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Retributive Justifications for Jail Diversion of Individuals with Mental Disorder

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Abstract Jail diversion programs have proliferated across the United States as a means to decrease the incarceration of individuals with mental illnesses. These programs include pre-adjudication initiatives, such as Crisis Intervention Teams, as well as post-adjudication programs, such as mental health courts and specialized probationary services. Post-adjudication programs often operate at the point of sentencing, so their comportment with criminal justice norms is crucial. This article investigates whether and under what circumstances post-adjudication diversion for offenders with serious mental illnesses may cohere with principles of retributive justice. Key tenets of retributive theory are that punishments must not be inhumane and that their severity must be proportionate to an offender's desert. Three retributive rationales could justify jail diversion for offenders with serious mental illnesses: reduced culpability, the avoidance of inhumane punishment, and the achievement of punishment of equal impact with similarly situated offenders. The article explores current proposals to effectuate these rationales, their manifestations in law,

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and how these considerations may impact decisions to divert individuals with serious mental illnesses from jail to punishment in the community.

In response to burgeoning numbers of offenders with serious mental illnesses and the spiraling cost of incarcerative care for this population, jurisdictions across the United States have launched diversion programs aimed at shunting offenders away from jails and into community treatment (Redlich, Steadman, Robbins & Swanson, 2006; Skeem, Manchak, & Peterson, 2011). These programs include pre-adjudication initiatives, such as police-based responses to individuals with mental illnesses, as well as post-adjudication programs, such as mental health courts and specialized probationary services. Post-adjudication programs often operate at the point of sentencing, so the degree to which they comport with principles of justice is important. Retributive principles of just deserts and proportionate punishment animate the sentencing codes of many, if not most, jurisdictions. Three retributive rationales could justify jail diversion for offenders with serious mental illnesses: reduced culpability, the avoidance of inhumane punishment, and the achievement of punishment of equal impact.²

Punishment, Retributivism, and Proportionality

To understand how mental disorder may warrant a disposition other than incarceration under retributive theory, it is first necessary to lay some theoretical groundwork. For centuries, philosophers have struggled to justify the state's power to punish wrongdoers and the relative distribution of punishment among offenders (Von Hirsch, 1990, pp. 259–260). Agreement on the precise definition of “punishment” is elusive, (Bagaric, 2016, pp. 45–48), but, broadly speaking, criminal punishment involves

² Much of Part C of this article is drawn from E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147 (2013) and E. Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 CATH. U.L. REV. 625 (2014).

the state's imposition of a typically unpleasant condition on an individual in response to that individual's violation of a legal rule (Duff, 2001, pp. xiv–xv; Hart, 1968, pp. 4–5; Von Hirsch, 1976, p. 35). Critically, the principles that justify the state's power to impose punishment may differ from those that control the distribution of punishment—the type and quantity of punishment the state should order a particular offender to suffer for a particular crime relative to the penalties other offenders should receive for their offenses (Hart, 1968, p. 4).

Retribution, one of several traditional justifications for punishment, animates the sentencing codes of many jurisdictions (Frase, 2005, p. 76 n. 22; Robinson, 2008, pp. 145–146). There are numerous strands of retributivism, (Berman, 2012; Cottingham, 1979), but one dominant viewpoint holds that state-imposed punishment expresses blame or censure (Feinberg, 1970, p. 98; Hudson, 2003, p. 47). According to some expressive perspectives, the hard treatment inherent in a criminal sanction should reflect the degree of censure appropriate for an offender's blameworthiness (Duff, 2001, p. 132). This viewpoint inspired the development of just desert theory, which rose to prominence in the late 1970s as a means of curtailing sentencing discretion and bounding the state's coercive power (Kellogg, 1978). This theory, propounded most thoroughly and effectively by Professor Andrew von Hirsch,³ allocates punishment according to a proportionality equation involving culpability, seriousness of harm, and severity of penalty (Von Hirsch & Ashworth, 2005, p. 4).

³ Von Hirsch developed and refined his sentencing theory over the course of four books: *Doing Justice: The Choice of Punishments* 35 (1976), *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1985), *Censure and Sanctions* (1993), and, with Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (2005).

Although philosophers have long distinguished “punishment” as an intentional deprivation of liberty from “its accessories,” which include both the foreseeable and unforeseeable consequences of such deprivation, (Bedau, 2001, pp. 111–112; Mabbott, 1939, p. 165), a number of scholars have recently argued that the state should be morally responsible for the foreseeable results of its punitive actions (Johnston, 2013, pp. 190–191; Kolber, 2009, pp. 185–186). Foreseeable, but unintentional, consequences could include, for example, the degeneration of an individual’s mental health while confined in segregation, the exacerbation of preexisting health conditions, emotional distress, or even victimization by larger and stronger inmates. Just desert theory measures a penalty’s severity by how the sanction typically affects an offender’s interests and quality of life from the perspective of the typical offender (Von Hirsch, 1993, p. 35). Thus, just desert theory relies upon an understanding of punishment broad enough to encompass at least foreseeable, substantial risks of serious harm, proximately caused by the state in the context of incarceration (Johnston, 2013, p. 186, pp. 218–219; Von Hirsch & Ashworth, 2005, p. 176).

According to just desert theory, three requirements must be satisfied for a penalty to properly reflect the degree of censure warranted by an offense (Von Hirsch, 1990, pp. 278–279). First, criminal sanctions must take a punitive form, such as a deprivation of liberty or property, so that deprivations are imposed in a manner that expresses censure or blame (Von Hirsch & Ashworth, 2005, p. 135). Second, the severity of a sanction should convey the degree of the intended censure (Von Hirsch & Ashworth, 2005, p. 135). Finally, to effectuate the second requirement, punitive sanctions should reflect “ordinal proportionality;” that is, they “should be arrayed according to the degree of

blameworthiness (i.e., seriousness) of the conduct.” (Von Hirsch & Ashworth, 2005, pp. 138–141). Blameworthiness is an amalgamation of the harm caused by an offense and the offender’s culpability in effecting that harm (Von Hirsch & Ashworth, 2005).

Three aspects of ordinal proportionality warrant emphasis. First, ordinal proportionality demands parity: individuals convicted of crimes of comparable seriousness should receive penalties of comparable severity (Von Hirsch & Ashworth, 2005, pp. 139–140). Such offenders need not receive the same punishment, but they should receive penalties of substantially the same degree of onerousness (Von Hirsch & Ashworth, 2005, pp. 139–140). For example, if simple assault were considered roughly as serious as a theft of \$200 to \$2,000, offenders who commit either crime should receive penalties of roughly the same severity, perhaps probation for three to six months. Second, penalties should be ordered so that their relative severity reflects the degree of seriousness of their corresponding crimes (Von Hirsch & Ashworth, 2005, p. 140). For example, offenders should receive a more serious penalty for committing murder than a property offense. Finally, penalties should be spaced so that the difference between two penalties’ onerousness mirrors and calls attention to the difference between two crimes’ seriousness (Von Hirsch, 1976, p. 90). In addition, the overall magnitude and anchoring points of a penalty system are established by “cardinal magnitudes,” the absolute severity levels that must be chosen for certain crimes (Johnston, 2013, pp. 209–210).

This proportionality scheme supplies the necessary structure for assessing how mental illness may factor into the allocation and distribution of punishment (Johnston, 2013). The following sections explore three retributive rationales that could support jail

diversion for offenders with serious mental illnesses: reduced culpability, the avoidance of inhumane punishment, and the achievement of punishment of equal impact.⁴

Reduction of Culpability

When symptoms of mental illness at the time of the crime diminish an offender's culpability, a judge should reduce the length or severity of her punishment. Ordinal aspects of the proportionality axiom dictate that less blameworthy offenders receive less punishment than more culpable offenders for effecting the same harm. An individual's culpability depends on her level of personal responsibility for her conduct. Serious mental illness at the time of an offense may serve as a mitigating factor to the extent that the offender had a reduced ability to understand the nature of her acts or their wrongfulness, a reduced ability to control her actions, or a diminished capacity to form the necessary mens rea for a crime.

Legal theorists have long wrestled with which effects of mental illness warrant mitigation of punishment. One leading theory asserts that mental illness reduces culpability to the extent it results in irrationality (Moore, 1984, pp. 372–373). Stephen Morse (1997) argues that rationality “is the most general, important prerequisite to being morally responsible” and that, to merit criminal punishment, an individual must have “the general capacity to understand and to be guided by the reasons that support a moral prohibition that we accept” (pp. 24–25). Morse identifies two forms of irrationality: an individual may be “unable rationally to comprehend the facts that bear on the morality of [her] action or [be]

⁴ Importantly, this article assumes that offenders are competent to plead guilty and be sentenced. It also assumes that offenders are culpable, i.e. they should not be spared punishment on grounds of insanity (or actual innocence). These assumptions, while perhaps questionable in the context of individuals with serious mental illnesses who are subject to diversion, are beyond the scope of this article.

unable rationally to comprehend the applicable moral or legal code” (p. 25). Society, Morse (1996) submits, cannot reasonably demand that a person obey rules she is incapable of following or understanding (p. 530). When obedience to the law is thus beyond a person’s cognitive capacities, punishment is an unfair and inappropriate means of addressing the offender’s behavior (Morse, 1996, p. 530).

In addition, some scholars have argued that mental illness may reduce culpability to the extent it renders a person incapable of controlling her behavior at the time of a crime (Moore, 1984, p. 374). For example, Morse (1994) hypothesizes that mental disorder may result in internal duress, whereby the offender is unable to resist the demands of her psyche (pp. 1619–1620). Mental conditions capable of exerting such extraordinary psychophysical pressure include compulsive disorders, which traditionally have been conceptualized as involving volitional or control deficiencies (Morse, 1994, pp. 1620–1621; Morse, 1997, p. 29). However, Morse ultimately finds that distinguishing between internal duress and irrationality may be unnecessary, as most cases of the former are best understood as instances of the latter (Morse, 1994, p. 1624; Morse, 2003, p. 295). Similarly, Christopher Slobogin (2000) argues that the concept of “controllessness” captures blamelessness from reduced rationality, affective appreciation, and volitionality (pp. 1237–1238). To measure the extent to which an individual’s mental disorder meaningfully reduced her culpability, Slobogin advocates that triers of fact should consider mental illness as part of the traditional inquiry into whether a criminal offender had the required mens rea or a justification or excuse for the crime (pp. 1238–1239).

While much ink has been spilt on which mental conditions so eviscerate culpability as to warrant acquittal, little attention has been paid to the effect partial culpability should

have on the allocation of punishment. Partial culpability could be conceptualized as a partial excuse (which reduces the grade of an offense) or a mitigating excuse (which merely carries sentencing consequences) (Wasik, 1982, pp. 524–525). Recognizing that irrationality warrants lessened criminal responsibility, Herbert Fingarette and Ann Fingarette Hasse (1979) have proposed a “partial disability of mind” defense calling for mitigation when the finder of fact concludes that the defendant lacked the mental capacity for rational conduct in relation to the criminal significance of her act and where that lack of capacity “played a material role but not the chief or the predominant role in the defendant’s commission of the alleged criminal act” (p. 265). A jury’s finding of “partial disability of the mind” would not affect the defendant’s degree of criminal liability but would require the sentencing judge to mitigate the defendant’s punishment within her discretion (Fingarette & Hasse, 1979, p. 245).

Recently, several scholars have argued that a finding of partial culpability on account of mental illness should result in a standardized punishment discount or perhaps a reduction in the grade of the offense or a general adjustment in a state’s sentencing guideline system (Robinson, 2011, pp. 308-309). For example, inspired by Fingarette and Hasse, Morse (2003) has advocated for the adoption of a “partial responsibility” defense that would grant a fixed punishment discount upon a jury’s finding that, “at the time of the crime, the defendant suffered from substantially diminished rationality for which the defendant was not responsible and which substantially affected the defendant’s criminal conduct” (p. 300). Morse argues that the penalty discount should be inversely related to crime seriousness and that, to parallel the defendant’s substantially diminished powers of rationality, the discount should also be substantial, perhaps of the order of 50% (Morse,

2003, p. 303; Morse, 2011). Other scholars have argued, however, that diminished responsibility is best assessed during sentencing, as opposed to the guilt phase as Morse recommends (Arenella, 1977; Slobogin, 1985; Wasik, 1982).

More recently, Mirko Bagaric (2016) has proposed that any offender who had a mental impairment at the time of the offense should receive a penalty discount of around 10% on account of her reduced culpability. Bagaric argues that a penalty reduction is necessary because all mental disorders to some degree reduce individuals' capacities "to exercise sound judgment and make sensible choices" and thus diminish blameworthiness (p. 35).⁵ He asserts the penalty should be small, however, because these offenders were not acquitted on grounds of insanity and thus presumably understood the wrongfulness of their acts and had the requisite mens rea for the crime (pp. 35–38). Bagaric argues that sentencers should assume the existence of a nexus between a mental disorder and a criminal act given the difficulty of ascertaining causation and the contested nature of this subject in criminal law (pp. 38–39).

Increased Foreseeable Severity of Sentence

Serious mental illness also increases the foreseeable hardship that a sanction—in particular, incarceration—will exert (Johnston, 2013; Johnston, 2014). Confinement within the general prison population can be seriously damaging for an inmate with a serious mental illness. The default rule followed by many state correctional agencies, as well as the Federal Bureau of Prisons, is to house inmates with mental disorders within the general

⁵ Importantly, many people with mental illnesses are fully functional and maintain rationality. The justification for sentencing mitigation may be considerably stronger for individuals with serious mental illnesses who suffer from serious cognitive impairments and are more susceptible to victimization.

prison population at the appropriate security level (Human Rights Watch, 2003). This arrangement may be appropriate for those individuals with diagnosed mental illnesses who are fully functional, maintain rationality, and are able to fare reasonably well in penal environments. Indeed, this housing arrangement could facilitate equality of opportunity, full participation in programs, and independent living for some individuals with mental illnesses (Anderson, 1999). However, housing in the general population can be quite hazardous for individuals with serious mental illnesses who are vulnerable to irrationality, impaired functioning, and risk of victimization.

Individuals with mental illnesses often do not receive mental health treatment in carceral facilities (Human Rights Watch, 2015; James & Glaze, 2006 (finding that, of inmates with a mental health problem, only 33.8% of state prisoners, 24.0% of federal prisoners, and 17.5% of jail inmates reported receiving mental health treatment since admission)). When individuals do receive treatment, they are most likely to receive medication (Adams & Ferrandino, 2008, p. 922; James & Glaze, 2006). Given their cost, older psychiatric medications are the treatment modality of choice (Human Rights Watch, 2003). Large studies and meta-analyses have found that some traditional antipsychotic medications may be as effective as certain second-generation antipsychotic treatments in reducing symptoms, although with different side effects and adherence patterns in community settings (Keefe et al., 2007; Leucht et al., 2009; Swartz et al., 2007). For individuals for whom older medications are insufficiently effective—or who cannot tolerate their side effects—jails and prisons may offer few options. Although the vast majority of prisons report providing some form of psychotherapy or counseling, (Beck & Maruschak, 2001, p. 2), they must limit their distribution of this expensive service

(National Institute of Corrections of the U.S. Department of Justice, 2001, pp. 4–5). Consequently, many inmates do not receive the therapy that they need to cope effectively in prison⁶ (James & Glaze, 2006).

Prison poses other, more acute dangers as well. Unable sufficiently to assess danger and modify their behavior to ward off attacks, individuals with serious mental illnesses are more prone to physical and sexual victimization than non-disordered individuals (Beck, Berzofsky, Caspar, & Krebs, 2013; Johnston, 2013). In addition, strict compliance with prison rules can be difficult for individuals with mental and behavioral limitations, and prisoners with serious mental illnesses are more likely than non-disordered prisoners to violate prison rules (Human Rights Watch, 2015, pp. 29–30; Johnston, 2013). As a result, seriously mentally ill prisoners are disproportionately punished in segregation (Human Rights Watch, 2015, pp. 32–33; Johnston, 2013). These inmates may also be housed in isolation as a means of protection (Johnston, 2014). Evidence suggests that—depending on duration and conditions of confinement (O’Keefe et al., 2013)—individuals with serious mental disorders housed in segregation are especially susceptible to deterioration, psychotic break, and suicide ideation (Human Rights Watch, 2015, pp. 33–34; Johnston, 2013; Shames, Wilcox & Subramanian, 2015, p. 17).

⁶ It should be noted, however, that, for many offenders, prison offers an opportunity to receive mental health care that they were not receiving in the community (Lamb & Weinberger, 2005, p. 531; Torrey, 1995, p. 1611). Other sentencing options—including those provided by specialized probation and mental health courts—may be more treatment-friendly than jails and prisons.

Thus, the sanction of incarceration may be markedly, and foreseeably, harsher for an individual with serious mental illness than for a non-ill offender.⁷ However, this author has cautioned:

[t]o warrant sentencing accommodation, an offender with a serious mental illness may need to make a particularized showing that harm is probable in his case. In many instances an individualized showing of likelihood of serious harm will be possible given prior patterns of behavior, a personal history of abuse, and a constellation of other risk factors that can be brought to a judge's attention at a sentencing hearing

(Johnston, 2013, 180–181). For some individuals with serious mental illnesses, factoring this degree of severity into the proportionality equation should result in the selection of a non-carceral sentence. Diversion may be necessary to avoid an inhumane punishment or achieve rough parity in the impact of punishment with similarly situated non-ill offenders (Johnston, 2013, pp. 207–220; Johnston, 2014, pp. 643–647).

Inhumane Punishment

A retributive understanding of punishment suggests a sentencing system should consider an offender's foreseeable hardship in order to avoid imposing an inhumane punishment. Premised upon respect for the moral dignity and personhood of the offender, (Murphy, 1973, pp. 229–231), retributivism will not tolerate punishments that violate human dignity, (Murphy, 1979, p. 233), fail to recognize the personality of offenders, or “approximate a system of sheer terror in which human beings are treated as animals to be intimidated and prodded” (Morris, 1968, p. 488).

⁷ It is admittedly difficult to establish and defend the risk profile of a generalized “non-ill” offender, as characteristics beyond mental illness contribute to vulnerability to harm. (National Prison Rape Elimination Commission, 2009).

Determining when, exactly, a mode of punishment or conditions associated with a particular sanction cross the line from harsh to inhumane is a difficult contextual question ultimately reflecting the sensitivities and values of a particular society (Garland, 1991, p. 143; Kleinig, 1973, p. 123). While corporal punishment was once commonplace, much of the civilized world now rejects corporal sanctions, such as whipping and lashing, as inhumane (Garland, 1991, p. 143; Khullar, 2010, pp. 187–188). The same holds true for sanctions intended profoundly to disrupt one’s personality or senses or to precipitate mental crisis (Reyes, 2007, pp. 594–616). Philosophers, legal scholars, and courts distinguish incarceration from corporal sanctions by emphasizing the former’s primary function as a deprivation of rights (Mabbott, 1955, p. 257). However, a sentence of incarceration that carries an unacceptably high likelihood of victimization or psychological harm for a vulnerable inmate may more closely resemble an inhumane corporal penalty than an unobjectionable deprivation of rights (Dolovich, 2009, pp. 915–916). If this is true, then, when the foreseeable risk of serious physical or psychological harm in jail or prison surpasses an acceptable threshold, incarceration under a certain set of conditions should no longer be a permissible punishment option, and the sentencing judge should select a community punishment.

Indeed, in order to maintain the authority to punish, the state holds an obligation to tend to the offender’s basic needs and provide an environment conducive to her mental health. Providing the conditions necessary to allow an individual to understand the message of punishment is part and parcel of recognizing the humanity of the defendant and treating her as a moral, autonomous agent (Duff, 2001, pp. 129–130). As Professors Dan Markel and Chad Flanders (2010) observed, to the extent that the state “breaks” an offender, or

renders her incapable of understanding her punishment as punishment, the state forfeits its right to punish that individual (pp. 957–958). Thus, the state has the duty—from the moment a punishment is imposed to the moment it is completed—to ensure that a defendant’s mental health remains sufficiently intact to allow her to understand and appreciate her punishment. If an individual is likely to suffer significant mental deterioration in a carceral facility—and a community sanction would facilitate treatment and allow for an appropriately severe sentence given the offender’s crime—then the judge should select the alternative sanction (Johnston, 2013, p. 197).

Equal Impact

When incarceration would be significantly more onerous—but not inhumane—for a member of a vulnerable population, Professors von Hirsch and Andrew Ashworth have argued the individual should receive an adjusted sentence as a means to avoid disproportionate penal severity. The principle of equal impact holds that, “when an offender suffers from certain handicaps that would make his punishment significantly more onerous, the sanction should be adjusted in order to avoid its having an undue differential impact on him” (Von Hirsch & Ashworth, 2005, p. 172). This principle derives from ideals of fairness and equality and is closely related to a principle of nondiscrimination (Ashworth & Player, 1998). At its essence, the equal-impact principle calls for members of certain vulnerable classes to receive penalties of roughly equivalent severity as nonvulnerable individuals. It is important to emphasize that the equal-impact principle does not call for a reduction in punishment, but rather for equalizing the severity of penalties imposed on equally blameworthy offenders (Von Hirsch & Ashworth, 2005, p. 173). While scholars originally conceptualized the equal-impact principle as standing outside the bounds of

proportionality, (Ashworth, 1983, p. 275), desert theorists have argued that, at least in some cases, recognition of the equal-impact principle is necessary for the achievement of proportionality (Ashworth & Player, 1998, p. 255; Ashworth & Roberts, 2009, pp. 345–346; Von Hirsch, 2009, p. 328).

While the equal-impact principle may also apply to onerous sanctions such as community service or intensive probation, scholars typically raise the principle within the context of incarceration (Von Hirsch & Ashworth, 2005, pp. 172–173). Concerned about the foreseeable impairment of interests critical to offenders' quality of life, scholars have suggested—though without robust analysis—that adjusted sentences would be appropriate to effectuate proportionate punishment for individuals with mental illness, (Ashworth, 2010, p. 100; Ashworth & Player, 1998, p. 255), individuals with physical disabilities, (Von Hirsch & Ashworth, 2005), and elderly persons (Ashworth & Player, 1998, pp. 259–260; Von Hirsch & Ashworth, 2005, p. 176). Scholars have also argued for categorical youth discounts to reflect incarceration's infringement upon important developmental interests and the likelihood of impairing juveniles' self-esteem (Ashworth, 2009, p. 300; Von Hirsch, 2009, p. 323; Von Hirsch & Ashworth, 2005, pp. 42–43).

Application of the equal-impact principle in the context of serious mental illness is appropriate because incarceration affects the interests of offenders with serious mental illnesses and non-ill offenders differently. For example, incarceration typically deprives a standard prisoner of privacy and autonomy by restricting the individual's ability to choose her activities and associates. When the offender has a major mental illness, however, she may suffer a much more extreme loss of autonomy due to the deterioration of her mental integrity. The ultimate result of a carceral term (particularly of a long term) may be highly

degrading, corroding her rationality and perhaps threatening her capacity for autonomous thought. As compared to non-ill offenders, the likely psychological toll of incarceration on offenders with major mental illnesses impedes a broader, more substantial set of interests and affects these interests to a more significant degree. In addition, offenders with serious mental illnesses have an interest in receiving mental health treatment to retain or recover their mental functioning and autonomy. As juveniles have certain developmental interests that make imprisonment uniquely hard for them, (Von Hirsch, 2009, p. 327), offenders with serious mental illnesses have health-related interests that are also negatively impacted by incarceration. These interests include receiving regular and adequate mental health treatment in a nurturing environment in which they can develop a relationship of trust with a mental health provider in order to function at an adequate level. As previously noted, mental health care in prison is often inadequate, and the environment is far from therapeutic. Under the equal-impact principle, if incarceration is more onerous when undergone by offenders with serious mental illnesses, proportionality principles may require that judges reject standard terms of incarceration for this population. To avoid disproportionality, judges could select a noncarceral sanction of roughly equivalent punitive bite.

To identify sanctions of equivalent punitive bite or onerosness, Professors von Hirsch and Ashworth have proposed using the “living standard analysis” developed by von Hirsch and Professor Nils Jareborg (1991) in the context of evaluating the severity of criminal offenses. A living standard analysis focuses on “the means or capabilities for achieving a certain quality of life,” (Von Hirsch & Ashworth, 2005, p. 194), and compares the severity of various penalties by their degree of intrusion into offenders’ interests (Von

Hirsch, 2009, p. 146). In essence, penalties that typically impair interests more critical to quality of life (such as physical integrity) will be considered more severe than those that affect less significant interests (such as privacy) (Von Hirsch, 2009, p. 146). Similarly, a penalty that typically threatens individuals' very subsistence will be understood as more severe than one that infringes upon their well-being to a lesser extent (Von Hirsch, 2009, p. 146). Thus, penalties' severities can be compared objectively by the extent to which the sanctions interfere with offenders' interests or with resources to which offenders have legitimate claims (Von Hirsch, 2009, p. 327). Penalties may affect multiple dimensions of human welfare, including physical integrity, freedom of movement, choice of activity and associates, material support and amenities, freedom from degrading treatment, future earning power, privacy, and autonomy⁸ (Von Hirsch & Ashworth, 2005, p. 147).

Von Hirsch and others have argued that a living standard analysis should reflect "the means and capabilities that ordinarily assist persons in achieving a good life" and should not vary according to individuals' preferences or subjective perceptions of pain (Von Hirsch, 1993, p. 35). They articulate two main reasons for confining the living standard analysis to the "typical" offender: first, individualizing the standard would create unmanageable diversity (Von Hirsch & Ashworth, 2005, p. 188); and, second, "when one is talking about atypical harms, foreseeability diminishes," (Von Hirsch & Ashworth, 2005, p. 189). Although scholars to date have focused largely on the average offender, when empirical evidence establishes that a given penalty will affect the interests of an

⁸ This list was not derived from "deep theory," but rather from "impressions of the main kinds of concerns that seem typically involved in victimizing crimes" and penalties (Von Hirsch & Ashworth, 2005, p. 205). Accordingly, some scholars have criticized the list as arbitrary (Czbanski, 2007, p. 67; Bagaric & McConvill, 2005, p. 59).

identifiable, vulnerable offender class more substantially than average offenders, strong arguments exist for conducting a separate analysis for individuals in that class. Indeed, just desert theorists have indicated a willingness to perform living standard analyses in “nonstandard cases” by assessing “typical impacts for the members of that group” (Von Hirsch & Ashworth, 2005, p. 173 note f).

Translating this theory into more concrete and predictable terms, Bagaric (2016) has proposed granting a substantial sentencing discount to offenders with mental illnesses who are likely to find a sanction especially burdensome (pp. 41–50). Analogizing the plight of incarcerated individuals with mental illnesses to those of offenders housed in supermax conditions, (pp. 41–43), Bagaric argues that—“when an offender’s condition suggests that he or she will suffer considerably more than other prisoners”—sentencing judges should consider granting a penalty discount in the range of 50% (pp. 43–44). This substantial discount, which would be additive to the ten percent discount for offenders who acted while disordered, (p. 50), is dictated by principles of retributive justice and proportionality (p. 49) (“Given that mentally-impaired offenders often suffer more as a result of being subjected to criminal sanctions, it follows that proportionality requires this to be factored into sentencing. Thus, offenders with mental impairment should be accorded a sentencing discount if the sanction is likely to set back their interests more than those of other offenders.”). Bagaric contends that “[o]ffenders should only receive a mental health discount when it is established that their condition would demonstrably worsen *as a result of* incarceration, or they would be disproportionately adversely impacted by the prison experience compared to other prisoners” (pp. 48–49). In addition to serving to shorten

terms of incarceration, this analysis should apply to the threshold decision of what kind of sanction to impose and thus would militate toward diversion (p. 50).

Conclusion

At least three retributive rationales support the diversion of offenders with serious mental illnesses from jail to a community sanction such as probation. First, serious mental illness at the time of the crime may diminish an offender's culpability and thus should reduce the severity of her punishment. Second, considering the foreseeable consequences of incarceration for individuals with serious mental illnesses, diversion may be necessary to avoid an inhumane punishment. Third, diversion may be necessary to achieve rough parity in the impact of punishment with similarly situated non-ill offenders.

Retributive aims animate the sentencing codes of many states as well as the federal system. Thus, it is not surprising that many mitigation statutes reflect these principles. For instance, state statutes often allow judges, in their discretion, to reduce an offender's sentence length or alter her disposition on the basis of substantial or significant impairment of the capacities to appreciate the criminality or wrongfulness of her conduct or to conform to the law. (Parry, 2009, p. 149).⁹ In addition, the Federal Sentencing Guidelines (2016) provide for a reduced sentence if a "significantly reduced mental capacity . . . contributed substantially to the commission of the offense" and neither violence in the offense nor the defendant's criminal history indicates a need to protect the public (§ 5K2.13). An

⁹ In these states, the standard for acquittal on grounds of insanity will typically be more demanding, for instance requiring that the defendant, because of a mental infirmity, disease, or defect, "[d]id not know what he or she was doing or its consequences; or . . . did not know that what he or she was doing was wrong." (Florida Statutes Annotated, 2017, § 775.027(1)). Some states have opted to abolish the insanity defense altogether and limit the consideration of mental illness to sentencing.

application note defines “significantly reduced mental capacity” as indicating a “significantly impaired ability to . . . understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason or . . . control behavior that the defendant knows is wrongful” (§ 5K2.13, app. n. 1).

In addition, at least a dozen jurisdictions recognize excessive offender hardship as a mitigating factor (Johnston, 2014). Many state statutes frame the sentencing factor in general, source-neutral terms and authorize judges to consider when imprisonment would result in “undue” or “excessive” hardship for an offender (Johnston, 2014). Other states specify that mitigation may be appropriate when the likely hardship stems from a specific source. Illinois, for example, instructs a sentencing judge to consider, as a factor in favor of withholding or minimizing a sentence of imprisonment, whether “the imprisonment of the defendant would endanger his or her medical condition” (Illinois Comprehensive Statutes Annotated, 2017, § 5/5-5-3.1(a)(12)). The District of Columbia, on the other hand, allows a judge to sentence outside the voluntary sentencing guidelines if she determines that the defendant, “by reason of obvious and substantial mental or physical impairment or infirmity, cannot be adequately protected or treated in any available prison facility” (D.C. Sentencing & Criminal Code Revision Commission, 2015, § 5.2.3(8)).

To the extent that they prioritize just deserts, jurisdictions should expand their adoption and use of such mitigating factors in order to ensure that the punishment of individuals with serious mental illnesses properly reflects their culpability, is not inhumane, and is appropriately severe. Jail diversion is a justifiable response when incarceration carries too great a risk of unjustifiable hardship or would pose too severe a penalty given an offender’s desert.

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