It is a familiar claim that moral theories, especially deontological theories of the Kantian sort, can, should and do provide the conceptual underpinning for the criminal law. The latter is, in effect, seen as applied moral philosophy. Nor is this conception limited to ethicists. Constitutional lawyers and philosophers of law routinely seek a justification or foundation in moral theory for one aspect or another of the criminal law.

For my part, I am skeptical of the idea that we can derive more or less all the principal features of the legal system, especially the criminal part of it, from traditional moral philosophy. It is not simply that existing legal systems exhibit features that are incompatible with conventional deontology (examples of which we will examine later in this paper); those, after all, could be changed if necessary to bring legal systems into line with our moral intuitions if thought necessary or desirable. Much more telling is the fact that there are some parts of any conceivable legal system, both ineliminable and important, that don’t appear to be subsumable under a deontological umbrella.

In today’s paper, I identify two key areas of the theory of crime and punishment that are demonstrably not derivable from deontological or retributive moral theory. In the first section, I will show that deontological moral theories are helpless when faced with the challenge of either justifying or deriving a standard of proof for criminal trials. In the second section, I will show that existing moral theories of punishment (especially Retributivism) in fact are nothing of the sort, in that they lack the resources to justify or derive a schedule of punishments or even a nonarbitrary definition of the just deserts for any given crime. Put differently, while Deontic theories stress the importance of convicted defendants receiving their just deserts, they have no
machinery for figuring out what the just deserts are for any given crime. This pair of arguments is an ambitious agenda so let me turn to it straightaway.

**Part I: Deontology’s Struggles with the Standard of Proof**

No criminal proceeding worthy of the name can proceed in the absence of a standard of proof. That standard serves as the decision rule for the trier of fact in reaching a verdict on the case. Without a standard of proof, the verdict itself is unmotivated and any finding of guilt is unjust unless it can be shown that the evidence presented against the defendant satisfies the preordained probatory standard.

Deontological theories have a curious structure: on the one hand, they are adamant that a defendant cannot be justly punished unless we are sure that he committed the crime; on the other hand, those theories lack the resources for telling us how sure we have to be before a conviction is justified. In short, their moral demand that we must be sure of guilt requires them to deliver on an epistemic promise that they have long made but never satisfied. In this section, I want to explore this tension in some detail.

It is widely and correctly supposed by deontologists that the standard of proof must depend (at least in part) on one’s determination of the respective harms occasioned by the errors that can be made in verdicts at trial. A false conviction inflicts a grievous moral harm on the innocent defendant whose liberty is denied, and whose reputation is indelibly tarred. A false acquittal likewise inflicts moral harm not only on the defendant who (as Kant would have it) has a right to receive his just deserts but also on the victim of the crime, who receives no sense of closure or justice if the true perpetrator is acquitted. There is a universal consensus among deontologists (and they are probably right) that the former harm is more egregious than the latter harm. Because it is, they argue, it is reasonable that we demand near certainty before we regard a conviction as just. Hence, they say, we want a standard of proof that is very demanding. The trouble with this argument is, of course, that the fact that a false conviction represents a greater moral harm than a false acquittal only warrants the assertion that the standard of proof at trial must be greater than the preponderance of the evidence and nothing more than that. Without being told *how much worse* a false conviction is than a false acquittal, all we can infer from the claim that
the former is worse than the latter is that the standard of proof must be more probable than not. So, to this point, we can’t get a standard that is anywhere close to near-certainty.

For a long time, deontologists have tried to fill in this gap by conjecturing about the relative harms associated with the two errors. What is generally known as the Blackstone ratio (which is an hypothesis about the acceptable ratio of false acquittals to false convictions in a long run of trials) is often set at 10:1. That is generally construed as warranting a standard of proof around 90% since it is thought—wrongly of course—that such a standard would produce errors that would exemplify this ratio. That in itself is nonsense as Ron Allen and others have repeatedly argued. However, that is not that point I wish to pursue here. The point I want to emphasize is the utter arbitrariness of the claim that a false conviction is an order of magnitude more harmful than a false acquittal. In general, deontological theories have the conceptual resources to ascertain that one harm is more harmful or less harmful than another. What they generally cannot do—except by an act of sheer, arbitrary intuition—is to determine how much more harmful one harm is than another.

Return briefly to the Blackstone ratio. While much discussed since the Middle Ages, prominent thinkers have reached no consensus about what its value should be. Maimonides insisted that it would be better to falsely acquit 1,000 guilty defendants than to convict one innocent one. Benjamin Franklin opined that the ratio should be about 100-to-one. Matthew Hale, famous English jurist of the 17th century, suggested that 5-to-1 would be about right. Voltaire asserted that the ratio should be 2-to-1. Interestingly, not a single one of these proposed values for the ratio was argued for or defended, except for saying that false convictions were more harmful than false acquittals. More troubling still, these estimates differ by a factor of 500, suggesting that there is not even a uniformity of intuitions, let alone of reasoned arguments for one version rather than another of the Blackstone ratio. Every one of these versions of the Blackstone ratio was simply asserted to be self-evident, as raw intuitions are apt to be.

Apart from their intrinsic arbitrariness, the proposed values for the ratio and therefore for the criminal standard of proof are all over the map. If Voltaire is right, the criminal standard of proof should be about 65%. If Maimonides is
correct, it should be 99.9%. The point is that, absent a consensus about the proper value of the Blackstone ratio and absent any plausible arguments for setting that ratio at one point rather than at another, the deontologist cannot claim to have a foundation for the standard of proof in his personal judgment about the relative costs of the two erroneous verdicts. Clearly, this particular approach by the deontologists to defining a standard of proof will never reach closure since it depends on having a metric for determining relative degrees of harm and deontologists have no machinery for playing that game, save their untutored and unmotivated intuitions.

A very different analysis has been proposed by Dworkin that merits our attention, if only briefly. Dworkin claims that innocent defendants have a moral right not to be convicted. If they are convicted, the harm done by the conviction and punishment are exacerbated by the moral harm that was done in denying the innocent defendants' right to be found not guilty. Accordingly, says Dworkin, we must recognize a moral right that protects the defendant from a false conviction. That right, he says, is the right to be tried according to the BARD standard. Why that standard in particular? Because, says Dworkin, it represents the most that the legal system can do to protect a defendant from a false conviction.

This idea that what justifies the use of BARD is that it represents the maximal protection against false convictions that the legal system can offer is widespread both among moral philosophers and legal scholars. Rinat Kitai insists: “Guilt beyond a reasonable doubt is assumed to be the highest standard of proof that is realistic and within the realm of human knowledge.”1 She goes on:

> The duty imposed on the state [by the social contract] ... gives rise to the individual's absolute and inalienable right ... not to be convicted unless her guilt has been proven beyond all reasonable doubt.

Alex Stein subscribes to the same view:

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A legal system may justifiably convict a person only if it did its best in protecting that person from the risk of erroneous conviction....

Thirty years ago, Laurence Tribe sang the same tune:

The [criminal justice] system does not in fact authorize the imposition of criminal punishment when the trier recognizes a quantifiable doubt as to the defendant’s guilt. Instead, the system ... insists upon as close an approximation to certainty as seems humanly attainable in the circumstances.

The refrain is all too familiar; the just state must do everything in its power to avoid a false conviction of an innocent person and a key part of that process involves adopting a standard of proof that is as demanding as human efforts will allow.

Unfortunately, this analysis is doubly wrong; BARD does not represent the best we could do to protect innocent defendants from conviction, if that were our duty; and, more importantly, it is demonstrably not our duty to do everything humanly possible to prevent false convictions. Consider these points in turn.

If we were unequivocally committed to protecting the innocent defendant at all costs, we could, for instance, expand the size of the jury; insist that jurors must have no doubts—not even irrational ones—about defendant’s guilt; we could insist that, for a conviction, the judge must concur with the decision of the jurors; we could exclude all confessions on the grounds that some of

2 Alex Stein, *Foundations of Evidence Law* (Oxford University Press, 2005), p. 175 (my italics). This principle of Stein’s seems to be redundant on its face. If its first clause is satisfied, namely, if the state genuinely did its best to protect a defendant from false conviction, the possibility would not arise that it gave better protection to some other defendant since the latter situation, if it occurred, would gainsay the claim that the state had done its best for the former defendant.

3 Lawrence Tribe, *A Further Critique of Mathematical Proof*, 84 Harvard L. Rev. 1810 at 1818 (1971). Can Tribe really believe that if the trier of fact is persuaded that the likelihood of defendant’s guilt is 99.999%, an acquittal is required? The fact that a doubt is quantifiable has nothing to do with whether it is reasonable or unreasonable.
them are false and so forth. In brief, there is literally no limit to the lengths we might go to in order to prevent a false conviction. The reason why we do none of these things is that doing so would exact an unacceptable cost in false acquittals, leading to a situation in which virtually no criminal defendants were convicted. And this takes us, of course, to the second way in which the Dworkin-Stein position is wrong-headed. The state does not have a duty to do everything humanly possible to avoid a false conviction. If we took this duty literally, we would have to impose a rule that criminal trials could never result in convictions since, so long as there are convictions, some of them will be false. This is inescapable. Accordingly, it is a silly counsel of perfection to imagine that our target should be to design trials in such as way that we have done our very best to reduce the risk of false conviction. For such reasons, being tried according to the BARD standard is most certainly not a moral right. Nor has the defendant a moral right that we do everything humanly possible to avoid a false conviction.

Accordingly, each of the three main argumentative routes that deontologists have proposed to arrive at a standard of proof fails. The bare claim that false convictions are worse than false acquittals will not get us a clear standard of proof. The claim that false convictions are $n$ times worse than false acquittals will not either, since whatever value we assign to $n$ is arbitrary and unmotivated. And, finally, the effort to justify BARD by claiming that it represents the best that we mortals can do to minimize false convictions is simply false. Were we so minded, we could do much more than BARD does to protect the innocent defendant.

I’ve argued thus far that standard deontological theories lack the conceptual resources to enable us to derive a just and reasonable standard of proof. Sadly, that is not the end of the problem but only the beginning. In every criminal proceeding, from initial arrest through decisions about bail, about admissibility of evidence, about jurisdiction, about the qualifications of experts, about whether a defendant claiming an affirmative defense has met his burden of production, and about sentencing (to mention only a few of the dozens of common decision points), a decision rule is required. Such a rule will normally be different from the standard of proof.

If we are to have a coherent account of the criminal justice system, we must be able to show that the rules governing every such decision are appropriate.
For the same reason that the deontologists cannot give us a standard of proof for the verdict at trial’s end, their theories do not entail any other decision rules at trial. In a way that is thoroughly typical of the modus operandi of moral philosophers, they have constructed their moral theories supposing that we know (for instance) that x is admissible, or that this is the appropriate jurisdiction, or that bail is appropriate or inappropriate. But we don’t generally ‘know’ these things in the technical sense of that term. All such decisions are made under conditions of uncertainty and moral philosophy is notorious for lacking an account of how decision making under such conditions is to take place. If the deontologist can’t tell us when the granting of bail is justified, when evidence should be admitted, when an appeal should be accepted or rejected, and so on ad nauseam, then we cannot take seriously the claim that a trial should be seen as an exercise in applied morality.

**Part II Can Deontological Moral Theory Explain or Justify Specific Regimes of Punishment?**

Much of the literature of moral theory in the context of the law has addressed questions about punishment. They include: when and why punishments can be applied by the state; whether defendants have a right to be punished; whether punishment legitimately aims at rehabilitation, revenge, deterrence or something else; and whether capital or corporal punishments are ever justified. These are interesting and important questions. But, the core question faced by those who must mete out punishments within a legal system, whether they are judges or jurors, is none of the above; it is, rather, what punishment is just for someone convicted of a particular crime. Officially, contemporary deontological theory has an answer to that question too: namely, guilty defendants should receive their just deserts or, more colloquially, guilty defendants should receive a sentence that fits their crime, that is, that accurately reflects the harms for which they have just been convicted. This form of vengeance or using its more politically correct description, retribution, is very much the fashion among moral theorists, now that rehabilitation as the aim of punishment has been largely discredited.

It is one thing to be told that the defendant should receive his just deserts and quite another to figure out what those just deserts are. Contemporary
moral theories are adamant about the former and strangely silent about the latter. Indeed, it is difficult to find any moral theorist who will tell us specifically what is the appropriate punishment, the just desert, for any given type of crime. This pervasive silence about the sentence appropriate to a certain crime is no accident or oversight. It is, I suggest, a direct result of the fact that deontological theory has little or no machinery for figuring out whether a punishment does or does not ‘fit’ the crime.

I hasten to add that I am by no means the first to remark on the fact that retributivists, for all their emphasis on giving convicted felons their just deserts, almost never bother to tell us what those deserts are. But I will try to offer an explanation of the fact that they virtually never address what you would expect to be their most central concern.

The reason for this lacuna is not difficult to surmise. Deontologists have machinery for determining whether one crime has produced more harm than another. Specifically, they look at the victim’s rights violated by one crime and compare them with the rights violated by a different sort of crime. If some of these rights are more fundamental, more basic, than others, it becomes possible to argue that (say) murder is a more egregious harm than rape or that armed robbery is worse than burglary. This procedure, at least in principle, enables the deontologist to construct a rank ordering of the harshness of different crimes. When that is combined with her rule that the punishment should fit the crime, it leads inexorably to the idea that the rank ordering of the harshness of punishments should mirror the rank ordering of the sentences associated with those crimes.

The insoluble problem for the retributivist is simply this: given an ordinal rank ordering which tells which, among a range of harms, are more serious and which are less serious, we can draw no inferences whatever about what punishments are appropriate for which harms. We can be sure that (say) murder demands a harsher punishment than fraud or robbery but nothing in

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the rank ordering tells us what specific penalty is the just deserts for any crime, let alone all of them. (Ordinal measurements describe the order of a set of objects relative to their exemplification of some quality of interest, but say nothing about the relative size or degree of difference between the items measured.) Things would be different if the retributivists would give us a ratio rank ordering. That would tell us not merely which harms were worse than others but it would also tell us specifically how much worse one crime was than another. In that way, provided that we knew the appropriate punishment for at least one crime, we could work out the appropriate punishments for the rest. Even with such a ratio rank ordering, however, the retributivist would still have to figure out what was the just punishment for at least one crime; a task that it is not clear that he knows how to discharge. As it is, with neither a single crime and its punishment defined and with only an ordinal rank ordering to work from, it is logically impossible to figure out which punishments would be the just deserts for which crimes. Indeed, given the paltry tools the retributivist provides us, it is provably the case that there are infinitely many mutually incompatible sentencing schedules that are compatible with any given rank ordering. That feature of deontological discourse explains, I believe, why we hear much talk about defendants getting their just deserts but almost none about what those just deserts are.

The criticism that deontologists have not offered an analysis of the punishments appropriate for particular crimes because they lack the conceptual resources for doing so was explicitly addressed by the deontologist von Hirsch in a short paper in the *Journal of Philosophy*. He acknowledged that deontologists have not worked out a ratio scale for measuring the differences in harm associated with different crimes. But he produces a different explanation than mine for this failure. The fact that we lack such a scale, he insists, is simply "because nobody has yet seriously tried to construct such a theory."\(^5\) Still, here we are, more than thirty years after von Hirsch’s excuses, and we still lack such a scale, despite an abundance of retributivists doing active research in the intervening three decades. How long need one wait before one is entitled to conclude that the nonexistence of such a scale is a powerful sign that deontologists haven’t the tools necessary to construct one?

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If my criticism of retributivism seems rather abstract, here is a table that may make it more concrete:

<table>
<thead>
<tr>
<th>Harm rank order</th>
<th>Crime</th>
<th>Schedule 1</th>
<th>S2</th>
<th>S3</th>
<th>S4</th>
<th>S5</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>fraud</td>
<td>1 yr.</td>
<td>1 day</td>
<td>10 days</td>
<td>20 yrs</td>
<td>banishment</td>
</tr>
<tr>
<td>2</td>
<td>robbery</td>
<td>5 yrs.</td>
<td>2 days</td>
<td>20 days</td>
<td>21 yrs</td>
<td>cut off hand</td>
</tr>
<tr>
<td>3</td>
<td>kidnapping</td>
<td>10 yrs</td>
<td>3 days</td>
<td>30 days</td>
<td>22 yrs</td>
<td>send into slavery</td>
</tr>
<tr>
<td>4</td>
<td>rape</td>
<td>15 yrs</td>
<td>4 days</td>
<td>60 days</td>
<td>23 yrs</td>
<td>castrate</td>
</tr>
<tr>
<td>5</td>
<td>murder</td>
<td>25 yrs</td>
<td>5 days</td>
<td>25 yrs</td>
<td>25 yrs</td>
<td>execute</td>
</tr>
</tbody>
</table>

Each of these sample punishment schedules complies with the ‘harm rank ordering’ supposedly generated by the retributivist. But what are the just deserts for (say) rape: 15 years, 4 days, 60 days, 23 years or castration? If you think I’m only abstractly playing with numbers, consider some real-life cases. If we look at sentencing schedules in France and in the United States for similar crimes, we discover that the US sentences are, in general, 500% to 1,000% harsher than French sentences are. For instance, while the US guidelines mandate a maximum of life for first-degree murder, and the English give a maximum of 35 years, the French specify 8 years. Where the maximum US sentence for fraud is 12 years, the English maximum is 7 years. Interestingly, all three countries’ sentencing schedules generally comply with the kind of ordinal rank ordering that a retributivist could endorse.

Nonetheless, we are left with the unavoidable question: how can the retributivist possibly decide which country, if any of the three, is giving its murderers their just deserts: the Americans, the English or the French? (I

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6 James Q. Whitman, *Harsh Justice: Criminal Punishment And The Widening Divide Between American And Europe* 5(2003). See also Joshua Kleinfeld, “The Concept of Evil in American and German Criminal Punishment,” SSRN: “America’s sentences of imprisonment are on average five to ten times longer than those of France, and much longer than those of Germany as well—arguably the continent’s leading legal system, and the focus of comparison in this essay.”
note parenthetically, that this puzzle is the exact counterpart of our question in Part One: “Who had it right about the value of Blackstone’s ratio: Maimonides, Voltaire, Franklin or Blackstone himself?” And if, as I believe, he cannot answer that question, then his dogged insistence that a convicted felon should receive precisely his just deserts (no more and no less) reveals itself to be a hollow slogan and a sham. In effect, they retributivist is in the position of saying: “The state has the obligation to give a convicted criminal his just deserts; and by the way, we haven’t a clue what those are.”

The retributivists’ thesis that the punishment should fit the crime becomes even more shambolic when one realizes that virtually all real-life sentencing schedules specify not a highly specific punishment but a sentencing range. Consider the sentencing ranges that now prevail in the United States for half a dozen crimes:

<table>
<thead>
<tr>
<th>Crime</th>
<th>Sentencing Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>10 months to life</td>
</tr>
<tr>
<td>Attempted Murder</td>
<td>6 to 14 years</td>
</tr>
<tr>
<td>Aggravated Assault</td>
<td>3 to 8 years</td>
</tr>
<tr>
<td>Rape</td>
<td>10 months to 15 years</td>
</tr>
<tr>
<td>Drug Possession</td>
<td>Probation to life</td>
</tr>
<tr>
<td>Fraud</td>
<td>Probation to 12 years</td>
</tr>
</tbody>
</table>

In short, according to American authorities, a sentence of 7 years could be appropriate for a murderer, an attempted murderer, a rapist, a drug dealer, and someone who commits fraud or aggravated assault. Are these figures compatible with the doctrine that the punishment should fit the crime? Are there forms of murder so comparatively benign that they merit the same or lesser punishment than fraud? If, as I suspect, overlapping ranges such as these cannot be accommodated within the rank ordering proposals of the retributivists, then it becomes even more clear that phrases like ‘just deserts’ and ‘the punishment must fit the crime’ are little more than hollow

7 Clearly, retributionism can accommodate ranges of just deserts for crimes, so long as they do not overlap with the ranges for clearly dissimilar crimes.
clichés that do next to nothing to shed light on what sentencing policies are reasonable and which are not.\textsuperscript{8}

One well-known retributivist, Paul Robinson, has suggested that the problem of having no schedule of sentences associated with a deontological perspective can be obviated by carefully ascertaining what sentences the general public believes are appropriate for which crimes.\textsuperscript{9} In their three studies, Robinson and his colleagues described a set of situations for their interviewees in which it would be possible to see whether just deserts concerns were more or less important than deterrence in fixing people’s beliefs about suitable punishment. While the two kinds of concerns clearly intermingle in the popular mind, Robinson claims to have evidence that retrospective judgments about the severity of the crime played a larger role than prospective issues of general crime deterrence in making up one’s mind about appropriate sentences. Unfortunately, what these research studies did not do was to pay any attention to the role of either incapacitationist or rehabilitationist issues that might have been driving citizens preferences about punishments. Under those circumstances, we cannot plausibly assume that citizens’ judgments closely match what a just deserts theory of punishments would countenance.

For such reasons, one has to say that the deontologist lacks the ingredients necessary to have a theory of punishment. That is a serious failing in what purports to be a theory of punishment. I am not suggesting that the deontologist is reduced to total silence since he can a). criticize a sentencing schedule if it fails to satisfy his rank ordering of the severity of crimes; likewise, b). he can lodge an objection if someone attempts to impose a punishment based on issues of dangerousness or future behavior of the accused. But being able to kibbutz from the sidelines does not qualify one as being a serious player in the complex business of articulating a satisfactory regime of punishment. Until and unless the deontologist can quantify the magnitude of the differences in moral harms, he will not be able to say, of

\textsuperscript{8} Bedau put the point succinctly: “The new retributionism fails at precisely the same point where the old retributionism did; it has yet to solve the dilemma of making the punishment fit the crime.” Bedau, op. cit., p. 615.

any given punishment for any given crime, that it delivers the just deserts to those found guilty of committing it.

Conclusion

To conclude: Doubtless, you will have already noted a common focus shared by the two sections of this paper, one dealing with the standard of proof and the other dealing with sentencing policies. In both cases, my critique of the deontologists involved a claim of incompleteness of their project to provide conceptual foundations for the criminal law. In both cases, the deontologists came up shorthanded because they lacked any plausible way of scaling the relevant harms. In the case of the standard of proof, they had nothing but the crudest of intuitions to tell them how much more serious a false conviction was than a false acquittal. Without some more specific and less arbitrary measure of that difference they can neither derive a standard of proof nor any other decision rule for the numerous other decisions that judges are routinely called on to make.

In precisely the same way, their inability to measure the difference between the harms involved in different crimes makes it impossible for them to identify the just deserts that, in their view, should be associated with each and every crime. Absent knowing what the just deserts are for any crime, their core retributivist thesis that just deserts should be the engine driving the setting of punishments becomes nothing more than sloganeering. The bottom line in my judgment, is simply this: until and unless the deontologists can spell out a metric for evaluating the magnitudes of moral harms, they will be unable to say anything very informative about the standard of proof, about the decision rules that drive criminal trials, and about the punishments that should be meted out for crimes of differing degrees of harmfulness. Almost a century ago, A.C. Ewing, acknowledging that retributivism faces serious conceptual problems, insisted that we should not be quick to dismiss it out of hand.10 That might have been sound advice in 1929 when retributivism was emerging from a century of relative neglect. But it doesn’t

10 “The ideas of desert, of ‘justice’ as a good-in-itself, and even of proportion between guilt and penalty, are too deeply rooted in our ethical thought to be dismissed lightly, however hard they may be to rationalize.” (Ewing, The Morality of Punishment, (London: Kegan Paul, 1929, p. 45)
cut the ice any longer since contemporary retributivists, despite the impressive growth of their numbers, seem no closer to resolving these issues than Ewing was.

Whether there are non-deontological moral theories (such as consequentialism) that possess the tools for achieving these ends is a question I shall leave for another time.