proposal for excommunication of persistent, dangerous offenders;⁴⁷ limiting retributivism;⁴⁸ and indeterminate sentencing.⁴⁹

Starting with parole, there is a resemblance between it and the lost status view, but there are also three important differences. First, if we assume that a given prison sentence is deserved as a matter of punishment, then what granting parole does is punish the prisoner *less* than he deserves.⁵⁰ Lost status, in contrast, allows detention beyond the

47. See DUFF, *supra* note 15, at 169–74.

48. See NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); see also MODEL PENAL CODE § 1.02 (1962) (regarding the purposes of the Model Penal Code (MPC)).

49. I focus here on the proposal defended by Slobogin, *supra* note 17.

50. The purpose of parole is to “help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed.” *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). This practice is in obvious tension with the idea that certain crimes, committed with certain levels of culpability, deserve certain sentences. It can be justified on retributive grounds only if

period that could be justified as punitive. People need not be detained during the time when they have lost their immunity to LTPD, and their release may function very much like parole—it may be likewise based on a determination that the detainee would not be a danger to others in society.⁵¹ But such a release is not from a deserved prison sentence. Second, because the LTPD of one who has lost immunity to it is *preventive* detention, not *punitive* detention, and because the punishment in the lost status view is *only* loss of immunity from LTPD, the conditions of detention for one who is subjected to LTPD should be as nonpunitive as possible.⁵² This is not the case for those who are denied parole. Their conditions are meant to be punitive.⁵³ Third, there should be a difference in the presumption with regard to detention. Parole, at least

some weak or mixed form of retributivism is true, one that allows the state, for a variety of practical reasons, to allow people to serve *less* time than they deserve, but not *more*. This sort of mixed retributivism will be discussed in Part V.

51. See, for example, California’s parole statute, which provides that the Board of Prison Terms “shall set a release date unless it determines that . . . consideration of the public safety requires a more lengthy period of incarceration.” CAL. PENAL CODE § 3041(b) (West 2000 & Supp. 2011).

52. Saul Smilansky has recently argued that if people are detained for the sake of others, despite not “deserving” to be detained because of some criminal act, then the institutions for their detention would “need to be as delightful as possible. They would need to resemble five-star hotels, where the residents are given every opportunity to enjoy life.” Saul Smilansky, *Hard Determinism and Punishment: A Practical Reductio*, 30 LAW & PHIL. 353, 355 (2011). His reason is that the “undesirable nature of the incarceration (both in itself and as compared to normal life on the outside), when . . . completely undeserved, cannot but be grave injustice.” *Id.* at 356–57. Smilansky has a point if detention is *completely* undeserved—though even then his image of the five-star hotel may be extreme. But with regard to those cases in which susceptibility to detention is a deserved punishment, the force of his argument is somewhat blunted. The conditions still should not be punitive, but the rest of society should not have to bend over backwards to make detainees as comfortable as possible either.

53. What it means to be punitive has recently been called into some dispute. Adam Kolber, for example, argues that “retributivists must calibrate each offender’s punishment so that the punishment imposes the appropriately-sized change in his baseline condition.” Adam Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1582 (2009). David Gray interprets this as implying a subjective baseline, such that those who do not suffer easily should be punished more so that they suffer as much as others who suffer more easily, and vice versa. Gray responds that “punishment is measured and determined by objective standards,” not subjective suffering. David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1664 (2010). Kolber, however, insists that his argument applies equally to objective losses that nonetheless take into account each person’s baseline in terms of objective standards of welfare. See Kolber, *supra*, at 1584. My own view follows that of VON HIRSCH & ASHWORTH, *supra* note 15, at 102. “With criminal prohibitions seen as public admonitions, and sanctions as public acts of censure, what counts [for proportional sentencing] is the degree of blameworthiness of the offence.” *Id.* In other words, the punishment should track the culpability of the criminal act, not the welfare of the criminal and how it is affected by the punishment. An argument for that position is, however, beyond the scope of this Article.

as classically understood, is discretionary⁵⁴ and is to be granted when the parole board judges that a prisoner is sufficiently rehabilitated and will likely do no further harm outside of prison.⁵⁵ On this discretionary model, there is no presumption that it must be granted if the detainee poses no ongoing threat to the community; the detainee still *deserves* loss of liberty.⁵⁶ In contrast, those who suffer LTPD because of their lost status do not *deserve* to lose their liberty. They deserve only their loss of status, and although that allows the loss of liberty, it allows it only if the security interests of the community outweigh the detainee's interest in liberty.

Second, I turn now to Duff's proposal for the excommunication of what he calls a "dangerous offender": someone who has engaged in the "persistent commission of crimes of serious violence against . . . person[s]."⁵⁷ Duff starts from the premise that some people do more than commit individual crimes or even a persistent string of minor crimes; they engage "in a *continuing* attack, a continuing *campaign* of attacks, on the community's members and its central values."⁵⁸ These people—whose crimes must be serious—commit a persistent crime that is "categorically more serious" than the sum of its parts.⁵⁹ They commit the more serious crime of *attacking* the community and its central values. For that serious crime, they deserve a more serious punishment, namely, exclusion from the community in the sense that they may now be subjected to "permanent imprisonment."⁶⁰ Duff makes it clear that the exclusion "should be *presumptively* permanent, it should not be *irreversibly* permanent; we would owe it to them, as moral agents who

54. See Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing To Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 497–501 (2008) (describing the historical idea that parole was meant to be given to the rehabilitated prisoner).

55. See *supra* note 51 and accompanying text; see also Medwed, *supra* note 54, at 503–04 (arguing that discretionary parole boards do a better job than mandatory parole systems in terms of preserving public safety).

56. Note, however, that parole, once granted, may not be taken away without due process, though this due process may fall short of that provided in a criminal trial. See *Morrissey v. Brewer*, 408 U.S. 471, 482–84 (1972) ("The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions.").

57. DUFF, *supra* note 15, at 170. It should be pointed out that Duff is not fully comfortable endorsing his proposal. *Id.* at 172–74.

58. *Id.* at 172.

59. *Id.*

60. *Id.* at 173.

could still redeem themselves, to allow them a way back to community.”⁶¹ But he thinks it might be the most just way for a retributivist to deal with the serious repeat offender.⁶²

The lost status view differs from Duff’s proposal in two ways. The first difference is that it is not as radical; it does not categorize lost status as a justification for presumptively permanent imprisonment. The proportional period of lost status may be some determinate term of years that should be far shorter than the person’s remaining life span. Moreover, people who have lost their status have simply lost their immunity to LTPD; they have not necessarily lost their liberty. Whether individuals should also lose their liberty depends on whether the threat they pose can be adequately neutralized using less restrictive means. The second difference follows from the first. Because the lost status view is not as radical, it does not require the actor to have committed a “campaign” of attacks. It could be attached to certain crimes, even if committed only once, as long as the actor has thereby indicated the kind of profound disrespect for the law that warrants the penalty.

Third, the lost status view resembles, but can be distinguished from, limiting retributivism.⁶³ Limiting retributivism is the position that holds that utilitarian goals can and should be pursued within broad limits set by retributive notions of desert.⁶⁴ Thus, according to limiting retributivism, people *should* serve at least as much time in prison, as a matter of punishment, as would be minimally required given the gravity of their crimes.⁶⁵ But after that utilitarian considerations might call for the release of individuals if their interest in liberty outweighs any community

61. *Id.* at 172.

62. Importantly, Duff’s argument is *retributive*. Although he clearly is motivated by a concern with what one could say to victims of a persistent criminal who is released from prison and harms again, his *justification* is retributive, based on what the actor deserves for the pattern of persistent, violent crime. Richard Lippke’s discussion of Duff misreads him as being fundamentally concerned with an actor’s dispositions, which is a future-oriented, not a retributive, concern. See Richard L. Lippke, *No Easy Way Out: Dangerous Offenders and Preventive Detention*, 27 *LAW & PHIL.* 383, 391–99 (2008).

63. Christopher Slobogin suggested to me, in a personal communication, that my position is effectively a version of limiting retributivism.

64. These limits are broad because, as Norval Morris framed it, “we do not have adequate ‘moral calipers’ to reach [single correct retributive punishments for each crime, and] at best, we can merely ascertain when a punishment is clearly excessive or insufficient on desert grounds.” Christopher Slobogin, *Introduction to the Symposium on the Model Penal Code’s Sentencing Proposals*, 61 *FLA. L. REV.* 665, 671 (2009) (citing Norval Morris & Marc Miller, *Predictions of Dangerousness*, in 6 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 1, 37 (Michael Tonry & Norval Morris eds., 1985)).

65. Even Morris’s theory of limiting retributivism recognized, even if reluctantly, the possibility of early release and sentencing mitigation for good behavior or pretrial cooperation by a defendant. See Richard S. Frase, *Sentencing Principles in Theory and Practice*, in 22 *CRIME AND JUSTICE*, *supra* note 64, at 363, 375 (Michael Tonry ed., 1997).

interest in their being incapacitated by being imprisoned. And yet no matter how dangerous, they must be released if they have been in prison for the length of time that represents the maximum that could be justified on retributive grounds. In many ways that fits the lost status view.

There are nonetheless three important differences. First, the lost status view is not committed to the skepticism about retributive desert that is at the core of limiting retributivism. Even if one believes that retributive desert is primarily ordinal, with some more or less vaguely defined anchor points, that might require, in a particular sentencing regime, that certain fairly determinate sentences be the norm.⁶⁶ The lost status view can at least accommodate, even if it does not presuppose, that sort of determinate retributivism both for the length of deserved imprisonment and for the length of deserved loss of the immunity from LTPD. Second, in many if not most cases the proper punishment for a crime either will involve no lost immunity from LTPD or, if there is a period of lost immunity, will overlap with the period of punitive incarceration. Therefore, lost immunity to LTPD will affect only a small percentage of criminal sentences. In contrast, for a limiting retributivist, it would be the norm if not the rule that a person's period of detention should be substantially governed by utilitarian considerations. Third, the utilitarian considerations that come into play in the lost status view concern only the balance between the security benefits of incapacitation and the liberty interests of the convict. In contrast, the utilitarian considerations that come into play for limiting retributivists run the gamut from the benefits of incapacitation to those of general and specific deterrence to victim and community restoration.⁶⁷

Lastly, there is a way in which the lost status view is close to the kind of indeterminate sentencing scheme proposed by Christopher Slobogin.⁶⁸ Slobogin's proposal would set the duration of detention—through the “risk-proportionality principle”—on the basis of a limited set of utilitarian considerations. Specifically, he would connect it to the product of the probability that various harms will occur and the magnitude of those harms.⁶⁹ This limits the utilitarian considerations that are relevant

66. This kind of idea is discussed in more detail in Part V below.

67. See Slobogin, *supra* note 64, at 670. Note that victim and community restoration can also be considered part of a retributive sentencing scheme. See *infra* note 78 and accompanying text.

68. See Slobogin, *supra* note 17, at 1128–31.

69. *Id.* at 1131.

to detention to the same ones that are considered by the lost status view.⁷⁰ Nonetheless, Slobogin's indeterminate sentencing scheme is different from the lost status view for two reasons. First, as just mentioned with regard to limiting retributivism, the lost status view would only be of practical relevance in a small percentage of cases, while Slobogin's proposal aims to govern all cases. Second, the lost status view would incorporate restrictions based on the idea of retributive proportionality. In contrast, Slobogin eschews the use of any such notion. Indeed, for him, a crime is just a "trigger" for entering the world of indeterminate sentencing.⁷¹ If one takes seriously the idea of retributive proportionality, as I do, then his scheme not only is different but would often result in detentions that are fundamentally unjust.⁷²

IV. ILLUSTRATION THROUGH APPLICATION

To get an even better handle on the proposal, it will help to apply it to a range of cases in which it might well make a difference. I will consider three kinds of cases: (1) cases in which the punitive detention is short because the crime was merely inchoate or preparatory, but the target crime is serious; (2) cases of recidivists; and (3) cases of sexually violent predators (SVPs).

70. The problem with the use of a wider set of criteria is that it allows detainees to be used merely as a means of deterring others. This is a tricky area; I believe that the anchor points for an ordinal retributive scheme can be set with an eye to general deterrence. And I believe that people who have committed crimes and caused harms owe it to the community to endure punishments that will deter others. But the punishment should at least reflect ordinal proportionality. To deviate up from that for the sake of general deterrence exacts more from a person than that person can reasonably be thought to owe.

71. Slobogin, *supra* note 17, at 1140.

72. Slobogin resists this conclusion, saying that it follows "only if we allow retributivists to hijack the word *justice*." *Id.* at 1160. He insists that someone who believes in determinate sentencing takes a position

unjust to the victim of an offender who has been released prematurely, as well as to the prematurely released offender who must now suffer avoidable punishment for a crime the offender would not have committed had detention and treatment continued. It is also unjust to the contrite offender who is ready to be law-abiding but must serve out the sentence he or she "deserves."

Id. I am unsure what it means to be released prematurely. If it means prematurely relative to what would be done under Slobogin's indeterminate sentencing scheme, then his first argument is equivalent to saying that it is unjust to allow dangerous people to be free. That position, however, is fundamentally at odds with the core premise of this Article and with liberal society. As for the contrite offender, a retributivist can take contrition into account, but insofar as the effect of contrition is limited, it is limited by the notion of desert, which is at the core of retributive justice itself. So I see no argument here.

A. Preparatory or Inchoate Crimes

Suppose, for the sake of argument, that the sentences people get when they complete a crime and cause a harm are normally both fair and sufficiently long that there would be no reason to treat them as deserving to lose their immunity to LTPD afterwards.⁷³ Consider, for example, the sentence range the U.S. Sentencing Guidelines suggest for one who has been convicted of using a firearm in a premeditated aggravated assault that caused serious bodily injury: sixty-three months to seventy-eight months.⁷⁴ I am not committed to the view that such a crime is serious enough to lose one's immunity to LTPD, but even if we suppose that it is, one can imagine that persons who served that time would also have been detained for as long as they would have justifiably lost their immunity to LTPD.

Now take the same crime and subtract the injury. The Sentencing Guidelines would, in that case, suggest a sentencing range of thirty-seven months to forty-six months.⁷⁵ Just as one can imagine that the

73. This might not be true in some countries, such as Sweden, where the sentences for even the most significant crimes, such as murder, are, or at least *were*, relatively short. They may not have *seemed* short, as the official penalty for murder in Sweden is ten years to life. BROTTSBALKEN [BrB] [CRIMINAL CODE] 3:1 (Swed.). But a life sentence may not actually result in a life in prison. At one point, lifers in Sweden served on average eight years in prison. In recent years, however, this has doubled to sixteen years. See John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess*, 48 BRIT. J. CRIMINOLOGY 275, 275 (2008). Sixteen years is still far shorter than "life," but it is arguably long enough to cover the desire to strip a convict of immunity to LTPD. If not, however, then in countries such as Sweden, adopting a lost immunity to LTPD might make a difference more often than in countries such as the United States.

74. I will suppose the act fits the definition of an "aggravated assault" under prong A: "a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon." U.S. SENTENCING GUIDELINES MANUAL § 2A2.2 cmt. § 1 (2010). The base level for this offense is fourteen. *Id.* § 2A2.2(a). To that one, I would add the following increases: two levels for an assault that involved more than minimal planning, § 2A2.2 (b)(1); five levels for the use of a firearm that was discharged, *id.* § 2A2.2(b)(2); and five levels for causing a serious bodily injury, *id.* § 2A2.2(b)(3)(B). That leads to a level of twenty-six. For a first-time offender, that would call for a sentence range of sixty-three to seventy-eight months—five years, three months to six years, six months. *Id.* ch. 5, pt. A.

75. The crime would register five levels lower, for a level of twenty-one. The sentencing range for that level, for a first time offender, is thirty-seven to forty-six months. *Id.* ch. 5, pt. A. It is worth noting what the sentence would be if the offender's luck went the other way and the offender killed the person who was meant to be merely injured. That would fit the definition of second-degree murder under federal law. See 18 U.S.C. § 1111 (2006). The base level for that is thirty-eight, for which the suggested

first sentence would cover the period of time the actor might deserve to lose immunity to LTPD, so one can imagine that the second sentence might not. It might be thought, for example, that anyone who commits aggravated assault and discharges a firearm in the process deserves to lose immunity to LTPD for six years, in which case the defendant would deserve to lose immunity to LTPD for at least an additional twenty-six months beyond the end of his punitive sentence.

Why think that these two punishments—punitive detention and lost immunity to LTPD—*should* align this way? In particular, why think that the period of punitive detention should go down if no harm is caused? And why think that the period of lost immunity to LTPD should not? Additionally, why think that the two punishments should be of comparable length when a harm is caused? I will now offer answers to the first two questions. The third question I will just touch on here because the answer turns on the question of proportionality for the punishment of lost immunity to LTPD, which I will address in Part V.

First, does it make sense for the period of incarceration to vary depending on whether a harm is caused, and if so, why? I think the answer is yes, and the simple reason is that one who has caused harm has more to atone for than one who has not. Consider again the aggravated assault case. If what distinguishes two actors, Jones and Smith, who perform qualitatively similar acts of assault is only luck—Jones happens to hit another with a bullet, Smith happens to miss—then in one sense they are *equally* blameworthy. They both flouted the law in the same way and acted with the same disregard for the rights of their intended victims. But Jones has something to atone for that Smith does not. This makes it appropriate to put more of the burden of carrying the social good of punishment—in particular the good of deterring others—on Jones.⁷⁶ By suffering a greater punishment, he does more good for society. Of course, in one sense, because Jones *does* nothing by serving time in prison, he only *suffers* the loss of his liberty; he does not actively *atone* for anything. But in the root sense of atonement—meaning to be reconciled with, or *at one* with, those from whom he has become

sentence is 235 to 293 months, which is, at a minimum, almost twenty years. U.S. SENTENCING GUIDELINES MANUAL § 2A1.2, ch. 5, pt. A (2010).

76. I made this point in my reply to ALEXANDER & FERZAN WITH MORSE, *supra* note 5, in Alec Walen, *Crime, Culpability and Moral Luck*, 29 LAW & PHIL. 373, 381–82 (2010).

alienated⁷⁷—carrying this social burden, even if involuntarily, will help Jones atone, on a social level, for the harm he has caused.⁷⁸

If one focuses on the luck dimension of the case, this differential punishment may seem to be unjust.⁷⁹ But the moral landscape is permeated by people having to own their luck in this way.⁸⁰ Two groups of people can make equally wise or unwise investments, but one will do well and one will fail due to dumb luck. Still, we let ones who did well keep the lion's share of their profits. Two groups can practice equally healthy or unhealthy lifestyles, and only one group will get sick. Still, we let the healthy ones enjoy their health without having to try to compensate those who got sick until their lives are equally enjoyable or miserable. And so on. One might wish to undo or compensate for all consequences of brute luck. But not only is it impossible to sort out the results of brute luck and choices—life does not operate in simple pairwise comparisons, and our choices at every moment are framed by both the choices we have already made and the dumb luck we have already encountered—the aim of doing so is deeply inconsistent with how we do, and inevitably must, aim to run our lives: by deciding how to play the odds given the situation we find ourselves in. To attempt to sort out the brute luck is to fail to come to terms with what it means to have one's own life to lead. This is not to say that we should, as a society, abandon those who suffer bad luck to their fate. We still owe help to those who suffer. Nor is it to say that we should be indifferent to the landscape of options people face. The demands of justice call for structuring the institutions of society to come as close as possible to giving people fair opportunities to succeed with their life plans, insofar

77. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 73 (10th ed. 1999) (giving the etymology of *atone* as coming from Middle English, "to become reconciled, fr. *at on* in harmony, fr. *at + on one*").

78. This is not to deny that a criminal who causes harm might also owe reparations directly to the victim. See, e.g., DUFF, *supra* note 15, at 94–96.

79. The luck dimension primarily serves to distinguish completed but failed attempts from successfully completed crimes. Even then, skill and level of commitment, more than luck, may sometimes explain the difference. Luck is even less likely to be the dominant explanatory factor distinguishing attempts that are interrupted before the final act and those that are taken to completion. And the gap between preparatory crimes, such as providing material support to terrorists, and completed crimes that cause harms, such as setting off a bomb that kills many civilians, is not a matter of luck at all. It is a matter of type of engagement. Nevertheless, the luck objection applies to enough of these cases to be worth taking seriously.

80. I discuss most of the themes in this paragraph in Walen, *supra* note 76, at 379–81.

as those plans are respectful of the rights of others.⁸¹ It is simply to say that we should be sanguine about the thought that those who cause harms, in part because of dumb luck, have more to atone for than those who act in qualitatively similar ways and do not cause harms.⁸²

Now the question is, If we accept that the punishment for a crime that does not cause a harm should be less than that for the same crime that does cause a harm, why should we not treat loss of immunity to LTPD the same way? The answer, in brief, is that although punitive detention and lost immunity to LTPD are both forms of hard treatment, the notion of proportionality that guides how each should be deployed is shaped by a somewhat different set of utilitarian purposes. The former serves the purpose of general deterrence, and the latter does not; this explains why the need to atone for harms caused is relevant only to the former.

This explanation must be unpacked in stages. I start by looking at the justifications for hard treatment. The retributive justification for hard treatment is that it expresses society's condemnation of the criminal act.⁸³ It would not be sufficient, however, merely to *say* that society condemns criminal acts. To be taken seriously, society has to *punish* for criminal acts. Moreover, to achieve certain utilitarian goals—classically deterrence, incapacitation, and rehabilitation in one sense of the word⁸⁴—in a way that respects the dignity of autonomous moral actors, those goals have to be pursued in combination with punishment for criminal acts, thereby giving potential criminals prudential reason both to pay attention to the authoritative condemnation of such acts and to avoid performing such acts in the first place.⁸⁵

81. This is the essence of Rawls's notion of justice as fairness. See JOHN RAWLS, *A THEORY OF JUSTICE* 14–15 (1971).

82. This fits the general pattern in criminal law, in which the punishment for attempted crimes is lower than that for completed crimes. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 27.02[C], at 381 (5th ed. 2009). The MPC resists this, saying that an attempt is generally to be treated as a crime of the same grade as the most serious offense attempted. MODEL PENAL CODE § 5.05(1) (1962). But it makes an exception for capital crimes and “felon[ies] of the first degree.” *Id.* The exception seems to be an ungrounded concession to the dominant legal rule. But I suggest that the truly ungrounded position is the MPC's main position, which ignores the moral relevance of having caused a harm.

83. For an early statement of this view, see JOEL FEINBERG, *DOING & DESERVING* 97–100 (1970).

84. As Michael Moore has pointed out, rehabilitation can be a paternalistic idea, aimed at remaking individuals for their own good, or it can be a utilitarian idea, aimed at remaking individuals so that they are less dangerous to others. See MICHAEL MOORE, *PLACING BLAME* 85 (1997).

85. See VON HIRSCH & ASHWORTH, *supra* note 15, at 21–24, 32 (defending this double role of hard treatment as helping both to express censure and to achieve the utilitarian goals of the criminal law).

Deprivation of liberty, for some period of time, is the primary means by which most societies dole out hard treatment.⁸⁶ But as I will explore in greater length in Part V, the quantity of hard treatment cannot be set only with reference to the actor's culpability or blameworthiness for the crime itself. The sentencing regime that is used must also be framed, at least in part, with reference to the utilitarian purposes it serves.⁸⁷ Moreover, as just explained, the need to atone on a social level for having caused a harm connects, in particular, to the social good of general deterrence. And that is why when criminals have caused no harm, it is appropriate to impose a shorter sentence on them. They should still suffer some hard treatment, proportional to their culpability, where the notion of proportionality is specified, at least in part, with reference to the utilitarian goals served by that system of punishment. But a criminal's sentence can justifiably be shorter than it would be if the criminal had also caused a harm.

Lost immunity to LTPD is also a retributive punishment in the sense that it expresses condemnation of people for their disrespect of the law and of those who were the targets of their criminal activities. And it too should be proportional to the crime committed. But the similarities with punitive detention do not end there; they also include the fact that what proportionality means in the context of lost immunity cannot be pinned down without reference to some utilitarian considerations. However, lost immunity does not engage as cleanly with the goal of providing general deterrence. It would, indeed, be an odd fit for general deterrence because one cannot say in advance how undesirable the loss of immunity will be. In each case it will depend in substantial part on

86. Duff envisions a number of other forms of hard treatment that he would prefer to use, at least in cases of nonviolent crimes: a reparative burden, community service, and participation in confrontational programs. DUFF, *supra* note 15, at 108–09. I see these, however, as complementary ideas, not ones that should displace the loss of liberty as the norm for hard treatment.

87. Interestingly, the Supreme Court recently downgraded rehabilitation as a primary goal of punitive detention, unanimously holding that the Sentencing Reform Act precludes federal courts from “impos[ing] or lengthen[ing] a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.” *Tapia v. United States*, 131 S. Ct. 2382, 2393 (2011); *see also* VON HIRSCH & ASHWORTH, *supra* note 15, at 102 (“The offender may not, for example, be held in a given penal regime for a significantly longer period than others convicted of similarly blameworthy offences, even were the extra time helpful in inducing ‘reform’ on his part.”). Both leave open the possibility, however, that if it would help promote reform if sentences were generally longer or shorter, then that *would* be a relevant consideration in designing a system of punishments.

whether the lost immunity is accompanied by lost liberty. The latter, however, is not part of the punishment; it is merely a contingent possibility given the punishment. Thus, lost immunity to LTPD is not a good vehicle for carrying the burden of atoning for harms caused. Its length should, instead, be more or less completely determined by the actor's level of culpability—in particular, the extent to which the actor's crime shows a profound disrespect for the law and the rights of those targeted by the criminal action. Therefore, although the period of punitive detention should be shorter if no harm is caused, the period of lost immunity should be the same regardless of whether harm is caused.

We can extend the range of examples for which the causing of harms is relevant to punitive detention but not lost immunity to LTPD from attempts to preparatory crimes, which, like attempts, are normally punished less severely than the related completed crime. For example, someone who has given material support to a terrorist organization can be sentenced to at most fifteen years in prison.⁸⁸ This is in contrast to someone who commits a terrorist act that actually kills someone, who can be sentenced to either life in prison or death.⁸⁹ At the same time, it would arguably be reasonable to think that at least *some* people who give material support to terrorist groups have shown such fundamental disrespect for the law and for the rights of others that they deserve to lose their immunity to LTPD for more than fifteen years.⁹⁰ Again, this does not mean that they should necessarily lose their liberty for more than fifteen years. But if they still seem to pose a great threat to others, then they could be subject to LTPD for some longer period of time.

Admittedly, I have still not given any reason to think that the duration of lost immunity should track more closely the punishment for a crime that caused a harm, rather than one that did not. For now, however, I will simply claim that there is no *prima facie* reason to think that the period of lost immunity has to track, at most, the length of punishment for crimes that do not cause harms. If it could be longer, then that opens up the possibility that this dimension of punishment would not be of any practical significance when the actor commits a serious crime and causes a serious harm but would be *disclosed* as relevant in analogous or related cases in which no harm is caused.

88. 18 U.S.C. § 2339A(a) (2006 & Supp. III 2010).

89. *Id.* § 2332(a)(1).

90. It is equally clear that some who provide what is called material support for terrorism deserve no penalty whatsoever. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2732 (2010) (Breyer, J., dissenting) (objecting to the use of the material support statute to criminalize such things as teaching members of designated foreign terrorist organizations how to “petition various representative bodies such as the United Nations for relief” (quoting *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 921 n.1 (9th Cir. 2009))).

B. Lost Immunity for Recidivists

The period of punitive detention for a given crime may seem adequate to cover the fitting loss of status when the crime is a first offense, but it may seem inadequate if the crime is one in a series of offenses, especially if they are of a similar and serious nature. But this mismatch bears a complicated relationship to the normal sentencing practices with regard to recidivists. It is not unusual for punitive detention sentences to go up for repeat offenders. Returning to the assault example used above, if the defendant who shot another and caused serious bodily injury had been convicted of two other crimes, each with sentences exceeding thirteen months that ended less than fifteen years ago, then the defendant's sentence range under the U.S. Sentencing Guidelines would be seventy-eight to ninety-seven months.⁹¹ In other words, the lower end would match the higher end for someone with no criminal history, and the upper end would be more than a year and a half longer. This is what is known as a recidivist premium. So the question is, How should recidivist premiums work with regard to both punitive detention and loss of immunity to LTPD?

It must first be noted that recidivist premiums in the context of punitive detention have been the source of some controversy. Some think that having a prior record "provides no good reason to judge either the current offense or the offender more harshly."⁹² Others are willing to throw away the key for anyone with "three strikes," at least insofar as they are moderately serious strikes. I take a middle position, akin to that proposed by Stephen Morse, who discussed the theoretical merits of extending the crime of reckless endangerment to cover the crime of failing to "commit oneself voluntarily or to take other reasonably effective steps to avoid causing future harm" when one knows, on the basis of

91. This is based on the defendant's having a criminal history category score of six points or Category III. See U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1(a), 5A (2010). That in turn assumes that there is nothing else about the defendant's prior convictions that makes them more serious. If they were "prior felony convictions of either a crime of violence or a controlled substance offense," then the defendant's criminal history category would be Category VI. See *id.* § 4B1.1(a)–(b). That would increase the sentence to a minimum of ten years and a maximum of twelve-and-a-half years. See *id.* § 5A.

92. DUFF, *supra* note 15, at 167. Duff, following von Hirsch, is willing to consider some small first-offender discount for crimes that are not particularly serious. But otherwise he resists recidivist premiums, except, perhaps, for his idea of excommunicating persistently dangerous offenders. See *id.* at 170–74; Lippke, *supra* note 62, at 391–99.

one's past crimes, that one is tempted to commit them.⁹³ In other words, those convicted of crimes have an obligation to reform themselves, and their subsequent crimes are more culpable because they carry the weight of having failed to do so. Multiple offenses, particularly in the recent past, indicate that one has chosen not to reform oneself, and that can be the basis for an increased punishment.

What I want to add to Morse's proposal is the idea that the form this punishment should take is lost immunity to LTPD. For what recidivists have really shown is that they are undeserving, for some extended period of time, of the normal presumption that they will be law-abiding. They do not show that their crimes are worse than earlier crimes of the same sort. With the possible exception of a small mitigation for first-time offenders committing relatively minor crimes,⁹⁴ there is no reason to take the culpability of any given crime, such as stealing a certain amount of money, to vary, depending on whether it is a first criminal act or a tenth one; nor do the number of prior convictions and warnings not to commit future crimes show that a subsequent crime is a more heinous act than crimes for which the defendant was first convicted.⁹⁵ An assault is an assault, a theft is a theft, and the flouting of a judge's instructions to reform oneself does not make the assault itself into a worse crime. What another crime, after some number of convictions and sentences, does show is that one has not taken on the task of reforming oneself and that one therefore deserves to lose one's status as a presumptively law-abiding person. Even if one's crimes are not so serious that they warrant loss of immunity to LTPD on their own, a recidivist pattern could justify a punishment of such lost immunity.

I should highlight that this is offered as a reformist proposal. Currently recidivist premiums are expressed in terms of longer prison

93. Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 152 (1996). Morse characterizes his proposal as "purely heuristic" or, in other words, one he would not recommend adopting "because it would be wildly intrusive and a nightmare to administer." *Id.* at 152 n.126. He nevertheless thinks it illuminates a sense in which we should be responsible for ourselves. It is worth noting, in this context, that recent research into how humans deal with temptation suggests that it is not best resisted by will power but by avoiding the temptation. See Roy F. Baumeister et al., *The Strength Model of Self-Control*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 351, 351 (2007) (discussing the way that will power resembles "a muscle that gets tired"); Jonah Lehrer, *Don't! The Secret of Self-Control*, NEW YORKER, May 18, 2009, at 29 (discussing how children who exercise self-control distract themselves from the tempting object).

94. See DUFF, *supra* note 15, at 167–69.

95. See *id.* at 168 (arguing that disrespect for the law is not what matters when the crime is *malum in se* and is already fully taken into account by the nature of the crime if it is *malum prohibitum*).

sentences.⁹⁶ These are clearly meant to be incapacitative. In other words, they are tools for LTPD. But if the most recent crime does not itself warrant the long prison sentence, then the long sentences are disproportionate and unjust. What would make more sense is lost immunity to LTPD, in which LTPD would be used only if necessary to preserve the welfare of the wider community; otherwise lesser limits on the defendant's liberty would be called for.

To see this critique in the context of a concrete example, consider the case of *Ewing v. California*.⁹⁷ Ewing had committed a substantial string of prior offenses: two violent crimes (a battery and a robbery), five theft offenses, four burglaries, and two possession offenses (a gun offense and drug offense).⁹⁸ Prior to his most recent conviction, he was sentenced to nine years for one of those robberies and three of the burglaries. Ten months later, while still on parole, he stole three golf clubs, worth about \$1200, from a pro shop.⁹⁹ For that last crime he was sentenced to twenty-five years to life, with no possibility of parole.¹⁰⁰

No reasonable person thinks that Ewing could deserve to lose his liberty for twenty-five years to life for stealing three golf clubs. The Supreme Court let the punishment stand, but that was because the constitutional jurisprudence of proportionality in the United States, as linked to the idea of cruel and unusual punishments, is exceedingly deferential to legislatures outside of the context of the death penalty.¹⁰¹ At the same time, it is hard to see how someone like Ewing would deserve to be treated as though he is still a presumptively law-abiding citizen. He has shown that he is not. The question is, What punishment is fitting for him?

The penalty of twenty-five or more years in prison, without the possibility of parole, is needlessly harsh. Indeed, even lost immunity to LTPD for twenty-five years seems too harsh, but given his long criminal background, it is not absolutely indefensible. What is indefensible—or

96. See, e.g., CAL. PENAL CODE § 667 (West 2011).

97. *Ewing v. California*, 538 U.S. 11 (2003).

98. *Id.* at 17–18.

99. *Id.* at 18–19.

100. *Id.* at 20.

101. The problems developing a jurisprudence for the death penalty have been great. They eventually caused Justice Blackmun to throw up his hands, declaring: “From this day forward, I no longer shall tinker with the machinery of death.” *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). Arguably the problems in the death penalty context have given the Court pause in other contexts.

would be indefensible if California had been administering the punishment of long-term lost immunity to LTPD as a third-strike punishment—is the failure to consider what would be the least restrictive alternative, given the security needs of the community. Because Ewing committed mostly property crimes—though some were violent (robbery with a knife) and some risked violence (burglary)—a more fitting punishment would have been, after serving his prison sentence for theft, a period of lost immunity to LTPD accompanied by measures such as some sort of intrusive monitoring of his activities—perhaps with a tracking device on his person¹⁰²—and perhaps a ban on carrying anything like a knife in public. Violation of these conditions could be conceived of either as new criminal acts that could send him back to prison or as evidence that he is too dangerous to be given that much freedom, at least for some period of his ongoing loss of immunity to LTPD. But as long as he avoided future crimes or violations of these restrictions, there would seem to be no reason for him to lose his liberty again.

C. *Lost Immunity for Sexually Violent Predators*

I turn now to the last of the three examples: the LTPD often imposed on SVPs after they have served their time in prison. As a matter of constitutional law, SVPs can be subjected to LTPD after serving their punitive sentences as long as they suffer “a mental abnormality” that results in their having a “special and serious lack of ability to control behavior.”¹⁰³ Many have argued that it makes no sense to say that offenders can be responsible enough for their actions to deserve punishment and yet so unable to control their impulses that they can be subject to LTPD after having served their sentences.¹⁰⁴ Yet there is a way in which this practice is morally defensible. SVPs seem too sane not to be subject to criminal trials, and at the same time, insofar as they do suffer from a mental abnormality that makes it especially hard for

102. Tracking devices are already used postconviction in some jurisdictions in other contexts, such as for sex-crime parolees. See Karl Vick, *Laws To Track Sex Offenders Encouraging Homelessness*, WASH. POST, Dec. 27, 2008, at A3 (discussing one feature of California’s Jessica’s Law).

103. *Kansas v. Crane*, 534 U.S. 407, 412–13 (2002) (citing *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997)).

104. See, e.g., Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 489, 503–04 (2006) (citing Stephen J. Morse, *Fear and Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL’Y & L. 250, 257–58 (1998)); Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77, 107 (2005); Morse, *supra* note 4, at 272.

them to control their behavior,¹⁰⁵ there is extra reason to want to subject them to LTPD.

To illustrate the problem, consider the case of Leroy Hendricks, the plaintiff in the first SVP case to reach the Supreme Court. Hendricks claimed that he did not simply have difficulty controlling his impulses: “He explained that when he ‘get[s] stressed out,’ he ‘can’t control the urge’ to molest children.”¹⁰⁶ Furthermore, he had sought help and found “that despite having received professional help for his pedophilia, he continued to harbor sexual desires for children.”¹⁰⁷ This led him to the conclusion “that the only sure way he could keep from sexually abusing children in the future was ‘to die.’”¹⁰⁸ What should the state do with someone like him?

One way to handle people like Hendricks is to say that they should be quarantined because their psyche is essentially like a contagious disease: they cannot mix with the general public without exposing others to serious risk.¹⁰⁹ This would be fitting if (1) they really could not avoid acting on their urge to molest children when they got it, and (2) they could not tell when the urge was coming on so as to put themselves in a position where *others* could prevent them from acting on it. If that is really their condition, they should not be subject to criminal prosecution at all.¹¹⁰ Like Odysseus tying himself to the mast while within earshot of the sirens and their song,¹¹¹ they should be subjected to LTPD in the

105. There is reason to doubt that their risk of recidivism is particularly great. *See Ahluwalia, supra* note 104, at 494–95. And there is reason to doubt that the concept of a mental abnormality is anything other than a label designed to say that we find these people scary. *See Morse, supra* note 4. I am willing to grant, however, at least for the sake of argument, that the notion of a mental abnormality, making it especially difficult for them to control their behavior, is not a complete fiction but rather descriptively true of at least some SVPs.

106. *Hendricks*, 521 U.S. at 355 (alteration in original).

107. *Id.* at 354.

108. *Id.* at 355.

109. *See supra* note 38 and accompanying text.

110. He would be acquitted under the MPC’s standard for insanity, which excuses conduct if the actor “lacks substantial capacity . . . to conform his conduct to the requirements of the law.” MODEL PENAL CODE § 4.01(1) (1962). He would not be acquitted under the *M’Naghten* rule, which excused criminal actions only if the defendant did not know “the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.” *M’Naghten’s Case*, [1843] 8 Eng. Rep. 718 (H.L.) 722. Federal law uses an even narrower test, a version of prong one of the *M’Naghten* rule. *See* 18 U.S.C. § 17 (2006). So much the worse, however, for federal law and any jurisdiction following the *M’Naghten* rule. *See Corrado, supra* note 104, at 105.

111. *See Morse, supra* note 93, at 152.

form of a quarantine, at least until they can be cured to the point where they can see the urge coming and then commit themselves to a detention facility for a short period of time, until the urge has passed.

But suppose their condition is not *that* extreme. Suppose they can tell when the urge is likely to come on and can resist it long enough to get themselves into a position where others can help them resist it. In that case, punishment for the choice to indulge the urge would be appropriate. Moreover, lost immunity to LTPD would plausibly be a fitting part of their punishment if they do indulge it. The fittingness of lost immunity draws on the same set of ideas that were relevant in explaining lost immunity for recidivists: one has a duty to ensure that one does not commit crimes.¹¹² Recidivists acquire that duty after their first conviction, which should alert them to the need to reform themselves. SVPs acquire the duty in virtue of their recognizing—something we can assume they can do as long as they are not insane—both their strong impulse to have sexual relations with children or others who do not or cannot give their consent and the fact that acting on this impulse is criminal. The fact that SVPs suffer a mental disorder that “makes it ‘difficult, if not impossible, for [them] to control [their] dangerous behavior’”¹¹³ may serve as a mitigating factor,¹¹⁴ reducing the punitive sentence that they deserve. But their failure to take sufficient care to ensure that they would not act on such an impulse shows a disregard for the law and their potential victims that could justify lost immunity to LTPD as part of their punishment, extending beyond the shortened period of punitive detention.

Importantly, on the lost status view, the significance of having committed a crime is not so much epistemic—evidence that a person is likely to commit the crime again—as punitive—grounding loss of the right to be treated as any other presumptively law-abiding, autonomous, accountable person. The disorder itself can clearly be present in a person who has not yet sexually preyed upon anyone. We would not and should not allow persons to be detained simply in virtue of having the disorder.¹¹⁵ One might think that the reason is that the diagnosis is not sufficiently certain without a corroborating act. That is the epistemic

112. See *supra* note 93 and accompanying text.

113. *Kansas v. Crane*, 534 U.S. 407, 411 (2002) (emphasis omitted) (quoting *Hendricks*, 521 U.S. at 358).

114. Compare the partial defense of extreme emotional disturbance proposed by MODEL PENAL CODE § 210.3(1)(b) (1962).

115. As the Court in *Hendricks* pointed out, there were actually four conditions that would allow for LTPD of SVPs, only the first of which was conviction for a sexually violent offense. *Hendricks*, 521 U.S. at 352. But the other three were all variations of the kind of mental illness that should suffice for detention under *Addington*. *Id.*; see *supra* note 21 and accompanying text.

view of the act. But the premise of that view, that one learns who *really* has the disorder by seeing who is convicted of a crime of sexual violence, is surely dubious. The more sensible view is that it is the act of indulging the impulses caused by the disorder that justifies treating the actor, for some period of time, as someone who has lost the status of a presumptively law-abiding person. Until that time, the actor deserves to benefit from the normal presumption that he will be law-abiding and will do what needs to be done to resist the temptation to prey sexually upon others.¹¹⁶

V. DEFENDING THE RETRIBUTIVE BONA FIDES OF THE LOST STATUS VIEW

I have claimed throughout that the lost status view contributes an important dimension to *retributive* punishment theory. It expresses a particular form of condemnation for certain crimes. In particular, it expresses the thought that certain especially serious crimes or recidivist patterns of serious crime show such disrespect for the law and the victims of the crime that the actor deserves to lose, for a period of time, the benefit of the presumption that he will be law-abiding in the future.

In this last part of the Article, I want to do two things: First, I want to defend the idea that this kind of punishment is really defensible as a retributive punishment. This will involve responding to five objections. Second, I want to say a little bit about what it would mean for the punishment to be proportional to the crime, as retributive punishments must be.

A. *Five Objections and Replies*

The first objection is that the loss of an immunity is just not how retributive punishment works; it works by depriving people, in decreasing order of severity, of life, liberty, or property.¹¹⁷ In other words, it works through imposition of the death penalty, imprisonment, or fines. The problem with this objection is that it is naïve on two levels. First, even if we restrict ourselves to this traditional triad of punishments, it is clear that there is no *one* form of punishment that is

116. For a similar view, see Corrado, *supra* note 29, at 811.

117. See U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”).

the retributive form of punishment. Second, the traditional triad is far from exhausting the options that retributivists have used. For example, the U.S. Constitution mentions, in passing, another traditional form of punishment, now thought of as barbaric, namely, maiming, when it says that no one shall “be subject for the same offence to be twice put in jeopardy of life or limb.”¹¹⁸ This certainly fits the most ancient retributive idea, *lex talionis*, calling for an eye for an eye and a tooth for a tooth.¹¹⁹ In a related vein, whipping was common in the United States and elsewhere in earlier centuries.¹²⁰ There have also been shaming punishments, such as the stocks,¹²¹ and hard labor, now presented in more humane form as “community service,”¹²² and other punishments as well. I certainly do not mean to endorse all or even most elements in this wide range of punishments. Many are needlessly cruel and counterproductive. But I do mean to point out that imprisonment is not the only option for a retributivist.¹²³ Therefore, the burden would seem to be on critics to show that there is some reason this particular loss of immunity cannot complement those other punishments that are acceptable to retributivists.

A second objection is that the lost status view is dehumanizing. It might be thought dehumanizing because, in merely weighing a detained actor’s interest in liberty against society’s interest in security, it treats autonomous persons like dangerous animals.¹²⁴ But the lost status view does not treat those who are sentenced to lost immunity to LTPD as mere animals across the board. It does not imply that they lose any of their other rights central to their humanity, such as the rights of freedom of conscience, of religion, or of speech; the right not to be used for medical experiments without their consent; the right not to be used as slave labor; and the right to legally contest their legal status and treatment.¹²⁵ The loss of status is limited to the loss of the presumption

118. *Id.* (emphasis added).

119. See Laws of Hammurabi, in LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 121, 196–97, 200 (Martha T. Roth trans., 1995).

120. See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 733 (1998); see also FYODOR DOSTOYEVSKY, *THE HOUSE OF THE DEAD* 71 (David McDuff trans., Penguin Books 1985) (1860).

121. See Garvey, *supra* note 120, at 733.

122. See, e.g., DUFF, *supra* note 15, at 108.

123. Indeed, prisons are a relatively recent innovation. See generally ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* (1992) (describing the evolution of prisons in the United States).

124. See *supra* note 4 and accompanying text.

125. This list of rights can be found in the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, in Article 18(1) (freedom of thought, conscience, and religion); Article 7 (freedom from unconsented medical experimentation); Article 8 (freedom from slave labor); Article 14 (right to contest legal status).

that an actor will be law-abiding. Indeed, because it limits an actor's detention to those cases in which his interest in liberty is outweighed by the community's interest in security, and because it requires the state to use the least restrictive interventions that will meet the security interests of the community, it promises to be a more humane form of punishment than the loss of liberty itself.

A third objection is that loss of immunity to LTPD is obviously concerned with *future* actions, but retributivism must base punishment on *past* actions. This objection confuses, as Douglas Husak points out, the question, "[W]hat is the purpose for which punishment is inflicted?," with the question, "[I]n virtue of what is punishment inflicted?"¹²⁶ Retributivism requires that punishment be imposed only in virtue of past criminal actions, but it does not require that punishment be imposed *only* for the purpose of responding to past acts. A moderate and plausible form of retributivism does not require, as Kant's extreme form of retributivism did require, that the punishment exactly match the crime with no consideration given to other purposes that might be met.¹²⁷ Rather, even as strict a retributivist as Michael Moore acknowledges that "[s]eparate argument is needed to answer [the] 'how much' and 'what type' questions, *after* one has described why one is punishing at all."¹²⁸ What a moderate and plausible form of retributivism is committed to is only three things: (1) that it is intrinsically good to punish the guilty as much as they deserve on the basis of a fair scheme of punishment, (2) that it is intrinsically bad to punish the innocent mistakenly or to punish anyone more than that person deserves on a fair scheme of punishment, and (3) that it is impermissible to aim to punish the innocent or to inflict on anyone a punishment greater than he deserves in the fair system of punishment that was part of the legal order in effect at the time and place he committed his crime.¹²⁹ This view leaves open the option that a fair scheme of punishment may and should be designed, in

126. Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 SAN DIEGO L. REV. 1173, 1186 (2011).

127. "[W]oe to him who crawls through the windings of eudaemonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises." IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 141 (Mary Gregor trans., Cambridge Univ. Press 1991). *But see infra* Part V.B (arguing that even Kant's theory fails to meet his high standard).

128. MOORE, *supra* note 84, at 88.

129. This is a paraphrase and slight modification of a formulation found in Ferzan, *supra* note 29 (citing ALEXANDER & FERZAN WITH MORSE, *supra* note 5, at 3–19).

part, to achieve the social good of preventing future crime. Lost immunity to LTPD is no different from punitive sentences in this regard: both help protect innocent people from future criminal acts, and both can be imposed only insofar as they are a fitting and proportional punishment for past crimes.

A fourth objection is that the lost status view is not really concerned with expressing or communicating condemnation for wrongs done¹³⁰ but is instead really just about depriving people of an immunity if they do not deserve to benefit from it. Retributivism requires the former; the latter is more closely related to civil commitment for the mentally ill and dangerous. Moreover, this is no mere gripe about labeling. Civil commitment for the mentally ill is justifiable only insofar as their capacity to operate as autonomous actors is compromised.¹³¹ Those who lose their status as presumptively law-abiding generally retain the autonomous capacity. Therefore, if their lost status cannot be justified in retributive terms, then it runs afoul of the Autonomy-Respecting Model.

The response to this objection is, much like the response to the last objection, that it exaggerates what is required for a punishment to be retributive. A punishment does not have to be *solely* concerned with expressing or communicating censure for wrongs done to be retributive. It can also be fitting. Being fitting in no way undermines the idea that the loss can convey the censure essential to retributivism. Rather, it simply refines the message, adding a bit of content, so that instead of saying simply, “Your deed merits condemnation,” it says, “Your deed was so heinous that you no longer retain the *right* to walk freely among us.” The loss of immunity, then, is not just fitting in the way that civil commitment of the mentally ill and dangerous is fitting. It is also responsive to the wrong the person has done and expressive of censure and condemnation for the choice.

The last objection is that a convict’s being subject to LTPD *after* having served a punitive sentence can only be an exercise of pure preventive detention because the retributive justification for punishment has been exhausted. This, it can be argued, is made clear from the fact that we normally speak of people who have served their time in prison as having “paid their debt” to society.

There are two problems with this objection. First, it is not so clear, in practice, that we do feel that those who have served their time have paid their debt in full in such a way as to deserve no continuing loss of rights. There are a range of disabilities that follow certain convicts post-sentence, ranging from the LTPD of SVPs, to registration requirements for certain

130. See *supra* note 15 and accompanying text.

131. See *supra* note 21 and accompanying text.

sex offenders, to loss of the right to use firearms, to the loss of voting rights of many convicted felons. These are officially not justified as punitive,¹³² and some are morally if not constitutionally dubious.¹³³ But all reflect the general belief that a convict may deserve to lose more than just liberty for the period of the punitive sentence. An honest treatment of these practices would recognize them not only as predicated on a conviction but as part of the punishment in a larger sense.¹³⁴

132. See *Megan's Law*, CAL. DEP'T OF JUSTICE, <http://www.meganslaw.ca.gov/> (last updated 2009). A law that declares the deprivation it imposes to be civil, not criminal, may still be judged criminal for purposes of applying the Constitution's restriction on ex post facto laws if the effect is sufficiently punitive. The traditional test has seven factors: [(1)] Whether the sanction involves an affirmative disability or restraint, [(2)] whether it has historically been regarded as a punishment, [(3)] whether it comes into play only on a finding of scienter, [(4)] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [(5)] whether the behavior to which it applies is already a crime, [(6)] whether an alternative purpose to which it may rationally be connected is assignable for it, and [(7)] whether it appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (citations omitted). The Court has held that these factors “are ‘neither exhaustive nor dispositive,’ but are ‘useful guideposts.’” *Smith v. Doe*, 538 U.S. 84, 97 (2003) (citations omitted) (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980); *Hudson v. United States*, 522 U.S. 93, 99 (1997)). The Court has also held that “‘only the clearest proof’ will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Hudson*, 522 U.S. at 100 (citation omitted) (quoting *Ward*, 448 U.S. at 249).

133. A large majority of focus groups based in Rutgers University—faculty and students—“were opposed to the *permanent* disenfranchisement of felons.” Milton Heumann, Brian K. Pinaire & Thomas Clark, *Beyond the Sentence: Public Perceptions of Collateral Consequences for Felony Offenders*, 41 CRIM. L. BULL. 24, 34 (2005). This fits an earlier finding in a national study that found that “a supermajority (81.7%) of Americans opposed the *permanent* disenfranchisement of felons.” *Id.* at 27. The typical concern in the focus groups was that disenfranchisement is inconsistent with reintegration into the community, though many wanted to make distinctions between different kinds of felonies. *Id.* at 34–35. *But see Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (holding that denying felons who had served their time the right to vote did not violate their constitutional right to equal protection under the law).

134. Notwithstanding the Court’s “clearest proof rule,” *Hudson*, 522 U.S. at 100, I believe that most should also be recognized as punitive in the narrow sense relevant to the Ex Post Facto Clause. See, e.g., *Simmons v. Galvin*, 575 F.3d 24, 62, 70 (1st Cir. 2009) (Torruella, J., dissenting) (arguing that the Massachusetts constitutional amendment disqualifying currently incarcerated felons from voting in certain elections violated the Ex Post Facto Clause under the *Mendoza-Martinez* test), *cert. denied*, 131 S. Ct. 412 (2010); *State v. Schmidt*, 23 P.3d 462, 477 (Wash. 2001) (Johnson, J., dissenting) (arguing that “restricting an individual’s right to bear arms is a punishment for a felony conviction, not a regulation”); see also BURT NEUBORNE & ARTHUR EISENBERG, *THE RIGHTS OF CANDIDATES AND VOTERS* 32 (1976) (“The most straightforward explanation of [criminal disenfranchisement] provisions . . . is that they are

Second, as discussed in Part IV.A, there are different purposes served by punitive detention and loss of immunity to LTPD. The former serves, among other things, to deter others from committing crimes; the latter does not, or at least that is not so central to its function. Additionally, the former extends sentences when criminal acts cause harm because those who cause harm have more to atone for, and longer sentences, with greater deterrent value, allow them to bear that burden. Those who do not cause harm, then, will have relatively short punitive sentences, which may leave an amount of time that would be fitting for lost immunity to LTPD yet to run. Similar things were said about punitive sentences for recidivists and for SVPs. In all of these cases, the deserved punitive sentence may not cover the period of time that it seems is fitting to strip someone of immunity to LTPD. Thus, it is not obviously true that criminals who have served a prison sentence have fully paid their debts to society; they may still owe more in terms of other sanctions that can reasonably be imposed.

B. Proportionality in the Lost Status View

This last objection brings us to the second issue concerning the retributive bona fides of the lost status view: how can we set some notion of proportional loss of immunity to LTPD? To answer that question it will help to understand proportionality in a plausible way when it comes to punitive detention. We can then apply what seems true there to lost immunity to LTPD.

The position I think we must take for proportionality in punitive sentencing is fundamentally an ordinal, not a cardinal, notion, but one in which the ordinal scale is anchored by reference to two different types of considerations: (1) symbolic considerations, and (2) utilitarian ones. To see why this seems right, let us start by considering why a cardinal approach—one that would set the magnitude of penalties to some measure that is absolutely appropriate for the crime committed—is implausible.

The only model for a cardinal approach of which I am aware is Kant's model of *ius talionis*: “[W]hatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.”¹³⁵ What does it mean to “steal from yourself”? Kant answers,

penal in nature and that the deprivation of the franchise is yet another form of punishment that is imposed upon persons convicted of felonies.”), *quoted in* Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1058 (2002).

135. KANT, *supra* note 127, at 141.

“Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property.”¹³⁶

The problems with this model are obvious. It is, first of all, likely to be too harsh. Moreover, it is radically unclear how to apply the system, which may compound the first problem, but it also adds the problem that it may in some cases be too lenient. Starting with the charge that Kant’s model is too harsh, one way to see this is to consider more of what Kant says about the punishment for stealing. As Kant himself notes, if persons do not have any right to property, they can survive only if others provide for them. Moreover, because “the state will not provide for him free of charge, he must let it have his powers for any kind of work it pleases (in convict or prison labor) and is reduced to the status of a slave for a certain time, or permanently if the state sees fit.”¹³⁷ A lifetime of slavery as a just punishment for theft?¹³⁸

Next, note that the length of the sentence hardly avoids Kant’s critique of other principles that “are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.”¹³⁹ What could be more fluctuating than letting the state decide whether to sentence someone to slavery for a “certain time” or “permanently” as it “sees fit”? At best, just and well-governed judges, given such a directive, would consult utilitarian principles. But the result would be far *less* bounded than any contemporary version of limiting retributivism.¹⁴⁰

Returning to the first problem, that of harshness, what are we supposed to do with criminals who do things like torture and rape their victims? Have they deprived themselves of any security against torture and rape? Must the state torture and rape them, or must it merely stand by and let others do so? Or is the category of harm they inflicted upon themselves simply loss of protection from physical assault, in which case they must put themselves at the mercy of the state to protect them, putting them in exactly the same position as thieves? If the state must either rape and torture them, or even if it must merely stand by and allow

136. *Id.* at 142.

137. *Id.*

138. For a fan of *Les Misérables*, like me, it is impossible to think of this and not think of Jean Valjean’s protest: “All I did was steal some bread!”

139. KANT, *supra* note 127, at 141.

140. See *supra* notes 63–67 and accompanying text.

them to be raped and tortured, then the punishment according to Kant's vision of *ius talionis* is not only too harsh but grotesque. If instead the state must protect them but at the cost of enslaving them just as it would enslave thieves, then because Kant's standard offers the state no guidance on how long it can enslave those who assault others, the punishment might be too lenient. And for the icing on the cake, it is not at all clear how one could even begin to determine which is the correct way to conceive of what torturing rapists will for themselves—the loss of protection from torture and rape in particular, or assault in general.

Because I see no alternative candidate for a cardinal account of retributive punishment, I turn to the idea of ordinal proportionality, according to which more severe crimes deserve more severe punishments—more severe punishments express greater censure, conforming to the judgment that the act was more blameworthy¹⁴¹—but there is no absolutely correct measure for any given crime. Interestingly, Paul Robinson and Robert Kurzban argue, based on empirical research, that although people do not agree on the absolute level of punishment fitting for a particular crime, they do agree to a great extent “on the relative degree of blameworthiness among a set of cases.”¹⁴² Moreover,

[o]nce a society determines the end point of the punishment continuum, shared intuitions of justice will set each case on a specific point on the continuum in its appropriate place relative to other cases. The specific amount of punishment due each case is fixed, then, not because there is some magical connection between that amount of punishment and that particular offense but rather because that is the amount of punishment needed to distinguish that case from cases of noticeably greater and lesser blameworthiness on the limited continuum of punishment.¹⁴³

This seems like a fairly plausible account of how an ordinal scheme of proportionality would work and be morally acceptable. But it leaves open how a society should come to determine the endpoints of the punishment continuum.¹⁴⁴ I want to suggest that two factors—other than the difference made by causing a harm—collectively have a role in determining those endpoints: (1) symbolic considerations, and (2) utilitarian considerations. I start with symbolic considerations. There should be

141. See VON HIRSCH & ASHWORTH, *supra* note 15, at 134 (“Disproportionate punishments are unjust . . . because they purport to condemn the actor for his conduct and yet visit more or less censure on him than the degree of blameworthiness of that conduct would warrant.”).

142. Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1854–55 (2007).

143. *Id.* at 1855.

144. A more complete treatment of ordinal proportionality would also include the discussion of spacing between crimes. See VON HIRSCH & ASHWORTH, *supra* note 15, at 140.

some sense that the most serious crimes are met with a serious penalty. Of course, what counts as a serious penalty will vary from culture to culture. But crimes such as murder should never be met with the equivalent of a slap on the wrist, even if, per impossible, the utilitarian considerations called for that. Additionally, trivial crimes should be met with penalties that *are* effectively a slap on the wrist—enough to convey the message of condemnation but not much more. Thus, even if utilitarian considerations pushed in the direction of punishing *all* crime quite severely, the bottom end of the punishment spectrum should still be held low.

Turning to the utilitarian considerations, the state should seek to strike a balance between, on the one hand, achieving utilitarian goals such as deterrence, and on the other hand, respecting the utilitarian principle of parsimony: that hard treatment is a bad thing in itself and that the state should therefore impose on convicts the least effective hard treatment. These considerations by themselves could lead to a clear inversion of proportionality because, for example, it might be most effective to punish high-profile defendants more severely than low-profile ones because their punishment would have more deterrent effect.¹⁴⁵ Or it could be that the only way to deter some not very serious crimes is by punishing them quite severely. These sorts of utilitarian inversions of proportionality would be ruled out by a notion of ordinal proportionality. In addition, the tendency to inflict harsh punishments across the board—to weigh parsimony parsimoniously—would be ruled out by the symbolic anchoring idea. Taken together, however, the idea of ordinal proportionality, anchored by an appeal to both symbolic and utilitarian considerations, seems to provide a fair measure for a system of proportional punishment for any given legal regime.

Now the question is, How could those ideas be applied in the context of lost immunity to LTPD? The answer is that ordinal proportionality would apply in the same way, allowing longer periods of lost immunity for worse crimes or greater patterns of criminal recidivism—for crimes that demonstrate a greater disrespect for the law and the rights of the victims. And the anchoring ideas would be similar. On the symbolic side, no individuals would deserve to lose immunity to LTPD unless their crimes were quite serious or their patterns of criminal activity quite long with at least some serious elements in it. For crimes that just meet

145. *See id.* at 132.

that cutoff—and I will suppose that for first convictions aggravated assault is at the low end for such a cutoff—the period of lost immunity should be on the low end. Thus I would endorse the example of the person who commits aggravated assault but gets “lucky” and does not harm the intended victim, and who gets sentenced to three-and-a-half years of punitive detention, also getting another two-and-a-half years of lost immunity to LTPD.¹⁴⁶ The six years of lost immunity to LTPD is far from trivial, but it is also on the low end of periods that might make any meaningful difference to the community. Meanwhile, at the high end, the period of lost status should track that of punitive sentences. If the latter can last for the rest of a person’s life, then so can the former; if the punitive sentence can last only for a term of years, then it would seem extreme for lost immunity to last longer. As for utilitarian considerations, their center of gravity in the context of lost immunity to LTPD is obviously incapacitation. Those would push in the direction of allowing longer periods of lost status. The concern with parsimony would be handled primarily through the fact that any individual would be subjected to only that amount of lost liberty necessary for the security of others. But the upper end, and the overall distribution of sentences of lost immunity, would still be constrained by the notion of ordinal proportionality and the symbolic anchors just discussed.

One final clarification is called for. Assessments of future dangerousness are not a factor in determining the length of the lost status punishment. They are relevant only to determining whether actors who have lost their status as presumptively law-abiding persons should actually be detained. Of course, predictions of future dangerousness are likely to be based on past actions, and thus, there is no clean separation between the past actions setting the length of the lost immunity period and the question of dangerousness. But the connection is not logically tight. It is only a reflection of common elements in both considerations. For example, Jones may have committed a serious crime for idiosyncratic reasons that are unlikely to repeat. He might then be subject to a lost status sentence because of his highly culpable act but might not actually deserve to be subject to LTPD because he might be held not to be dangerous. And regardless of how dangerous a person seems, if he is judged to be an autonomous and accountable person, then when the lost status sentence is up, he must be treated as one and released and again given the presumption of being a law-abiding person.¹⁴⁷

146. See *supra* notes 73–75 and accompanying text.

147. See *Foucha v. Louisiana*, 504 U.S. 71, 80–83 (1992) (holding that states cannot detain people who have served their sentences simply because they are dangerous).

VI. CONCLUSION

For the foregoing reasons, I think it would improve both our security and the fairness of our criminal justice system to add the punishment of lost immunity to LTPD, based on lost status as a presumptively law-abiding citizen, to the arsenal of sanctions the state has at its disposal. It not only would help us, as a nation, deal more effectively with serious threats from terrorists and the like, but it would also allow us to avoid the most egregiously unjust uses of LTPD, such as for recidivists who are not committing serious crimes.

I want to conclude with a brief discussion of two practical issues. First, if a state added this sanction to its arsenal, that would clearly affect plea bargaining. That would not, however, clearly be a bad thing. Prosecutors would have a new punishment to bargain with, but defendants would have a more humane alternative to bargain for. Besides, plea bargains operate in the “shadow” of the trial system.¹⁴⁸ So the same basic concern would still arise: would a prison sentence that a person is bargaining for be so short that that person should still suffer a longer period of lost immunity to LTPD afterwards? Some defendants may be able to bargain away both the punitive sentence and a period of lost immunity to LTPD. But that already happens with plea bargains that include the possibility of probation rather than time in prison. In the end, therefore, I do not think this would be terribly disruptive of the way a criminal justice system that is heavily reliant on plea bargaining would work.

Second, it is worth asking whether sentences of lost immunity to LTPD would run into ex post facto problems. Clearly that would not be a problem for those whose crimes are committed after any laws explicitly creating this sanction are passed. But what about those whose crimes have already been committed? I think the answer depends on the kind of sentence they are now serving. Consider the following three categories of cases. First, if someone is serving a recidivist sentence under a three-strikes regime, a change to a lost status regime would not inflict any new punishment on that person. It would, instead, effectively commute the sentence into something more humane and just. There can be no ex post facto problem with that.

148. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464–65 (2004).

Second, if someone is subject to civil commitment as an SVP, it is debatable whether there would be a problem. On the one hand, the person's treatment would go from being categorized as civil to being categorized as criminal. That change would trigger the concern with ex post facto limits. On the other hand, if courts are willing to look past this categorical but superficial distinction and examine the substance of the treatment, they may come to recognize that the detention of SVPs is already predicated on a prior criminal act and that shifting to the lost status model simply expresses more clearly, and reframes more humanely, what was already going on.

Third, in some cases, such as those of terrorists who give material support to terrorist groups (serious support, such as major amounts of fundraising), or those who attempt crimes where the sentence without the harm is small and we worry that the person *deserves* to lose the status of a presumptively law-abiding person for a period of time longer than the punitive sentence, the Ex Post Facto Clause would be a barrier to retroactively imposing sentences of lost immunity to LTPD. But such limits are best handled by recognizing them and moving on in a lawful way by passing new laws and applying them only prospectively.¹⁴⁹ If legislators think this would be a good tool to have in the judicial arsenal, then they should pass the legislation and let it work going forward.

149. Consider, for example, the laws criminalizing material support for terrorism. Sections 2339A and 2339B of Title 18 of the U.S. Code “were not amended to expressly apply extraterritorially to non-U.S. persons until October 2001 and December 2004, respectively.” DEP’T OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE 22 n.21 (Jan. 22, 2010), *available at* <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>. That limits their utility in prosecuting detainees in Guantanamo. So be it. That does not justify either imposing LTPD on those who cannot justifiably be subjected to it under the Autonomy-Respecting Model or violating the Ex Post Facto Clause. U.S. CONST. art. I, § 9, cl. 3. If such a limit applied to U.S. citizens, it would call for releasing and policing them as the state would do with any citizen whom it cannot convict of a crime.