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KENNETH W. SIMONS

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ON EQUALITY, BIAS CRIMES, AND JUST DESSERTS

by

Kenneth W. Simons¹

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Much of the appeal of retributive theories of criminal law flows from what they are not. Most importantly, they are not utilitarian, consequentialist, deterrence-oriented theories. They do not allow punishment of the innocent in order to serve a large social good. They do not permit selecting an offender for extremely harsh punishment by lottery, even if this would expend fewer overall social resources than imposing lower and proportionate punishment on all similar offenders. More generally, they would not permit exemplary punishment of an offender that is disproportionate to his just deserts, even if this would serve a significant deterrent function or would appease public anger. In short, retributivists would place significant limits on the state's ability to promote social welfare at the expense of fairness to the individual defendant.

But Professors Alon Harel and Gideon Parchomovsky enter the debate about the proper rationales for punishment with a tempting proposition.² Why not widen the retributive focus beyond the culpability of the offender and the wrongdoing he commits, to encompass egalitarian concerns? The authors offer this suggestion for two reasons—to give a convincing justification of bias crime legislation, and, more broadly, to remedy what they characterize as the retributive approach's inadequate attention to the interests of crime victims. In their view, the retributivist

¹ Professor of Law, Boston University School of Law. ©2000. All rights reserved. I thank Larry Alexander and Fred Lawrence for valuable advice, and Aravind Swaminathan for research assistance.

² Alon Harel and Gideon Parchomovsky, On Hate and Equality, 109 Yale L. J. 507 (1999) (hereafter "On Hate and Equality").

approach gives an inadequate justification of bias crimes and cannot explain the state's egalitarian duty to protect the most vulnerable victims.

The proposition is tempting because the egalitarian goals are worthy. Bias crime legislation is indeed justifiable on retributivist grounds, and the interests of crime victims indeed deserve great attention, by retributivists as well as utilitarians. But, I will argue, the suggestion is largely unnecessary and potentially dangerous. It is largely unnecessary because the authors understate the ability of the retributive paradigm to encompass egalitarian concerns, including the protection of especially vulnerable victims. Yet it is potentially dangerous. Insofar as a particular form of egalitarianism does permit, or even requires, that the defendant's blameworthiness be ignored, that egalitarian demand is in conflict with retributive values. To be sure, the state has a duty to promote egalitarian goals, and has many legitimate means for doing so. But sometimes we must decline to pursue these goals through the instrument of criminal law, if we care about giving offenders their just deserts.

I. Summary of the Harel/Parchomovksy argument

The authors correctly observe that contemporary criminal law discourse embodies a "wrongfulness-culpability hypothesis" (hereinafter WC).³ Under WC, criminal sanctions require that a defendant has culpably brought about a wrong; and increased sanctions are warranted, *ceteris paribus*, only if the defendant has acted more culpably, or has brought about a greater wrong. These features of WC, they note, are consistent with retributivist and other non-utilitarian approaches to

³ *Id.* at 508.

punishment.⁴

But WC is deficient, the authors assert, and must be supplemented by a “fair protection” paradigm (FPP).⁵ WC is deficient because it gives no independent weight to the interests of a victim. In particular, WC ignores the special vulnerability of certain victims. Consider (this is my example) the elderly. Suppose we conclude that they are especially likely to be crime victims (they are “high-risk” in the authors’ terms), or that they are likely to suffer especially severe harm if they are the victims of a crime like assault (they are “extra-sensitive”).⁶ WC cannot justify imposing a more serious penalty on a person who attacks an elderly victim. For “no particular offender is responsible for the fact that the victim was particularly susceptible to crime due to the disposition of other criminals to prey on her.”⁷

However, if WC is supplemented by FPP, then (the authors argue) a greater sanction for such an attacker can indeed be justified—by the victim’s greater need for protection. FPP expresses the egalitarian notion that protection from crime is a good produced by the criminal law, and the state has a duty to distribute this good fairly. Specifically, the state should make special efforts to reduce crime against those who are especially vulnerable due to immutable personal characteristics.⁸ Greater

⁴ Id. at 508 (“[WC] dominates the non-utilitarian discourse of criminal law”); 520 (“[WC] cannot accommodate utilitarian theories of punishment.”).

⁵ Id. at 509.

⁶ Id. at 510.

⁷ Id. at 521.

⁸ The FPP might also be interpreted as requiring the state to give priority to the needs of the most vulnerable. As the authors note, id. at 523-524, such a priority approach is not the same as a purely egalitarian approach to vulnerability. Under the latter, the state’s ultimate duty is to equalize vulnerability, either by “leveling up” so that no citizens are more vulnerable than the most secure citizens, or even by “leveling down” the most secure citizens. But under a priority approach, the state is obliged to help out only those

enforcement of the criminal law against those who victimize the most vulnerable citizens is one way for the state to discharge this duty. But when this is not feasible, the state should impose harsher sanctions.

In the course of this argument, the authors offer some provocative criticisms of WC, and also provide an interesting taxonomy of the types of vulnerability that they believe the state should address and the types it should not.⁹ But I believe that the argument as a whole is unpersuasive. Before I provide a general criticism, it will be helpful to consider whether the argument achieves the narrower goal of providing an attractive justification of bias crimes. Even in this narrower context, I believe, the argument fails.

II. Internal critique: Does FPP justify bias crime legislation?

The authors claim that the usual rationales within WC theory cannot justify bias crimes, and I respond to that claim later in this essay. But this is not the most original part of their argument.¹⁰ Rather, the authors' most

who are the most vulnerable to crime. The purely egalitarian approach to general vulnerability is obviously problematic. Should the state take steps to prevent the wealthy from providing themselves a degree of security that the state cannot afford to provide the rest of society? Should it provide lower penalties than would otherwise be justified whenever the victim is a wealthy person who is relatively invulnerable to crime?

On the other hand, a purely egalitarian approach to vulnerability is much more plausible in the narrower context of racially-based violence. That is, even if certain racial groups are much more at risk from such violence than others, we might choose not to give priority to their needs. Rather, a neutral bias crime statute that imposes the same punishment supplement for crimes against any group expresses the egalitarian value that racial bias is socially divisive and especially culpable.

⁹ See "On Hate and Equality," at 524-529, 535-536.

¹⁰ I do, however, find many of their arguments on this point to be rather ad hoc and unpersuasive. For a recent defense of bias crime legislation that addresses many of their arguments, see Frederick Lawrence, *Punishing Hate: Bias Crimes under American Law*

interesting assertion is that FPP is an especially promising rationale for bias crime legislation. In their view, such legislation responds to the fact that racial and other groups protected by such legislation are unusually vulnerable to crime. To compensate for that extra vulnerability, we need to impose a stronger sanction against those who select persons to be victims based on racial criteria and similar immutable characteristics.

The argument that FPP justifies higher sanctions for bias crimes has some initial plausibility. The authors are correct to point out that bias crimes often do contribute to the special vulnerability of the group members subject to bias. Obviously, other things being equal, if crimes committed on the basis of race suddenly ceased to occur, members of such victimized racial groups would be less vulnerable to crime.

But bias crime enhancement is not principally designed to compensate for this extra vulnerability. If it were, one would expect to see relatively widespread enactment of similar penalty enhancement laws for other vulnerable groups—the elderly, children, prison inmates, the hospitalized, the mentally ill, and so forth. No such widespread pattern exists.¹¹ Moreover, many of these other groups are much more vulnerable

(1999); see also Andrew Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong*, 40 B.C. L. Rev. 739 (1999); Carol S. Steiker, *Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 Mich. L. Rev. 1857 (1999).

¹¹ To be sure, special duties are often imposed in some of these situations. In many jurisdictions, for example, lack of consent to rape is conclusively presumed (or is deemed morally irrelevant) for certain classes of vulnerable victims, including children and those with mental disabilities. But this type of example is better understood as expressing a uniform criterion of criminal liability for a particular offense (i.e., requiring mature, knowing consent) than as evidencing an independent concern with general vulnerability to crime.

Criminal laws prohibiting the abuse of children, and heightened penalties for committing crimes against children, do show a genuine concern with vulnerability, at least in the “extrasensitive” sense. Of course, it is also quite plausible to conclude that the

to crime (in either the “high-risk” or “extrasensitive” sense, or both) than are the racial and other groups usually covered by bias crime legislation.

Furthermore, the additional vulnerability to crime due to bias crimes surely pales in comparison with additional vulnerability to crime due to geography, wealth, class, and similar factors. Moving away from a violent inner city neighborhood will reduce vulnerability to crime far more than changing the color of one’s skin will.¹² Indeed, if unequal vulnerability to crime is the overriding social problem that the authors suggest, the best and most direct governmental response would involve the following process: carefully collect statistical data about the incidence of crime on various groups; determine which factors (age, physical and mental health, poverty, urban versus nonurban location, large versus small city, gender, race, and so forth) have what degree of independent statistical significance; and then prioritize efforts (via higher sanctions or greater enforcement) to diminish vulnerability according to the relative significance of these factors. Whatever the merits of this approach, it is not the approach we see in contemporary substantive criminal law and criminal enforcement policies.

Even if unusual vulnerability really were the problem that bias crime legislation addresses, wouldn’t it make more sense to police, investigate, and prosecute crimes committed against bias crime victims more aggressively than to increase the sanctions for such crimes? The authors agree that either increased sanctions or increased enforcement might be an effective response to the unequal vulnerability of different victims, but

long-term emotional harms to a child from a given physical attack are considerably greater than the harms from a similar attack on an adult.

¹² The authors at least partially concede this point, “On Hate and Equality,” at 538, but argue that we should still address the racial component of vulnerability separately. However, if the additional vulnerability due to race and other criteria encompassed by bias crime laws is insignificant relative to other forms of vulnerability that criminal law does not address, then FPP is not a persuasive explanation for bias crime legislation.

they suggest that increased enforcement is not likely to be an effective strategy for bias crime victims, because “it is only after the perpetrator of the crime is detected that one can discern her motives clearly.”¹³ By contrast, they point out, special vulnerability due to poverty can more effectively be addressed through ex ante efforts (such as policing of poor neighborhoods) than through ex post higher sanctions.

But the greater ability to detect bias motivation ex post does not conclusively support employing increased sanctions rather than more aggressive prosecution. Post-crime investigation and prosecution of bias crimes could still be pursued more aggressively. And ex ante state efforts to prevent bias crimes by more aggressive policing are sometimes effective.¹⁴ In short, it is an open, empirical question whether, for bias crimes, higher sanctions are more effective than ex post enforcement efforts.¹⁵

A simple fact remains: most Americans at the turn of the century consider bias crimes to be especially outrageous and reprehensible, but for reasons other than the extra vulnerability of the victim. When a black is assaulted because of his race, a Catholic is targeted because of her religion, or a gay person is attacked because of his sexual orientation,

¹³ *Id.* at 537.

¹⁴ In some situations, police can reliably predict a significant chance of interracial hostility—for example, in certain neighborhoods, in connection with sporting events when teams are primarily of different races, or following a racially charged trial, the killing of a prominent minority leader, or the killing of an apparently innocent minority group member by police.

¹⁵ Suppose that studies indicate that a significant proportion of assaults committed by blacks on whites, or by whites on blacks, involve discriminatory selection. For purposes of FPP, it might actually be more efficient for police and prosecutors to aggressively give higher priority to all interracial crimes than to impose a higher sanction in those few cases where discriminatory selection could be proved at trial beyond a reasonable doubt. (Also, the extent to which a higher sanction will deter defendants is itself unclear, inasmuch as unconscious motives may play a role.)

additional moral condemnation is warranted; but the quantum of additional condemnation that is deserved is not a direct function of the protected group's unusual vulnerability to crime. Race, gender, religion, and sexual orientation are personal traits with enormous social significance. Criminal actors who select victims on these bases do not act in a historical and social vacuum. The moral and social significance of their acts is informed by, and partly a function of, centuries of official and private acts of discrimination that have disadvantaged groups along these lines. Contemporary bias crimes reinforce the memories and effects of that discrimination, and threaten social division. When the authors suggest that the fundamental reason for imposing higher sanctions against those who commit crimes out of bias is differential vulnerability, they offer a rationale that would equally justify imposing higher sanctions against those who victimize the emotionally sensitive, the gullible, or the physically weak. In so doing, the authors ignore the compelling social context of bias crimes.

III. Retributivism and FPP

To answer the broader claim that retributivism is a deficient theory of punishment, it is critical to examine more carefully the retributive perspective underlying WC. We will see that the authors greatly underestimate the capacity of retributivism to accommodate both egalitarian norms and norms protecting vulnerable victims. At the same time, they are correct that that capacity is not unlimited. However, I will argue that the limits which retributivism does place upon the incorporation of broad egalitarian goals within criminal law are a virtue, not a vice.

Criminal law is a distinctive legal institution. When the state imposes criminal sanctions, it deprives the offender of property or liberty, and it accompanies that deprivation with a solemn moral condemnation. The state must have a powerful justification for these practices.

Retributivists claim that they (in contrast, especially, with utilitarians) can provide such a justification, premised upon the offender's serious, culpable and unjustified breach of legitimate social norms.

A retributive perspective is backward-looking, assessing an actor's just deserts according to his culpability in causing a wrong and according to the wrong he has caused or risked.¹⁶ Different retributive theories differ in how they define and grade both culpability and wrong. They differ in the roles they would assign to different legal actors in defining criminal law norms, in applying them, and in choosing an appropriate sanction or sentence. But they will ordinarily agree in requiring minimal culpability (for example, negligence), a minimum level of wrongdoing (i.e., a threshold of what may legitimately be criminalized), proportionality (punishment should not be excessive in relation to culpability and wrongdoing), and some appropriate relationship between culpability and wrongdoing (negligently causing death is less blameworthy than intentionally causing death, but it might or might not be less blameworthy than intentionally causing a broken arm).

Can a retributive perspective accommodate egalitarian norms and norms protecting the especially vulnerable, either in its standards of culpability or in its standards of wrongdoing? Indeed it can. Before explaining how this is possible, however, I need to address a more basic point.

¹⁶ Culpability is ordinarily understood to encompass mental states, excuses, and degree of responsibility, while wrongdoing encompasses the harm or wrong, causation, and issues of justification. There are different ways of drawing the distinction, see, e.g., George Fletcher, Basic Concepts of Criminal Law 74-92 (1998) (distinguishing attribution from wrongdoing); Anthony M. Dillof, Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes, 91 Nw. U. L. Rev. 1015, 1024-1036 (1997) (distinguishing culpability from wrongdoing); Heidi Hurd, The Deontology of Negligence, 76 B.U. L. Rev. 249 (1996) (distinguishing culpability from wrongfulness in tort and criminal law). But for purposes of this essay, the differences are not significant.

A. Equality norms: Consequentialist or retributivist?

Given their explanation of FPP, it is clear that the authors understand egalitarian norms as consequentialist. They are concerned, in other words, with ensuring that the criminal law, in its content and enforcement, will promote egalitarian consequences—specifically, the consequence of fairly distributing to potential victims the “good” of protection from crimes. At the same time, they (correctly) understand WC to be essentially a retributivist, nonconsequentialist perspective.¹⁷

Accordingly, an initial puzzle about their analysis is, to put it bluntly, why they bother. Why would the authors even expect WC to accommodate FPP, so understood? After all, retributivist and consequentialist perspectives very often conflict; and the conflict of WC and FPP would be just one more example of such a conflict. (By contrast, if WC were understood to be part of a more general consequentialist theory—for example, if a largely utilitarian account were given of WC¹⁸—then FPP need not create a conflict; for the equality that it requires could simply be one more value to be promoted, along with utility, in an overall

¹⁷ On the consequentialist character of FPP, see “On Hate and Equality,” at 529 (imposition of harsher sanctions through the FPP is “intended ... to equalize the distribution of protection by deterring offenders from committing crimes against certain victims.”); 510-511. On the retributivist character of WC, see *id.* at 508, 520.

¹⁸ This is not just a theoretical possibility. In his recent work, Paul Robinson argues that the criminal law should, for utilitarian reasons, attempt to conform to lay intuitions about just deserts. See Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law (1995); Paul H. Robinson, Testing Lay Intuitions of Justice: How and Why?, 28 *Hofstra L. Rev.* 611 (2000). For two critiques, see Christopher Slobogin, Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law, 87 *J. Crim. Law & Criminol.* 315, 316-321 (1996); Kenneth W. Simons, The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy, 28 *Hofstra L. Rev.* 636 (2000).

consequentialist analysis.)

But perhaps FPP poses a genuine challenge to retributivism because it is reasonable to expect retributivist critics of utilitarianism—or at least liberal retributivists—to support egalitarian norms as well. I agree that such an expectation is reasonable. Where I differ with the authors, however, is in their apparent view that retributivism itself cannot incorporate egalitarian norms.

In the next two sections, I will give examples of such incorporation. For the moment, however, it is worth clarifying in general terms how the role of egalitarian norms differs under consequentialist theories (such as FPP) as opposed to nonconsequentialist theories (such as retributivism).¹⁹ The consequentialist interpretation is clear enough: under FPP and similar principles, the point of criminal punishment is to promote equality of protection from crime. The retributive interpretation is different: the point of criminal punishment is to accord an offender his just deserts, and egalitarian norms figure in as a relevant aspect of just deserts. But, since the reason for punishment is to impose a sanction proportional to the culpability that the offender displayed and the wrongdoing that he committed in a past act, it is irrelevant (on a pure retributive view) whether the infliction of punishment promotes any further beneficial egalitarian consequences. Put differently, retributivism does insist that the punishment actually imposed be appropriately tailored to the offender's just deserts, and egalitarian values (as we shall see) can be relevant both to an actor's demonstrated culpability and to his wrongdoing. But

¹⁹ For some discussions, see Derek Parfit, *Equality and Priority*, 10 *Ratio* 202 (1997) (explaining the distinction between teleological and deontological equality); Philip Pettit, *The Contribution of Analytic Philosophy*, from *A Companion to Contemporary Political Philosophy* (Goodin & Pettit eds. 1993) (explaining the distinction between promoting and honoring a value such as equality).

retributivism does not consider the possible beneficial consequences (egalitarian or otherwise) of punishment that lie further in the future.

Consider an example. A criminal prohibition of lynching would, in the American historical context, clearly be designed to address racially-motivated brutality that also constitutes an interference with the judicial process. Such a prohibition could reflect either or both interpretations of equality. On a purely consequentialist interpretation, it reflects a legislative intention to prevent future lynchings and thus to prevent both serious individual harms and the perpetuation of racial prejudice and racial division. On a purely retributive interpretation, punishment is not justified by, nor calibrated to, its expected efficacy in preventing future lynchings. Rather, without regard to such effects or to the relative efficacy of other social controls in preventing lynchings, a retributivist can justify especially harsh punishment of such an offender because he has made a highly culpable and wrongful choice to seriously harm the victim, to interfere with the victim's equality rights, and to inflame racial tensions in the community.²⁰

The authors briefly mention the possibility that egalitarian norms could be part of WC. In their view, however, incorporating fair protection into WC "would radically transform the [WC] paradigm" and "would require an expansion of the concept of wrongfulness far beyond its traditional boundaries."²¹ In the next sections, I will take issue with this view. We will see that WC can indeed accommodate egalitarian norms, including norms responding to the "fair protection" concerns that (according to the authors) only FPP can adequately address. Moreover, WC can also accommodate a distinctive concern about the special culpability and wrongfulness of

²⁰ In this essay, for purposes of clarity, I consider only the implications of a pure retributive approach, not a "mixed" approach that includes both retributive and consequentialist components.

²¹ "On Hate and Equality," at 522.

harming the vulnerable, a concern that is not always grounded in egalitarian values.

B. Retributivism and culpability

Can a retributivist justify imposing a greater penalty on a criminal offender who preys on the vulnerable, based on the offender's greater culpability? Can retributivist culpability principles also incorporate egalitarian norms? In each case, yes. Holding constant the degree of wrongdoing, it is sometimes more culpable to take advantage of the vulnerable or to act on reasons that violate egalitarian norms.

With respect to vulnerability, consider an example from the law of homicide. In People v. Poplis,²² defendant repeatedly beat a three year old child over a course of six days, resulting in the child's death. In deciding that the proof was sufficient to permit a conviction of "depraved indifference" murder, the court emphasized that the "continued brutality to a child" helped establish a "graver culpability" than would be displayed in a merely reckless killing.²³ It seems clear that the helplessness and vulnerability of the child are factors that the jury may legitimately consider in evaluating the defendant's culpability.²⁴ And a retributivist rationale, focusing on the offender's extraordinary callousness and malevolent character, can support this legal rule.

The authors do consider the view that "crime directed at high-risk victims is morally worse than crime directed at low-risk victims," because such a crime, by preying on one who lacks a fair opportunity to defend

²² 30 N.Y. 2d 85, 281 N. E. 2d 167 (1972).

²³ *Id.* at 88. A reckless killing that did not demonstrate "depraved indifference" would be classified as manslaughter, not murder.

²⁴ In the authors' terms, a child is both "high-risk"—she has special difficulty warding off an attack—and "extrasensitive"—she is more likely to suffer injury if attacked.

herself, violates the principle of fair play. “But,” they reply, “this view is premised on an analogy between criminality and sportsmanship—a dubious analogy, at best.”²⁵ Their brief analysis of the reasons why preying on the vulnerable is especially culpable is unconvincing. The appropriate question is not whether a victim has been offered a “fair chance” at self-defense—as if the offender owes, not just a primary duty not to commit a crime, but also a secondary duty to give the victim a “sporting chance” to fight back.²⁶ Rather, an actor’s willingness to exploit vulnerability often reveals an especially heinous disregard for the humanity of others, as the criminal law recognizes.²⁷

Thus far, I have argued that one who exploits vulnerability in causing a harm or wrong can justifiably be considered more culpable than one who does not. This argument does not essentially rely on any egalitarian norms. However, egalitarian concerns do underlie a principal argument in favor of bias crime legislation—that the special culpability of a prejudiced actor justifies a higher penalty, apart from whether the actor

²⁵ Id. at 530-531.

²⁶ Recall the comic book convention by which the villain who has captured the superhero inevitably gives his captive ample opportunity to make a courageous escape, a convention explored with acumen in the recent film, *Austin Powers, International Man of Mystery* (New Line Productions Inc. 1997).

²⁷ Death penalty statutes are another context in which criminal law culpability principles in fact consider exploitation of vulnerability. Such statutes often include as an aggravating circumstance that the murder was “especially heinous, atrocious, and cruel,” and some explicitly include exploitation of the vulnerability of children or the elderly as a distinct category. See, e.g., Ariz. Rev. Stat. Ann. §13-703 (F)(9) (1999) (aggravating circumstance that victim was under fifteen or over sixty-nine years of age); Colo. Rev. Stat. Ann. §16-11-103(5)(m) (2000) (aggravating circumstance that victim was under twelve years of age). Some states also count as an aggravating factor the victim’s status as a kidnap victim, a hostage, or a shield. Richard J. Bonnie, Anne M. Coughlin, John C. Jeffries, Jr., & Peter W. Low, Criminal Law 703 (Foundation Press 1997).

brings about a greater harm.²⁸ I will not add much to this argument here, except by way of brief response to two of the authors' points.

First, the authors object that motives for crimes are incommensurable: even if racism and similar forms of prejudice are blameworthy, how can we assess their significance relative to other motives like pecuniary gain or sadism?²⁹ The comparability problem here is indeed nontrivial. However, so is the more general problem of comparing the significance of different types of wrongdoing or harm (under either a retributive or utilitarian theory). Which is the greater wrong, destroying a building by arson, defrauding a business (of how much?), stealing property from the person of another (how much property?), or causing a person physical harm (how much harm)? Yet the difficulty of drawing uncontroversial distinctions in wrongdoing does not cause us to question that enterprise itself.

Second, the authors suggest that FPP explains aspects of bias crime laws that WC and retributive theory cannot explain. Specifically, some bias crime laws omit a racial animus requirement, and instead only require that the defendant selected the victim on the basis of the victim's race. WC cannot explain, they say, why one who lacks the special culpability of racial animus or hostility still deserves a higher sanction.³⁰

This is a valid point. A retributivist perspective that focuses on the defendant's culpability does have more difficulty justifying racial selection statutes than racial animus statutes. As I suggest below (in discussing the "Ignorant Initiate" example), any interpretation of a racial selection statute that completely ignores culpability would violate liberal retributive

²⁸ Lawrence, *supra* note 10=, at 58-61; Taslitz, *supra* note 10=, *passim*; Steiker, *supra* note 10=, at 1863-1870 (emphasizing that a variety of motives have independent significance in aggravating deserved criminal punishment).

²⁹ "On Hate and Equality," at 513.

³⁰ *Id.* at 533.

principles. Still, an offender who selects a victim because of race clearly displays some blameworthiness. Suppose an individual selects whites to rob only because he believes that they usually have more money.³¹ Nevertheless, he deserves at least some blame for his knowing decision to subject one racial group to special risks. Crimes against the elderly illustrate the point even more clearly. One who victimizes the elderly is likely to have no special animus towards them; his motive is simply to obtain criminal benefits more easily. Still, so long as the offender knows that the person he is victimizing is a member of a racial group, or a member of a vulnerable class such as the elderly, he does display greater culpability than an offender who unknowingly causes harm to a person in that class without any such culpability.³²

Moreover, a person who lacks animus but selects a victim on the basis of race or age ordinarily shows culpable indifference to the person's interests—in other words, a much greater willingness to harm such a person than to harm a person of his own race or group. This attitude of disrespect can be almost as blameworthy as hostility or animus.³³

³¹ Lawrence, *supra* note 10=, at 30.

³² I have been discussing forms of retributivism in which the actor's just deserts depends on his level of culpability. However, a retributive view that gives independent weight to the harm caused could analyze selection statutes somewhat differently. Harm-based retributivists support strict liability in the grading of crimes, and support punishing all attempts less seriously than the corresponding completed crime. On such a view, an offender D1 who assaults V1 on the basis of race deserves greater punishment than an offender D2 who assaults V2 (but not on such a basis), where "on the basis of race" means only that the race of the victim somehow plays a role in causing a greater harm or wrong, not that the offender was more culpable. (Consider the "Ignorant Initiate" example, below.)

But harm-based retributivism is controversial. And in this context, it would have the far-reaching consequence of justifying higher penalties in every interracial, interethnic and interreligious crime.

³³ See R. A. Duff, *Intention, Agency, and Criminal Liability*, ch. 7 (1990); Kenneth W.

Concededly, it might be preferable for bias crime laws to employ a narrower racial animus criterion, for reasons of fair notice and administrability,³⁴ but in principle it would be consistent with retributive theory also to impose liability based on a weaker criterion of culpable indifference.

Finally, egalitarian values other than the more obvious ones implicated in bias crimes can also inform a judgment of culpability. One interesting example is where an offender selects a victim for a random, inexplicable reason. In a famous example, Sir James Fitzjames Stephen suggests that a person who impulsively pushes a stranger off a bridge to his death is as heinous as a premeditated murderer.³⁵ The very randomness and senselessness of the act bespeak a special depravity. More generally, many “depraved indifference” murder cases involve people who kill victims randomly. (Common examples are shooting a gun into an occupied house or vehicle.) It would be consistent with retributive norms for a court to find that an offender’s decision to endanger a random victim is a factor militating in favor of murder liability.³⁶

Simons, Culpability and Retributive Theory: The Problem of Criminal Negligence, 5 J. Contemp. L. Issues 365, 388-393 (1994); Charles R. Lawrence, III, The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1989).

³⁴ See Lawrence, *supra* note 10, at 76.

³⁵ Sir James Fitzjames Stephen, 3 A History of the Criminal Law of England 94 (1884).

³⁶ Of course, insofar as random selection of victims is a more widespread social phenomenon, it can cause considerable public insecurity. In such a case, the insecurity is an additional harm and thus warrants a higher penalty because of the act’s greater wrongfulness, not just its greater culpability. The recent spate of random shootings of drivers on California highways is an example.

One might object that “random” or “arbitrary” selection methods don’t present equality problems at all, insofar as possible victims are selected by lottery, which is a kind of *ex ante* equality. But I disagree. Whether random selection methods satisfy or violate egalitarian norms depends on the context. See Kenneth W. Simons, Overinclusion and Underinclusion: A New Model, 36 U.C.L.A. L. Rev. 447, 524-527 (1989) (discussing the

C. Retributivism and wrongdoing

To what extent can retributivism accommodate concerns about equality and vulnerability in its specification and grading of wrongdoing (holding constant the degree of culpability)?³⁷ To a considerable extent, as we shall see; accordingly, the need for an independent, consequentialist FPP is considerably less than the authors believe.

Retributive theory is able to accommodate a number of different substantive conceptions of wrongdoing, including violation of egalitarian norms and norms protecting the vulnerable. Physical harm to persons is the core type of wrongdoing addressed by the criminal law, but economic

treatment of “nonrational” classification under equal protection law). In the present context, a random act of violence often reveals an unusual insensitivity to human welfare. Moreover, a coherent explanation of a killing based on the actor’s relationship to the victim can sometimes at least partly mitigate punishment, while a randomly directed killing is much less likely to seem understandable.

³⁷ Formally, bias crimes incorporate egalitarian norms as a mental state element of a crime, not as an actus reus element. To be guilty of a bias crime, one must act out of racial or other prohibited animus, or must select the victim on a prohibited basis. So it might seem that a retributivist justification of higher penalties for bias crimes must turn on the heightened culpability of a bias criminal (as expressed in this additional mental state element), not on his committing a more wrongful act or bringing about a greater harm. But this formal focus is too narrow. It is legitimate to base an ultimate justification of bias crimes on the greater wrongdoing or harm that such crimes express or bring about (as measured by actual affront to egalitarian values), rather than on their greater culpability (as measured by the actor’s attitude towards, or choice to bring about, that effect), even though as a formal matter, the state need not prove in any individual case that the crime implicated additional individual or social harms.

For a helpful discussion of the distinction between wrongfulness and culpability, and an acknowledgement that the distinction is not precisely coextensive with the criminal law distinction between actus reus and mens rea, see Dillof, *supra* note 16=, at 1024-1036.

harms, emotional harms, harms to the legal system, harms to national security, and myriad other harms or wrongs can also be included.³⁸

In many instances, the criminal “wrong” consists entirely in the violation of an egalitarian norm—for example, intentional interference with voting rights on the basis of race, or willful violation of laws against discrimination in employment, housing, or public accommodation. In the context of bias crimes, when prejudice or racial animosity lies behind a crime, the crime can cause additional harm both to the victim and to others, including the wider society.

The authors downplay the harm that prejudice causes to the victim, asserting that the only real harm is the physical or other injury caused by the crime. Discriminatory treatment, they claim, “does not exacerbate the wrong committed by the perpetrator.”³⁹ Moreover, to conclude otherwise, they believe, is to give the victim a “protectable interest in the perpetrator’s thoughts.”⁴⁰ But the claim that the harm from discrimination is exhausted by the harm that nondiscriminatory treatment would produce is quite implausible. Presumably their reason for supporting FPP in the first place is to endorse the equality rights of victims. The additional harm that violation of such equality rights adds to the criminal act might be less

³⁸ To be sure, some retributive theories will not be so pluralistic, and will be more restrictive in what may count as a “wrong.” However, the authors’ argument is more general, so I think I am being fair in treating them as concluding that no retributive account can accommodate FPP.

Interestingly enough, the authors note that to employ their own criterion of “vulnerability” in applying FPP, they must identify the “magnitude of the harm,” and they concede that this “is often a vague concept. The harm may involve a violation of the dignitary interests of the victim or the violation of her autonomy, and any evaluation of the magnitude of these harms is inevitably controversial.” *Id.* at 527.

³⁹ *Id.* at 515.

⁴⁰ *Id.* at 516, relying on Dillof, *supra* note 16, at 1039-1040.

tangible, but that does not render it unreal.⁴¹ Nor does this analysis presuppose that the victim has an “interest in the perpetrator’s thoughts,” any more than a race discrimination or sex discrimination victim in a noncriminal case is concerned with free-floating thoughts that the perpetrator does not act upon.⁴²

The authors are also skeptical that bias crimes cause any distinctive harm to the wider society. But their skepticism is a result of defining that harm in race-neutral terms (generalized harm to communities; precipitation of further violence), and then observing that bias crimes are not as distinctive as claimed in causing such harms. These doubts are unwarranted once we notice that the distinctive features of bias crimes can exacerbate racial division in the wider society.⁴³

⁴¹ See Simons, *Equality as a Comparative Right*, 65 B.U. L. Rev. 387, 431-433 (1985). Moreover, for evidence that the additional injury caused by bias includes significant emotional and psychological effects, as well as harms to the community, see Lawrence, *supra* note 10=, at 40-44.

⁴² Perhaps the authors believe that while FPP imposes a duty on the state to equalize protection, it does not imply any correlative equality right on the part of the victim. Although this is a coherent position, it is a surprising one, in light of the authors’ pervasive complaint that WC is seriously inadequate relative to FPP in the protection it affords to victims. This position also seems to have the troubling implication that civil antidiscrimination laws that give full-fledged enforceable rights to victims (including injunctive and damage remedies) are unjustifiable.

⁴³ A similar blindness seems to underly their dubious explanation for why bias crime laws neutrally protect all races and religions. This feature of bias crimes is a puzzle for the authors and for their “vulnerability” explanation of such crimes, insofar as racial and religious majorities are much less vulnerable to crime than minorities are. See “On Hate and Equality,” at 535-536. In explanation, they assert that racial prejudices are likely to change over time (by comparison, for example, with the explicit protection of the vulnerable under sentencing guidelines); thus, the neutral language protecting all groups “ensures that the group most in need of greater protection at any given time will actually receive it.” *Id.* at 532. But a much more straightforward and plausible explanation for this symmetrical coverage is that a bias crime by a minority group member against a majority

Thus, egalitarian norms are among the social norms that can justifiably warrant a retributive response when they are culpably violated. I have mentioned some of the more obvious examples of such egalitarian norms—such as criminally enforced antidiscrimination laws. Less obvious, perhaps, are concerns about the discriminatory enforcement and effect of criminal laws that, on their face, appear to be fair. A pluralist retributivism can also accommodate such concerns in its specification and grading of wrongdoing.⁴⁴

group member still can inflame community racial tensions, even though majority group members might not be especially vulnerable to crime.

⁴⁴ Consider three examples. *First*, the death penalty, as applied, will predictably be imposed disproportionately against blacks, and disproportionately against criminals whose victims are white. That discriminatory impact counts as a strong reason against enforcing the death penalty at all. *Second*, the doctrine of provocation might unjustifiably favor male “passion” killers relative to female killers, for a number of reasons: modern flexible approaches permit sexist views about gender roles to control; traditional approaches give categorical weight to factors, such as adultery, which disproportionately excuse men; and the requirement that the killing occur “in the heat of passion,” soon after the provocation, discriminates against women, who often explode into violence only after a long period of simmering emotions. -simmering internal debate= exprewho more often use violence instrumentally as a means of control over others, relative to women, who more often explode suddenly out of frustration. See Samuel Pillsbury, *Judging Evil: Rethinking the Law of Murder and Manslaughter* 147-155 (1998). If these claims are true, then the differential is a reason to consider reformulating, or even eliminating, the doctrine. *Third*, if the state’s own laxity in enforcing domestic abuse laws and in providing shelters for battered women is significantly responsible for the plight of such women, perhaps the state should relax the application of criminal law doctrines that would otherwise preclude a woman from successfully claiming self-defense when she assaults or kills her abuser.

Moreover, the form of substantive criminal law norms often is, in part, a response to egalitarian concerns. Rules might be chosen over flexible standards for this reason. Conversely, more individualized tests (relativizing the reasonable person standard, for example) can be understood as equalizing the criminal law’s treatment of each person to accord with her actual ability. (The young need only conform to the standard of a

Indeed, the authors' approach, as it stands, is in one respect less egalitarian than some retributivist approaches. For the authors focus on fairly distributing protection from "crimes"; they do not discuss how the content of crimes should itself be defined and justified. But in a society committed to equality, that content should itself reflect egalitarian values. If, for example, the crime of rape is punished leniently relative to other types of physical assault, or if it is defined very narrowly, then one might justifiably complain that the criminal law fails to treat the interests of women as seriously as the interests of men.

Now let us turn to the question whether a retributive conception of wrongdoing can accommodate concerns about special vulnerability. Specifically, consider the question whether assaulting an elderly person, or a child, can legitimately be considered a more serious wrong than assaulting a non-elderly adult, consistent with retributive norms.⁴⁵ And

reasonable young person, the disabled to the standard of a reasonable disabled person, and so on.) Much obviously depends on which particular egalitarian value we endorse.

The authors do not explore these egalitarian norms. The norm they do defend, FCC, is not inconsistent with them. But the authors do not acknowledge that there are many ways, within the retributivist paradigm, to implement a broad range of egalitarian values.

⁴⁵ My example is an enhancement statute. Legislatures have enhanced penalties for assault on a wide variety of types of victims—not only the young and the elderly, and not only police officers, but also firefighters, school employees, judges, jurors, emergency medical personnel, the disabled, and even coaches at athletic events. See Richard J. Singer, *The Model Penal Code and Three Ways Courts Avoid Mens Rea*, 4 *Buffalo Criminal Law Review* ___ (forthcoming), at 37-38 (unpublished draft).

One could also imagine a statute under which victim status is the criterion that converts noncriminal into criminal behavior. (Suppose a jurisdiction criminalizes intentionally causing serious emotional distress to a child or elderly person, but not intentionally causing such distress to a nonelderly adult.)

Under harm-based retributivism, culpability need not be required as to bringing about the greater harm. Under a more restricted form of harm-based retributivism that only requires culpability as to some harm or wrong, but permits enhancement if the harm

assume that the very reason for considering these types of assaults to be more serious is the reason expressed in FPP: these groups are especially vulnerable, and an otherwise similar crime inflicted upon them is more serious than such a crime inflicted on a young adult.

I do not see why retributivism cannot count harm to the especially vulnerable as a form of aggravated wrongdoing—so long as culpability as to that wrong is also required. One who intentionally, knowingly, recklessly, or even negligently takes advantage of a more vulnerable person can be, for that reason, more deserving of blame than one who commits an otherwise identical crime against a person lacking that vulnerability.

But is this argument circular? The authors believe that FPP best explains why we would sometimes want to treat differently two people who commit the same criminal act: FPP can explain why an assault against a vulnerable person should receive more punishment than the same assault against a nonvulnerable person, while WC cannot. And the authors might object that I have arbitrarily redefined “the same criminal act,” calling an assault against a vulnerable person “a more serious criminal act” than an assault against a nonvulnerable person, but ignoring the fact that each is really just an assault.

Yet there is nothing arbitrary about defining criminal wrongs differently based on such circumstances as the vulnerability, social role, or identity of the victim. It is just not true that an assault is an assault. Only a very narrow and implausible criminal law theory would consider all assaults the same. Rather, the state may justifiably view an assault

caused is greater than that culpably risked or intended, it would be permissible to enhance punishment for an assault on a police officer or an elderly person even if the actor was unaware of the victim’s status, but not permissible to convert a noncriminal into a criminal act absent such culpability. Many courts do permit enhancement based on

(however defined) on a police officer, a witness, a prison guard, a judge, a President, or a child, as a more serious wrong, for a number of good reasons, consistent with retributivism (as well as other criminal law theories). For, in addition to the physical harm to the immediate victim, such an assault implicates broader social interests, such as public security or the integrity of the trial process.⁴⁶

Another straightforward example of how vulnerability is a relevant aspect of wrongdoing is the crime of bank robbery, which is often punished more severely than robbery of other commercial establishments. Why? Presumably not simply because the expected value of the loss is larger (a factor that could easily be addressed by grading the punishment according to the amount stolen), but also because the ready availability of money in banks makes them tempting and frequent robbery targets. (When asked why he robbed banks, Willie Sutton is said to have answered, "Because that's where the money is."⁴⁷)

Similarly, to a retributivist it is relevant whether a particular type of crime has become more attractive or prevalent. For example, certain types of drug use are more common and attractive today, and that is a reason for punishing distribution of such goods more harshly.⁴⁸ (Likewise,

victim's status even absent a finding of culpability as to that element. See Singer, *id.* at 38-40.

⁴⁶ To be sure, one could imagine a retributive theory with an extremely narrow criterion of wrongdoing, a criterion that defined harms and wrongs to human interests according to a simple, uniform standard (such as serious interference with physical functioning). But such a theory would be wildly inconsistent with any contemporary system of criminal law; it would embrace homicide and assault, perhaps, but could not even explain the harm of rape, not to mention serious non-physical harms, harms to property interests, non-individuated harms to social interests, and the like.

⁴⁷ For discussion of whether Sutton actually made the famous statement attributed to him, see: http://www.banking.com/aba/profile_0397.htm.

⁴⁸ In the debate over whether the large differential in punishment for distributing crack-cocaine versus powder-cocaine can be justified, it is certainly relevant (if true) that young

assaulting a police officer can deserve a higher penalty than assaulting a private citizen, for the first type of assault undermines public respect for law and increases public fear and insecurity by reducing public protection against crime.)

With respect to both bank robbery and drug offenses, the seriousness of the harm depends not just on the amount of economic or physical harm that the offender personally causes in an individual case, but also on the acts of others—specifically, the risk that others will also find the crime an attractive option. Only an extremely cramped view of “wrongdoing” would ignore such factors. Offenders act in a social setting. The significance of any particular criminal act depends in part on the acts of other offenders, other victims, and other persons. And the state is entitled to consider this broader significance in criminalizing and grading wrongs.

A good example of how retributive theory can take vulnerability into account is the crime of rape. Almost all rapes are committed against women. The threat of rape significantly contributes to the greater vulnerability that many women feel when they are alone in public spaces. Accordingly, rape can legitimately be considered a more serious crime than an otherwise comparable attack on a person’s physical safety and integrity. Concededly, this proposition is difficult to test, insofar as it is very difficult to compare the severity of rape with the severity of other intentional physical harms and invasions with quite different objective

people are significantly more likely to use or distribute crack cocaine. See U.S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy (1997) (supporting some differential, though not the 100-1 ratio in current law, based on such findings as these: crack cocaine is more often associated with violent street crime related to its marketing and distribution; it is more widely available on the street; and it is more affordable, and thus “is particularly appealing and accessible to the most vulnerable members of our society”).

characteristics. Still, in principle, even if we believed that a rape was a somewhat less serious wrong than, say, an intentional wounding causing serious bodily injury, the egalitarian concern about women's vulnerability could justify punishing rape with a penalty as high or higher.

The authors appear to assume that WC cannot accommodate these broader concerns. Thus, they assert that WC can only accommodate reasons that are "intrinsic to the criminal encounter."⁴⁹ And they suppose that WC cannot explain why I might have weightier reasons to protect my child than to protect someone else's child, since "[h]arming my child is not more wrongful than harming someone else's child."⁵⁰ But retributive theorists need not, and indeed characteristically do not, endorse an agent-neutral view of responsibility. To the contrary, one common critique of utilitarian theories, a critique typically offered on behalf of deontological theories like retributivism, is that utilitarians cannot make sense of agent-relative duties.⁵¹ Retributivists can provide an account of duties (for example, duties of affirmative action) with varying scopes depending on the actor's role responsibility.⁵² Moreover, in the context of

⁴⁹ "On Hate and Equality," at 509.

⁵⁰ *Id.* at 522.

⁵¹ See, e.g., Samuel Scheffler, Introduction, Consequentialism and its Critics (S. Scheffler ed. 1988).

⁵² Consider the views of Robert Nozick, who endorses a retributivist view that punishment should be proportional to "r x H," terms that essentially correspond to culpability and wrongfulness, respectively. In the course of explaining why H (or wrongfulness) should encompass both "wrongs" and "harms," Nozick defends both the view that injuring a more vulnerable person is a greater wrong, and the view that the degree of wrongfulness depends in part on role responsibilities:

Letting H correspond to the degree to which others are wronged, or to the wrongness of the act, rather than to the degree of harm, fits our view that (a) injuring helpless people or children who cannot resist and do not fully understand what is happening is worse than a similar injury to competent adults; (b) doing an act you have a special duty or responsibility not to do (for instance, a policeman

necessity and self-defense, many retributivists insist on an absolute (agent-relative) duty not to intentionally cause the death of an innocent person, in opposition to (agent-neutral) utilitarian arguments that might rationalize an intentional killing if such a killing would promote a net savings of lives.⁵³

But can retributivism really accommodate, as an aspect of wrongdoing, the concern to protect the general public rather than just the individual victim? Or is this actually a disguised consequentialist view?⁵⁴ Here we need to recall the sometimes subtle distinction between retributive and consequentialist perspectives. A retributivist can consider egalitarian values, susceptibility of others to crime, and even crime-prevention concerns, as part of her definition of wrongdoing, so long as she conceives of wrongdoing as a retrospective assessment of just deserts. Thus, she can give weight to such crime-prevention interests as protecting witnesses from physical harm, and accordingly can justify a higher penalty for those who knowingly assault or kill a witness, so long as the punishment increment is consistent with the offender's culpability and wrongdoing. (A similar analysis applies to those who deliberately destroy or conceal evidence of a crime.) For similar reasons, retributivists can justify punishing a person who knows he is dangerously close to committing a crime as severely as one who succeeds, or a (knowing) killer

on duty using his weapon to settle a private grudge) is worse than someone else's doing the same act.

Robert Nozick, Philosophical Explanations, 719-720, note 85 (1981).

⁵³ For discussions of this issue in the context of the famous "Trolley Problem" and the "Utilitarian Surgeon," see Leo Katz, Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law 52-59 (1996); Michael S. Moore, Torture and the Choice of Evils, 23 *Israeli L. Rev.* 280, 290 (1991).

⁵⁴ See "On Hate and Equality," at 519 ("Taking other considerations [beyond those "intrinsic to the crime itself"] into account violates the Kantian principle that the criminal perpetrator must not be used as a means to promote social ends.").

who believes that he is practically certain to succeed more severely than a (reckless) killer who believes that his likelihood of success is much less.

One final observation is in order concerning the retributive significance of culpability and wrongfulness. I have analyzed these factors separately, but they sometimes operate synergistically. In the bias crime context in particular, certain types of wrongdoing are a function of culpability. Consider the harm of racial division, a harm invoked by proponents of criminalizing bias crimes. Normally only actors acting with a defined type of culpability—racial animus, or at least selection on the basis of race—will in fact cause this harm. For unless the community views the crime as racially biased, a crime committed by a white offender against a black victim (or vice versa) will not exacerbate racial tensions.

Accordingly, an act accompanied by a form of culpability that in other contexts suffices for retributive blame might not justify such blame in the bias crime context. For example, retributivism can indeed support an enhanced penalty for a person who “knowingly” victimizes a child or an elderly person, even if that status was motivationally or causally irrelevant, i.e., not a reason or basis for the offender’s decision to select that victim. (And similarly, it can support an enhanced penalty for one who knowingly victimizes a police officer, even if that status was not relevant to the actor’s selection of the victim.) Yet bias crime liability for a person who merely knows that the victim is of a different race or religion, but who neither is motivated by this status nor selects the victim because of this status, is ordinarily unjustifiable. Why? Because it is normally very unlikely that such a crime will exacerbate racial divisions or cause any other cognizable harm.⁵⁵

But “normally” is not “always.” In narrow circumstances, a merely knowing victimization of a person of a different race would plausibly cause

⁵⁵ And similarly, such knowledge (where the victim’s status is irrelevant to the decision to commit a crime) does not make the offender especially culpable.

sufficient social harm to warrant criminal punishment. Suppose the following context. In a particular city, most of the high schools are racially segregated, and almost every high school basketball game in the last several years has been followed by serious racially motivated violence. Many of these fights have been precipitated by minor interracial assaults, including some assaults that clearly were motivated by anger at losing a game rather than racial animosity. In this volatile environment, the city passes an ordinance increasing the penalty for assault in any case in which the actor knowingly assaults a person of the opposite race. Although it is a close question, I believe that such an enhancement is justifiable.

In all but such extraordinary circumstances, however, it is not legitimate to permit enhancement for a merely knowing victimization of a person of another race, even though it is legitimate to permit enhancement for a knowing victimization of a child or police officer (assuming in both cases that the victim's status is irrelevant to the decision to assault). Moreover, this distinction underscores the inadequacy of the FPP approach, which cannot readily explain why the situations differ. If it really is true that the best justification for bias crime enhancement is the special vulnerability of the victim, then in both cases, knowingly harming a person in a vulnerable category should be sufficient culpability to warrant criminal punishment. But it is not. And that should cause us to doubt the premise.

Much more could be said about the proper content of the "wrongdoing" component of retributive theory. Retributivist scholars have devoted much more attention to culpability, and the authors' essay shows the importance of more careful inquiry into wrongdoing as well. I do believe, however, that these brief comments suffice to counter their claim that retributive theory cannot justify greater punishment in the name of equality or protection of the vulnerable.

D. When FPP and retributivism conflict

If retributivism and the associated WC approach can accommodate concerns about equality and vulnerability as much as I claim they can, then is FPP just a harmless, gratuitous principle? I'm afraid it is not.

When the authors endorse supplementing retributive theory with the consequentialist equality approach of FPP, they are suggesting a significant change in the retributive approach, at least in some cases. The idea of imposing on the state a broad egalitarian duty to protect crime victims certainly sounds appealing. But supplementing retributivism in this way doesn't give us something for nothing. We lose retributivism's focus on the retrospective punishment of an actor in accordance with his just deserts, and its insistence on fairness to the individual defendant even at the expense of significant social benefits.

Isolating a pure illustration of the conflict is not easy, for FPP and the retributive WC approach often dovetail. FPP focuses on deterring defendants who would prey on the vulnerable. WC, as applied to punishment of crimes against the vulnerable, emphasizes retrospective punishment of defendants who, by preying on the vulnerable, have demonstrated greater culpability or caused greater wrong. Both deterrence and retributive blame might be reasonably well-served by requiring that the defendant have a culpable mental state (for example, at least negligence) with respect to harming a person in a specified vulnerable class (for example, the elderly).

But the approaches sometimes diverge. First, although a wide variety of forms of "wrongdoing" can be encompassed within a retributive theory, in the end any such theory will include some forms of wrong and exclude others. Once the appropriate content of wrongdoing is specified, additional equality concerns may arise about whether, once the criminal law is actually enforced, the state provides equal protection to the class of victims of "wrongs" so defined. But these additional equality concerns

about unequal vulnerability are indeed external to the retributive theory. On a retributive theory, those additional, external equality concerns, unlike internal equality concerns encompassed within the criterion of “wrongdoing” itself, can only be addressed by prosecutorial practices, not by varying the legal sanction for the crime (as I explain more fully below).

Second, sometimes FPP would support strict criminal liability, while a culpability-based retributivism would not. In some circumstances, strict liability might indeed be effective in furthering FPP: so long as a victim of an assault honestly believes that she was selected on racial grounds, FPP might justify enhancement, even if the offender actually did not act on that basis.⁵⁶ Such a rule is clearly inconsistent with culpability-based retributivism, but it might serve the consequentialist egalitarian goal of minimizing racially selective assaults. After all, it avoids the serious proof problems posed by racial selection (not to mention racial animus) statutes. Although this approach does create social costs by imposing additional punishment upon defendants who “objectively” did not violate the egalitarian norm, whether those costs exceed these other benefits is an empirical question; we cannot assume a positive answer in advance.⁵⁷

A powerful illustration of how FPP can generate problematic results that retributive theory would not permit is the authors’ analysis of the “Violent Showoff” example, an example that has become a staple in the bias crime literature. They suggest that their FPP model would support prosecution for a bias crime even if a defendant attacked a particular

⁵⁶ It might be objected that if the victim believes that she has been selected on a racial basis, but actually she has not been, FPP is not violated. But this depends on which interpretation of FPP is being defended. If we wish to offer victims the subjective satisfaction of feeling equally protected against crime, then it would be defensible to endorse a principle protecting those who merely believe that they are more vulnerable.

⁵⁷ Similarly, even more troubling forms of strict liability might serve FPP. Suppose that making parents strictly liable for the crimes of their children would have a significant deterrent impact, especially on offenders who prey on the most vulnerable victims.

victim only to impress his (biased) friends, and even if he had no idea that they were motivated by racial bias. Even in the absence of such knowledge, the authors assert, such a “Violent Show-Off” poses an additional risk to minorities’ safety, and that is enough to justify a higher penalty.⁵⁸ Thus, the authors go beyond even the view that criminal liability is warranted for offenders who are willing to effectuate the known prejudices of others. Their analysis both supports the criticism made above, that they ignore how racial equality rather than vulnerability is the principal value at stake in bias crime legislation; and also reveals that in some cases, the FPP approach really does reach results inconsistent with a retributivist approach.

To see this point even more vividly, consider the following example, which I will dub “The Ignorant Initiate.” Suppose the defendant wants to join a gang, and as part of the initiation rite, he must beat up the victim, an unidentified person whom the gang has kidnapped and placed inside a canvas bag. He does beat up the victim, but he is unaware (and has no reason to suppose) that the gang has deliberately chosen a victim who is a member of a different racial group than the defendant and the gang members. The authors’ analysis of the “Violent Show-off” entails that they would support convicting this defendant, and not just the gang members, of a bias crime!

Moreover, if the authors also mean to endorse FPP even when it counsels a lesser penalty than WC would warrant, then another type of conflict is possible. For sometimes FPP might not support criminal liability when retributivism clearly would—specifically, in those cases where criminal punishment might have little or no deterrent impact, but where defendants are still quite blameworthy. At least some categories of bias crimes might fit this description—perhaps the most impulsive bias crimes, or bias crimes by persons who consider a criminal conviction a badge of

⁵⁸ “On Hate and Equality,” at 534 (discussing Lawrence’s analysis).

honor, or who obtain such extraordinary sadistic pleasure from the crime that the prospect of a criminal penalty will have no measurable deterrent impact. In such cases, presumably, additional punishment on account of bias will not serve FPP's intended goal of protecting more vulnerable victims.

Indeed, if FPP has this kind of preemptive force, it might have the far-reaching effect of undermining the basic culpability structure of the criminal law. Penalty gradations are based (*inter alia*) on gradations in mental state. A purposeful killing is punished more harshly than a reckless killing, which is punished more harshly than a negligent killing. Yet, from the victim's perspective, a death is a death.⁵⁹ If that is what matters most, then it would seem that we should equalize victims' vulnerability to death, whatever the culpability with which the killer acts. And equalization might, depending on the facts (relevant to effective strategies for overcoming differential vulnerability), require that we throw out the usual mental state categories entirely, or punish some negligent killings much more harshly than some intentional ones.⁶⁰ In short, a focus on equalizing vulnerability might open the door to a thoroughgoing consequentialism that largely displaces principles of just deserts.

One way to avoid the conflict while preserving retributive values is to apply the egalitarian norms in FPP only in investigatory and prosecutorial decisions, not in the determination of criminal sanctions. As

⁵⁹ To be sure, sometimes the mental state with which the death is inflicted affects the degree of emotional harm that the victim suffers prior to death, and affects the degree of harm suffered by others; but the death itself will normally be the vastly predominant element of harm.

⁶⁰ In this example, culpability as to the death is the only culpability at issue; while in bias crimes, the offender has already acted culpably with respect to a criminal wrong, and the culpability at issue concerns the reason why he selected the victim. Nevertheless, it seems that a FPP focused on victims is susceptible to the same criticism in both situations.

the authors note, such decisions often do incorporate concerns about fair application of criminal law norms to the most vulnerable. Violent inner-city neighborhoods, and any other neighborhoods highly susceptible to violent crime, obviously do and should obtain a disproportionate share of police and prosecutorial resources (relative to population). But employing FPP here raises no concerns about proportionality and just deserts.⁶¹

A second way to avoid the conflict is to apply FPP norms outside the criminal context. The authors treat criminal law in isolation from other systems of moral condemnation, social control and social assistance. But tort law can compensate victims and vindicate their rights. Administrative law can license, fine, and enjoin, and can authorize victim remedies. Social and economic programs can pay special heed to the plight of the vulnerable. Why must criminal law, too, be dominated by concern for the victim, without regard to the actor's just deserts?

A third possible way to resolve the conflict is to consider evidence that the victim was unusually vulnerable only at sentencing, but to allow such evidence whether or not defendant was culpable with respect to that circumstance. This approach at least has the merit of not undermining substantive criminal law norms. But a genuine retributive perspective must reject this solution. Giving weight to factors in conflict with retributive

⁶¹ To be sure, retributivists should also be concerned about prosecutorial discretion: if the state is utterly indifferent to prosecuting some serious crimes, then this predictably results in the offenders receiving less than their just deserts. The difficult question of how a nonconsequentialist punishment rationale like retributivism appropriately limits prosecutorial discretion is beyond the scope of this essay. Although retributivist constraints must exist, they will play out quite differently from consequentialist constraints. Among other things, a retributivist, unlike a consequentialist, still can insist on one very important proportionality constraint: at trial, the state must prove that a retributively acceptable substantive criminal law norm has been violated beyond a reasonable doubt.

constraints is troubling even when it is less visible.⁶² Significantly, the Federal sentencing guidelines, which do give weight to whether the victim of a crime was vulnerable, only allow enhancement if the defendant “knew or should have known” that the victim was unusually vulnerable.⁶³

⁶²The authors actually acknowledge that visibility is a good reason for incorporating the egalitarian concerns of FPP into the substantive criminal law, rather than as sentencing guidelines. “On Hate and Equality,” at 538 n. 78.

⁶³ U.S. Sentencing Guidelines Manual § 3A1.1(b) (1998). The authors assert that these guidelines could reflect either WC or FPP (in the sense that the vulnerable victim needs special protection because she cannot easily defend herself). “On Hate and Equality,” at 530-531. But their assertion is undercut by this culpability requirement, a requirement that the authors do not discuss and that is better explained by WC than by FPP.

IV. Conclusion

An important theme throughout the authors' essay is the complaint that the retributivist/WC approach discounts the interests of the victim of crime.⁶⁴ Indeed, they complain that that approach "is heavily biased in favor of criminal offenders."⁶⁵ Insofar as this just amounts to the objection that retributivism cannot account for either egalitarian values or the problem of especially vulnerable victims, the objection is misplaced, for reasons I have explained. But if this amounts to the broader objection that any use of the criminal law that will be effective in protecting victims should be permissible, the objection confronts the bedrock retributive principle that adequate personal responsibility is a prerequisite to just criminal punishment. Strict liability, criminal punishment of children, and criminal punishment of the innocent are but a few members of the parade of horrors that retributivists can legitimately trot out in response to the objection.

⁶⁴ See e.g. *id.* at 508 ("The [WC] paradigm assigns no independent importance to the crime victim.").

⁶⁵ *Id.* at 508. As they elaborate: "Because the criminal offender controls, to a large extent, both her conduct and her mental state, the [WC] paradigm confers upon the criminal offender the power to dictate the content of criminal prohibitions and the sanctions imposed for violating them." This is a strange characterization of how crimes occur—as if a criminal offender chooses her state of mind (intention, knowledge, reckless, or negligence) off a mental rack. In any event, to a retributivist, focusing on the actor's chosen conduct and on the mental state he exhibits in so acting is no more a "bias" in favor of the actor than focusing on the harm to a tort victim is a "bias" in favor of that victim. If the distinctive rationale for criminal punishment should be just deserts, then we must focus on the actor; just as we must focus on harm to a tort victim if the distinctive rationale for tort compensation is corrective justice. In either case, of course, if the legal institution of punishment or liability has no distinctive rationale but is merely one

In this comment, I have argued that retributive theory can justify higher sanctions for bias crimes, and that it can do so more easily than the problematic fair protection principle (FPP) can. But I do not take a position here on some important questions. How great an increase in sanction can be justified under the most persuasive retributive account? Which other culpable motives, and which other affronts to egalitarian social values, should be treated as harshly as bias crimes? How, on a retributive account, is “bias” best understood? For example, my position is consistent with rejecting the severe punishment supplements permitted under some current legislation⁶⁶; with endorsing a larger punishment

cog in a larger consequentialist machine, then it would follow that any use of the cog that does not optimize the desired consequences is “biased.”

⁶⁶ For example, in Alabama, bias motivation increases the minimum penalty for Class A felonies from 10 to 15 years imprisonment, and for Class B felonies from 2 to 10 years. Ala. St. §§ 13A-5-6, 13A-5-13 (1997). In many states, bias motivation increases the authorized punishment for a crime by one degree—for example, increasing a Class B felony to a class A, or a second degree misdemeanor to first degree. See, e.g., Fla. St. Ann. §775.085 (1998); Neb. Rev. St. §28-111 (1997); Ohio Rev. Code Ann. §2927.12 (1998). The effect of such a category increase is often a substantial increase in the maximum punishment permitted, if not the minimum punishment required. For example, in Florida, any felony of the second degree that is based on prejudice is punishable as a felony of the first degree; thus, the authorized maximum penalty increases from 15 years imprisonment to 30. And the punishment for any third degree felony based on prejudice can increase from a maximum of 5 years to the 15 years authorized for a second degree felony. Fla. St. Ann. §775.082.

In *Apprendi v. New York*, 120 S. Ct. 2348 (2000), the Supreme Court recently struck down as unconstitutional a New Jersey statutory scheme that permits an increase in the maximum penalty for a “second-degree” offense from 10 to 20 years based on a judge’s finding, by a preponderance of the evidence, that the defendant acted with a purpose to intimidate because of race or other prohibited criteria. The specific constitutional defect was the state’s failure to require that the aggravating fact be proven to a jury beyond a reasonable doubt. If such a requirement were in place, however, it is very likely that the penalty enhancement would be constitutional. For the Court has

supplement for assaults motivated by sadistic pleasure or by pecuniary gain than for assaults motivated by bias; and with restricting “bias” to offenders directly motivated by racial hostility or prejudice.

Nor do I question the importance of the egalitarian goals underlying the authors’ approach. Unequal administration of the criminal law is obviously a compelling social problem, especially when it reinforces racial division and poverty. But the authors’ more radical suggestion that retributive principles be significantly compromised in order to achieve otherwise valuable egalitarian goals is usually unnecessary, and in any case indefensible.

treated the Eighth Amendment proportionality requirement as imposing only a weak constraint on the permissible length of imprisonment. See *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding mandatory life term for possession of more than 650 grams of cocaine). Nevertheless, as a matter of justifiable penal policy, I believe that retributivists can and should defend a stronger constraint than this.