Free Will Skepticism and the Public Health-Quarantine Model:
Replies to Objections

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This paper is not meant for publication in its current form. The material contained herein will be incorporated into a new book I am working on titled *Unjust Deserts: Free Will Skepticism, Criminal Behavior, and the Public Health-Quarantine Model*. Please cite material from this article as a draft chapter in the yet unpublished book named above.

One of the most frequently voiced criticisms of free will skepticism is that it is unable to adequately deal with criminal behavior and that the responses it would permit as justified are insufficient for acceptable social policy. This concern is fueled by two factors. The first is that one of the most prominent justifications for punishing criminals, retributivism, is incompatible with free will skepticism. The second concern is that alternative justifications that are not ruled out by the skeptical view per se face significant independent moral objections. Despite these concerns, I have recently argued that free will skepticism leaves intact other ways to respond to criminal behavior—in particular incapacitation, rehabilitation, and alteration of relevant social conditions—and that these methods are both morally justifiable and sufficient for good social policy (Caruso 2016; Pereboom and Caruso 2017). The position I defend is similar to Derk Pereboom's (2001, 2014, 2016), taking as its starting point his quarantine analogy, but it develops the quarantine model within a broader justificatory framework drawn from public health ethics. The resulting model—which I call the *public health-quarantine model*—provides a framework for justifying quarantine and criminal sanctions that is more humane than retributivism and preferable to other non-retributive alternatives. It also provides a broader approach to criminal behavior than Pereboom's quarantine analogy does on its own since it prioritizes prevention and social justice.

In Section I, I will begin by briefly summarizing my public health-quarantine model—for more details on the model, however, see Caruso (2016) and Pereboom and Caruso (2017). Then in Sections II-VI, I will respond to several criticisms that have been raised by Michael Corrado (2016, forthcoming), Stephen J. Morse (2017), John Lemos (2016), Saul Smilansky (2011, 2016), and others. In particular, I will address concerns about proportionality, human dignity, victims' rights, rehabilitation, cost, the incapacitation of innocent people, and replacing punishment with funishment. I will argue that each of these concerns can be met and that in the end the public health-quarantine model offers a superior alternative to retributive punishment and other non-retributive accounts.

I. Free Will Skepticism and Criminal Behavior

To begin, it is important to recognize that retributive punishment is incompatible with free will skepticism because it maintains that punishment of a wrongdoer is justified for the reason that he

deserves something bad to happen to him just because he has knowingly done wrong—this could include pain, deprivation, or death. As Douglas Husak puts it, "Punishment is justified only when and to the extent it is deserved" (2000: 82). And Mitchell Berman writes, "A person who unjustifiably and inexcusably causes or risks harm to others or to significant social interests deserves to suffer for that choice, and he deserves to suffer in proportion to the extent to which his regard or concern for others falls short of what is properly demanded of him" (2008: 269). Furthermore, for the retributivist, it is the *basic* desert attached to the criminal's immoral action alone that provides the justification for punishment. The desert the retributivist invokes is basic in the sense that justifications for punishment that appeal to it are not reducible to consequentialist considerations nor to goods such as the safety of society or the moral improvement of the criminal.

Free will skepticism undermines this justification for punishment because it does away with the idea of *basic desert* (see Pereboom 2001, 2014; Caruso 2012, 2016; Caruso and Morris, forthcoming). If agents do not deserve blame just because they have knowingly done wrong, neither do they deserve punishment just because they have knowingly done wrong. The challenge facing free will skepticism, then, is to explain how we can adequately deal with criminal behavior without the justification provided by retributivism and basic desert moral responsibility. While some critics contend this cannot be done, free will skeptics point out that there are several alternative ways of justifying criminal punishment (and dealing with criminal behavior more generally) that do not appeal to the notion of basic desert and are thus not threatened by free will skepticism. These include moral education theories, deterrence theories, punishment justified by the right to harm in self-defense, and incapacitation theories. While I agree with Pereboom and others that the first two approaches face independent moral objections—objections that, though perhaps not devastating, make them less desirable than their alternative—I have argued elsewhere that an incapacitation account built on the right to harm in self-defense provides the best option for justifying a policy for treatment of criminals consistent with free will skepticism (Caruso 2016; Pereboom and Caruso 2017).

My public health-quarantine model is based on an analogy with quarantine and draws on a comparison between treatment of dangerous criminals and treatment of carriers of dangerous diseases. It takes as its starting point Derk Pereboom's famous account (2001, 2014). In its simplest form, it can be stated as follows: (a) The free will skeptic claims that criminals are not morally responsible for their actions in the basic desert sense; (b) plainly, many carriers of dangerous diseases are not responsible in this or in any other sense for having contracted these diseases; (c) yet, we generally agree that it is sometimes permissible to quarantine them, and the justification for doing so is the right to self-protection and the prevention of harm to others; (d) for similar reasons, even if a dangerous criminal is not morally responsible for his crimes in the basic desert sense (perhaps because no one is ever in this way morally responsible) it could be *as* legitimate to preventatively detain him as to quarantine the non-responsible carrier of a serious communicable disease.

The first thing to note about the theory is that although one might justify quarantine (in the case of disease) and incapacitation (in the case of dangerous criminals) on purely utilitarian or consequentialist grounds, Pereboom and I want to resist this strategy (see Pereboom and Caruso 2017). Instead, on our view incapacitation of the dangerous is justified on the ground of the right

to harm in self defense and defense of others. That we have this right has broad appeal—much broader than utilitarianism or consequentialism has. In addition, this makes the view more resilient to objection, as will become clear in what follows.

Second, the quarantine model places several constraints on the treatment of criminals (see Pereboom 2001, 2014; Pereboom and Caruso 2017). First, as less dangerous diseases justify only preventative measures less restrictive than quarantine, so less dangerous criminal tendencies justify only more moderate restraints. In fact, for certain minor crimes perhaps only some degree of monitoring could be defended. Secondly, the incapacitation account that results from this analogy demands a degree of concern for the rehabilitation and well-being of the criminal that would alter much of current practice. Just as fairness recommends that we seek to cure the diseased we quarantine, so fairness would counsel that we attempt to rehabilitate the criminals we detain (cf. D'Angelo 1968: 56-9). If a criminal cannot be rehabilitated, and our safety requires his indefinite confinement, this account provides no justification for making his life more miserable than would be required to guard against the danger he poses. Finally, there are measures for preventing crime more generally, such as providing for adequate education and mental health care, which the free will skeptic can readily endorse.

Third, this account provides a more resilient proposal for justifying criminal sanctions than either the moral education or deterrence theories. One advantage this approach has over the utilitarian deterrence theory is that it has more restrictions placed on it with regard to using people merely as a means. For instance, as it is illegitimate to treat carriers of a disease more harmfully than is necessary to neutralize the danger they pose, treating those with violent criminal tendencies more harshly than is required to protect society will be illegitimate as well. In fact, in all our writings on the subject, Pereboom and I have always maintained the *principle of least infringement*, which holds that the least restrictive measures should be taken to protect public health and safety (Caruso 2016; Pereboom and Caruso 2017). This ensures that criminal sanctions will be proportionate to the danger posed by an individual, and any sanctions that exceed this upper bound will be unjustified.

In addition to these restrictions on harsh and unnecessary treatment, the account also advocates for a broader approach to criminal behavior that moves beyond the narrow focus on sanctions. On the model I have developed, for instance, the quarantine analogy is placed within the broad justificatory framework of *public health ethics* (Caruso 2016). Public health ethics not only justifies quarantining carriers of infectious diseases on the grounds that it is necessary to protect public health, it also requires that we take active steps to *prevent* such outbreaks from occurring in the first place. Quarantine is only needed when the public health system fails in its primary function. Since no system is perfect, quarantine will likely be needed for the foreseeable future, but it should *not* be the primary means of dealing with public health. The analogous claim holds for incapacitation. Taking a public health approach to criminal behavior would allow us to justify the incapacitation of dangerous criminals when needed, but it would also make prevention a *primary function* of the criminal justice system. If we care about public health and safety, the focus should always be on preventing crime from occurring in the first place by addressing the systemic causes of crime. Prevention is always preferable to incapacitation.

Furthermore, public health ethics sees *social justice* as a foundational cornerstone to public health and safety (Caruso 2016). In public health ethics, a failure on the part of public health institutions to ensure the social conditions necessary to achieve a sufficient level of health is considered a grave injustice. An important task of public health ethics, then, is to identify which inequalities in health are the most egregious and thus which should be given the highest priority in public health policy and practice. The public health approach to criminal behavior likewise maintains that a core moral function of the criminal justice system is to identify and remedy social and economic inequalities responsible for crime. Just as public health is negatively affected by poverty, racism, and systematic inequality, so too is public safety. This broader approach to criminal justice therefore places issues of social justice at the forefront. It sees racism, sexism, poverty, and systemic disadvantage as serious threats to public safety and it prioritizes the reduction of such inequalities.

Summarizing my account, then, the core idea is that the right to harm in self-defense and defense of others justifies incapacitating the criminally dangerous with the minimum harm required for adequate protection. The resulting account would not justify the sort of criminal punishment whose legitimacy is most dubious, such as death or confinement in the most common kinds of prisons in our society. The account also specifies attention to the wellbeing of criminals, which would change much of current policy. Furthermore, the public health component of my account endorses measures for reducing crime that aim at altering social conditions, such as improving education, increasing opportunities for fulfilling employment, and enhancing care for the mentally ill. This combined approach to dealing with criminal behavior, I maintain, is sufficient for dealing with dangerous criminals, leads to a more humane and effective social policy, and is actually preferable to the harsh and often excessive forms of punishment that typically come with retributivism.

II. Proportionality and Human Dignity

One concern critics have with my approach to criminal behavior is that they fear it will not protect human dignity and respect for persons in the same way that retributivism does. Retributivists adopt something called the *principle of proportionality.* As Alec Walen describes: "Retributive justice holds that it would be bad to punish a wrongdoer *more* than she deserves, where what she deserves must be in some way proportional to the gravity of her crime. Inflicting disproportionate punishment wrongs her just as, even if not quite as much as, punishing an innocent person wrongs her (Gross 1979: 436)" (Walen 2014). For retributivists, the principle of proportionality is needed to guarantee respect for persons since it treats them as autonomous, morally responsible agents and not just objects to be "fixed" or used as a means to an end. Hence, punishment administered because one is a morally responsible autonomous person who *justly deserves* punishment due to his or her own choices, preserves one's status as a person and a member of the human community of responsible agents as long as it is not disproportionate (see Lewis 1971; Oldenquist 1988; and Morris 1968). Critics contend that without this principle in place, there will be no limit to the harshness of punishment meted out and no way to block treating individuals as a mere means to an end.

Immanuel Kant, for example, famously argued that human beings possess a special dignity and worth which demands that they be treated as ends in themselves and never as mere means.

According to Kant, imprisonment could only be justified on the grounds that the criminal conduct was a product of the free willed choices of the criminal making him/her *deserving* of a punitive response. Kant, however, also believed that the death penalty was deserved, in fact obligatory, in cases of murder:

> But whoever has committed murder, must die. There is, in this case, no juridical substitute or surrogate that can be given or taken for the satisfaction of justice. There is no likeness or proportion between life, however painful, and death; and therefore there is no equality between the crime of murder and the retaliation of it but what is judicially accomplished by the execution of the criminal. His death, however, must be kept free from all maltreatment that would make the humanity suffering in his person loathsome or abominable. Even if a civil society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice. (Kant 1790, Part II: 6)

While many retributivists disagree with Kant regarding the death penalty, they share his belief that punishment should not exceed what is *deserved* and that free will and basic desert moral responsibility are needed to maintain respect for persons. John Lemos, for example, has argued, "the human capacity for moral responsibility gives human beings a special dignity and worth that is fundamental to a proper system of morality grounded on the concept of respect for persons" (2013, 78), and theories of punishment that reject basic desert moral responsibility are incapable of protecting this special dignity and worth (see Lemos 2013, 2016).

In response, I would argue three things: (1) it is unclear that the principle of proportionality *in actual practice* protects respect for persons any better than the alternatives; (2) what counts as proportional punishment is unclear and as a result several important questions remain—e.g., how should we measure the gravity of a wrong, and how can punishment be "proportional" to it?; and (3) the public health-quarantine model has a non-desert-based principle of proportionality of its own—one which I maintain *is* capable of securing respect for persons and protecting innocent people from being used as a means to an end. Let me take each of these in turn.

First, critics fear that by rejecting retributivism and the concept of just deserts, we will lose our primary means to ensure punishment is proportional. If we give up on retributive justifications for punishment entirely, what reason do we have to see to it that punishment is proportional to the harm caused and the type of agent? The worry is that without basic desert moral responsibility, there will be no limits on the harsh treatment meted out to criminals and perhaps even innocent people. If especially cruel punishment works, then without the restraints imposed by considerations of just deserts there will be no limits on the harshness of punishment. It's the constraint of just deserts, critics contend, that keeps punishment proportional and allows us to respect the dignity and worth of all persons.

While concerns over proportionality are important ones, the worry that relinquishing the concept of just deserts will lead to harsh and inhumane treatment of persons is overblown. Before getting to the more philosophical responses to this objection, I would first like to examine the question empirically and ask whether belief in just deserts and retributive justice *ensure* punishment is proportional any better than the alternatives. Since the *real-life effects* of free will skepticism is what is being questioned here, I think the empirical question is an important one. If the critics are wrong about the protective power of desert-based moral responsibility and the constraints it places on proportional punishment, then this concern loses much of its force.

Empirically speaking, then, does belief in just deserts and retributive justice ensure punishment is proportional? I contend that it does not. Of course, there are many reasonable retributivists who acknowledge that we imprison far too many people, in far too harsh conditions, but the problem is that retributivism remains committed to the core belief that criminals *deserve* to be punished and suffer for the harms they have caused. Recall Kant's claim that we should execute the last prisoner on the island before we abandon it in order that everyone "realize the desert of his deeds." This retributive impulse in *actual practice*—despite theoretical appeals to proportionality by its proponents—often leads to practices and policies that try to make life in prison as unpleasant as possible.

Bruce Waller has done an excellent job examining this question empirically and he sets up the cultural expectations as follows:

> Belief in individual moral responsibility is deep and broad in both the United States and England; in fact, the belief seems to be more deeply entrenched in those cultures than anywhere else—certainly deeper there than in Europe. That powerful belief in moral responsibility is not an isolated belief, existing independently of other cultural factors; rather, it is held in place—and in turn, helps anchor—a neo-liberal cultural *system* of beliefs and values. At the opposite end of the scale are social democratic corporatist cultures like Sweden that have taken significant steps beyond the narrow focus on individual moral responsibility. With that picture in view, consider the basic protections which philosophers have claimed that the moral responsibility system afford: first, protection against extreme punitive measures; second, protection of the dignity and rights of those who are held morally responsible and subject to punishment; and third, a special protection of the innocent against unjust punishment. According to the claim that strong belief in individual moral responsibility protects against abuses, we would expect the United States and Great Britain (the neo-liberal cultures with the strongest commitment to individual moral responsibility) to score best in providing such protections; and we would predict that Norway, Sweden, and Denmark (the social democratic corporatist cultures, with much more qualified belief in individual moral responsibility) would be the worst abusers. (2014a, 6; see also 2014b)

What happens when we actually make the comparison, however, is that we find the exact opposite. That is, we find that the stronger the belief in moral responsibility (as in the United States) the harsher the punishment, the greater the skepticism of moral responsibility (as in Norway) the weaker the inclination toward punishment. A few cross-cultural statistics should help make this point salient.

In 2014, the Pew Research Center asked people whether they agreed or disagreed with the notion that personal success is determined by factors outside of oneself. While not exactly measuring belief in free will and moral responsibility, the survey was able to confirm that Americans are much more likely to see success or failure in personal terms. This is in line with the systems of thinking Waller describes and is unsurprising given the U.S. emphasis on rugged individualism and individual responsibility—which, of course, is closely aligned with attitudes about just deserts, praise and blame, punishment and reward. For example, 57% of Americans disagreed with the statement "Success in life is determined by forces outside our control," which was the highest percentage among advanced countries. The U.K. was immediately behind the U.S. with 55% disagreeing. Unfortunately Scandinavia countries were not included in the survey but European nations like Germany and Italy came in at 31% and 32% respectively.

Now, retributivists would have us believe that given its strong commitment to individual moral responsibility, the United States can be expected to provide better protections against harsh and excessively punitive forms of punishment than countries with a weaker commitment to individual moral responsibility. The reality, however, is quite the opposite. Consider the problem of mass incarceration in the United States. While the United States makes up only 5% of the world's population, it houses 25% of the world's prisoners—that's one of the highest rates of incarceration known to mankind. Despite a steady decline in the crime rate over the past two decades, the Unites States imprisons more than 700 prisoners for every 100,000 of population, according to the International Centre for Prison Studies (ICPS).[1] This translates to about 1 in every 100 American adults being in prison. In 2012, for instance, nearly 7 million U.S. residents were incarcerated, on supervised parole, or on probation. Compare that to the social democratic countries with a much weaker commitment to individual moral responsibility, such as Norway, Sweden, and Finland, where the imprisonment rate hovers around 70 per 100,000. As a proportion of the population, then, the United States has 10 times as many prisoners as these other countries. Furthermore, the U.S. not only imprisons at a much higher rate, it also imprisons in notoriously harsh conditions. Waller, for example, points out that:

> In 2007, the European Court of Human Rights refused to allow the extradition of six men charged in the U.S. with terrorism, on the grounds that their confinement in U.S. supermax prisons would constitute torture and violate basic human rights; along similar lines, Amnesty International (2012) has concluded that conditions in Arizona's maximum security prisons are a violation of international standards for humane treatment, while a recent study by the New York Bar Association (2011) found that conditions in supermax prisons violated the U.S. Constitutional prohibition against cruel and unusual punishment and also violated international treaty regulations forbidding torture. (2014a, 8)

American supermax prisons are often cruel places, using a number of harsh forms of punishment including extended solitary confinement. Prisoners are isolated in windowless, soundproof cubicles for 23 to 24 hours each day, sometimes for decades. Under such conditions, prisoners experience severe suffering, often resulting in serious psychological problems. Supreme court

[1] International Centre for Prison Studies, "World Prison Brief," accessed November 5, 2013, www.prisonstudies.org/highest-lowest.

Justice Anthony Kennedy, for instance, recently stated that, "solitary confinement literally drives men mad."[2] Looked at empirically, then, it's nigh impossible to defend the claim that commitment to just deserts and retributivism *ensures* proportional and humane punishment. In fact, the opposite seems to be the case—the problem of disproportionate punishment seems to grow more out of a desire for retribution and the belief that people justly deserve what they get than from free will skepticism.

This claim is further supported by the fact that individual states *within* the United States with stronger belief in individual moral responsibility tend to have harsher forms of punishment (see Waller 2014a, b). Consider, once again, incarceration rates. The relative distribution of the prison population in the U.S. is concentrated mostly in the southern states and states where the methodology of the rugged individual, the self-made man, the causa sui, are strongest. The ten states with the highest number of inmates per 100,000 residents are Louisiana, Alaska, Delaware, Mississippi, Oklahoma, Texas, Alabama, Arizona, Georgia, and Arkansas. Furthermore, many of these states favor "frontier justice" which leads to more punitive forms of punishment. Texas, for instance, has consistently led the states in number of executions per year, with 16 prisoners put to death in 2013. Given these cross-cultural and inter-state comparisons, I cannot help but conclude along with Waller that, "commitment to moral responsibility exacerbates rather than prevents excessively harsh punitive policies" (2014a, 7).

Recent work in experimental philosophy further revels that where belief in free will is strongest we tend to find increased punitiveness (see Shariff et al. 2014; Carey and Paulhus 2013). Perhaps the strongest evidence for this linking comes from a set of recent studies by Shariff et al. (2014). Shariff and his colleagues hypothesized that if free will beliefs support attributions of moral responsibility, then reducing these beliefs should make people less punitive in their attitudes about punishment. In a series of four studies they tested this prediction. In Study 1 they found that people with weaker free will beliefs endorsed less retributive attitudes regarding punishment of criminals, yet their consequentialist attitudes were unaffected. In the study, two hundred and forty-four American participants completed the seven-item Free Will subscale of the Free Will and Determinism Plus scale (FAD+) (Paulhus and Carey 2011), which measures belief in free will. In order to further measure attitudes toward retributivist and consequentialist motivations for punishment, Shariff and his colleagues had participants read descriptions of retributivism and consequentialism as motivations for punishment and then indicate on two separate Likert scales (1 = *strongly disagree,* 7 = *strongly agree*) how important retributivism and consequentialism should be in determining motivation for criminal punishments. As predicted, Shariff et al. found that stronger belief in free will predicted greater support for retributive punishment, but was not predictive of support for consequentialist punishment. The effects remained significant when statistically controlled for age, gender, education, religiosity, and economic and social political ideology. Study 1 therefore supports the hypothesis that free will beliefs positively predict retributive attitudes, yet it also suggests that "the motivation to punish in order to benefit society

[2] He made this statement before the House Appropriations Subcommittee on Financial Services and Federal Government, as reported on in the Huffington Post on 3/24/2015: http://www.huffingtonpost.com/2015/03/24/anthony-kennedy-solitary-confinement_n_6934550.html

(consequentialist punishment) may remain intact, even while the need for blame and desire for retribution are forgone" (Shariff et al. 2014, 7).

It is Study 2, however, that really highlights how stronger belief in free will and moral responsibility can lead to increased punitiveness. In the study, participants were randomly assigned to one of two groups. In the anti-free will condition, participants were given a passage from Francis Crick's (1994) *The Astonishing Hypothesis* which rejected free will and advocated for a mechanistic view of human behavior. In the neutral condition, the passage was unrelated to free will. Next, participants read a fictional vignette involving an offender who beat a man to death. Acting as hypothetic jurors, participants recommended the length of the prison sentence (if any) that this offender should serve following a 2-year, nearly 100%-effective, rehabilitation treatment. As Shariff et al. describe:

> The notion that the offender had been rehabilitated was used in order to isolate participants' desire for punishment as retribution. The passage further focused participants on retributive, rather than consequentialist, punishment by noting that the prosecution and defense had agreed that the rehabilitation would prevent recidivism and that any further detention after rehabilitation would offer no additional deterrence of other potential criminals. (Shariff et al. 2014, 4)

As predicted, participants who read the anti-free passage recommended significantly lighter prison sentences than participants who read the neutral passage. In particular, participants whose free-will beliefs had been experimentally diminished recommended roughly half the length of imprisonment (~5 years) compared with participants who read the neutral passage (~10 years). This study helps further confirm that it is actually commitment to retributivism that increases punitiveness, contrary to what its proponent's claim.[3]

Moving on to my second reply, the principle of proportionality does not provide us with any clear and unambiguous way of measuring the gravity of a wrong. Nor does it tell us how we should determine which punishment is "proportional" to the wrong done. There is no magic ledger we can look to that spells out the gravity of a wrong in one column and the punishment that is deserved in another. This is obvious from the fact that retributivists often disagree with one another about how to measure the gravity of a wrong—consider, for instance, H.L.A. Hart's

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[3] Carey and Paulhus (2013) also found a relationship between beliefs about free will and punishment. In particular, they found that believing more strongly in free will was correlated with increased punitiveness—i.e., free will believers were more likely to call for harsher criminal punishment in a number of hypothetical scenarios. In the third of their studies, for instance, Carey and Paulhus presented two scenarios portraying serious crimes (child molestation and the rape of an adult woman) and tested the degree to which subjects' attitudes towards punishment of the criminals would be impacted by factors including the criminal having been abused as a child and assurance that a medical procedure would prevent the criminal from ever perpetrating similar crimes again. The fact that subjects who expressed the strongest belief in free will were essentially the only group of subjects whose attitudes towards punishment were not mitigated by environmental or consequentialist considerations led the researchers to conclude that "free will belief is related to retributivist punishment" (2013, 138).

question: “Is negligently causing the destruction of a city worse than the intentional wounding of a single policeman?” (1968: 162). And even when there is wide agreement on the gravity of a wrong, there is still often disagreement about what kind of punishment is deserved. For instance, all retributivists can agree that murdering an innocent person is a grievous wrong, but they can, and often do, disagree on what count as “proportional” punishment. Kant proposes death. Others propose life in prison. Others still think life in prison is too harsh. How do we decide questions like these on the principle of proportionality?

The problem of measuring *gravity*, for instance, is an important one for retributivists since what punishment is deserved is going to be determined by this. Yet the proportionality principle leaves unanswered several important questions. The first is “does it matter if harm is caused, or is the gravity of the wrong set fully by the wrong risked or intended” (Walen 2014). (For the position that harm does not matter, see Feinberg 1995; Alexander, Ferzan, and Morse 2009; for a criticism of that view, see Levy 2005; Walen 2010.) Second, what significance, if any, should be given to the difference between being punished for the first time, and having been punished before and then having committed the same or a similar wrong again? As Walen writes:

> Many retributivists resist the idea that past convictions should matter, on the grounds that having been punished already, more severe punishment for the next wrong would effectively constitute double punishment for the first (Fletcher 2000: 462; Singer 1979: ch. 5). Others think there is a way around this problem. One approach is to hold the repeat offender guilty of a culpable omission: the failure “to organize his life in a way that reduces the risk of his reoffending” (Lee 2009: 578). Another is to defend a first-offender discount, reflecting human susceptibility to temptation (frailty). This discount would progressively diminish for subsequent comparable offenses, effectively raising the offender’s culpability (von Hirsch and Ashworth 2005: 148–155), and it would apply only to lesser wrongs, as it is hard to sympathize with frailty when it comes to serious crimes such as rape or murder (Duff 2001: 169). (2014)

Until retributivists can agree on how to resolve these problems it remains unclear how gravity should be measured, which needs to be settled if we are to know how to apply the proportionality principle in practice.[4]

Assuming for the moment, however, that a rank order of gravity is possible, there still remains the problem of determining what counts as *proportional* punishment. There are two basic senses of proportionality that can be found in the literature: cardinal and ordinal. As Walen describes: “Cardinal proportionality sets absolute measures for punishment that is proportional to a given crime; ordinal proportionality requires only that more serious crimes should be punished more severely” (2014). There are, however, problems with both approaches. Cardinal proportionality, for instance, tends to lead to unacceptable extremes. For example:

> *Lex Talionis* (section 3.4) offers a theory of cardinal proportionality. In its traditional form—an eye for an eye, a tooth for a tooth—it seems implausible, both for being too lenient in some cases (take $10 from a thief who stole $10), and too extreme in others

[4] For additional difficulties with measuring the gravity of a wrong, see Walen (2014).

> (repeatedly torture and rape someone who had committed many such acts himself). Kant proposed what might be thought a better version, saying that the thief should lose not just the value of what he stole, but instead all rights to property (1797: 142), and prohibiting those forms of "mistreatment that could make the humanity in the person suffering it into something abominable" (ibid.). Nonetheless, his measure for theft swings to the overly punitive side, leaving the convicted thief a dependent on the state, and thereby "reduced to the status of a slave for a certain time, or permanently if the state sees fit" (ibid.). Others have tried to rehabilitate *lex talionis*, arguing, for example, that it can be rendered plausible if interpreted to call for punishment that "possess[es] some or all of the characteristics that made the offense wrong" (Waldron 1992: 35). But however one spells out the wrong-making characteristics, it seems likely that *lex talionis* will provide a measure either too vague to be of much help (see Shafer-Landau 1996: 299–302; 2000: 197–198), or too specific to be plausible (at least in some cases). (Walen 2014)

Ordinal proportionality, on the other hand, faces a different problem:

> If all that were required to do justice is to rank order wrongs by their gravity and then provide a mapping onto a range of punishments that likewise went from lighter to more serious—respecting the norms of rank-ordering and parity—then neither the range of punishments from a fine of $1 up to a fine of $100, nor from 40 years to 60 years in prison, would provide disproportionate punishment, no matter what the crimes. This seems wrong. Murder should not be punished with a $100 fine, and littering should not be punished with 40 years in prison. Some vague degree of cardinality therefore seems to be called for, punishing grave wrongs with heavy penalties and minor wrongs with light penalties. (Walen 2014)

Such problems reveal that the principle of proportionality is too ambiguous to guarantee respect for persons since it is unable to draw a clear line in the sand between deserved punishments on the one hand and cruel and inhumane punishment on the other. As a result, cultural and societal pressure can easily affect how gravity and proportional punishment are measured, and this can easily lead (as highlighted above) to excessively punitive forms of punishment.

Lastly, while rejecting the retributivist principle of proportionality, the public health-quarantine model has a proportionality principle of its own. It maintains that criminal sanctions should be proportionate to the danger posed by an individual, and any sanctions that exceed this upper bound will be unjustified. This is coupled with the principle of least infringement, which holds that the least restrictive measures should be taken to protect public health and safety. Together these two principles set strict limits on how individuals can and should be treated. Consider again the hypothetical scenario used in the Shariff et al. study. The fictional case involved an offender who beat a man to death but after serving two years in prison was nearly 100% effectively rehabilitated. The case further stipulated that "the prosecution and defense had agreed that the rehabilitation would prevent recidivism and that any further detention after rehabilitation would offer no additional deterrence of other potential criminals" (Shariff et al. 2014, 4). On my model, it would be unjust to continue to incapacitate this individual. Retributivists, on the other hand, will generally feel that this person *deserves* to be punished further since two years in prison is not proportional punishment—although, as my comments on the proportionality principle above

indicate, they will likely disagree on exactly what this additional punishment should amount to. Which of these views better respects human dignity? I have a hard time seeing how punishing someone who is no longer a threat to society, and in a way that exceeds effectiveness, respects human dignity. Instead, I maintain that the public health-quarantine model actually respects human dignity more since it specifies that (a) individuals who are not a serious threat to society should not be incapacitated, (b) no one should be incapacitated longer than is absolutely necessary (where this is determined by the continued threat the individual poses to society), and (c) when it is necessary to incapacitate an individual, we must do so in a way that treats them humanely, with respect and dignity, and with rehabilitation as our goal.

Furthermore, I will argue in Section VI that my model can also respect human dignity by prohibiting the incapacitation of innocent people. On the quarantine model defended by both Pereboom and I (see Pereboom and Caruso 2017), the justification for quarantine should not be understood in a strict consequentialist theoretical context. Rather, we justify incapacitation on the ground of the right to self-defense and defense of others. That right does not extend to people who are non-threats. It would therefore be wrong to incapacitate someone who is innocent since they are not a serious threat to society. The aim of protection is justified by a right with clear bounds, and not by a consequentialist theory on which the bounds are unclear. I will leave a further discussion of these points, however, to Section VI.

III. Victims' Rights

A second objection is that victims of violent crime will never receive proper justice or satisfaction on my account since it rejects harsh punishment in favor of rehabilitating dangerous criminals and implementing the least restrictive forms of sanctions needed to secure public safety. Democratic Senator Dianne Feinstein and Republican Senator Jon Kyl have argued, for instance, that "for too long, our court system has tilted in favor of accused criminals and has proven appallingly indifferent to the suffering of crime victims."[5] I think this is a gross misrepresentation of the U.S. criminal justice system over the last few decades—evidenced by our current mass incarceration crisis, the heavy-handedness of mandatory minimums, the increased use of plea bargains, and the three-strikes-you-are-out laws that have swept the nation—but I mention it because it captures a common concern critics have with reformist proposals like my own. The concern is that such models put the rights of criminals above the concerns of victims, and worse still advocate for reforms that run contrary to the concerns of victims. While I take this objection seriously, I do not think the public health-quarantine model is "indifferent to the suffering of crime victims." Rather, I maintain that it better reflects the attitudes and preferences of most victims and does a better job preventing future victims.

First, I contend that this objection is predicated on a mistaken assumption. The underlying assumption seems to be that most victims of violent crime want revenge and retribution above all else and that to deny them the satisfaction of seeing their perpetrators suffer is an injustice. Proponents of the death penalty and other forms of excessively punitive forms of punishment

[5] As reported on in the *Washington Post* (2016): https://www.washingtonpost.com/news/wonk/wp/2016/08/05/even-violent-crime-victims-say-our-prisons-are-making-crime-worse

typically argue, for instance, that whatever deterrence factor such punishment may or may not have, such punishment provides justice for the victims and their families since it satisfies their desire for revenge and proportional punishment. Kant, for example, famously argued that if a people do not insist on the execution of murders, "blood guilt" would "cling" to them "as collaborators in this public violation of justice" (1797: 142). Setting aside the issue of what counts as proportional punishment raised above, it is an empirical question what victims *actually* want, what their preferences and attitudes are, and what kind of justice they would like to see from the criminal justice system.

Fortunately, the Alliance for Safety and Justice has recently investigated exactly these questions. In its first-of-its-kind national survey, they found that victims of violent crime say they want to see *shorter* prison sentences, *less* spending on prisons, and a *greater* focus on the rehabilitation of criminals (2016). The survey polled the attitudes and beliefs of more than 800 crime victims pooled from a nationally representative sample of over 3,000 respondents. According to the report:

> Perhaps to the surprise of some, victims overwhelmingly prefer criminal justice approaches that prioritize rehabilitation over punishment and strongly prefer investments in crime prevention and treatment to more spending on prisons and jails. These views are not always accurately reflected in the media or in state capitols and should be considered in policy debates. (2016: 4)

An examination of the data reveals that victims prefer an approach much closer to the public health-quarantine model, with its focus on prevention, social justice, and rehabilitation, than retributivism. For instance, the survey found that:

- By a 2 to 1 margin, victims prefer that the criminal justice system focus more on rehabilitating people who commit crimes than punishing them.
- By a margin of 15 to 1, victims prefer increased investments in schools and education over more investments in prisons and jails.
- By a margin of 10 to 1, victims prefer increased investments in job creation over more investments in prisons and jails.
- By a margin of 7 to 1, victims prefer increased investments in mental health treatment over investments in prisons and jails.
- By a margin of nearly 3 to 1, victims believe prison makes people more likely to commit crimes than to rehabilitate them.
- By a margin of 7 to 1, victims prefer increased investments in crime prevention and programs for at-risk youth over more investments in prisons and jails.
- 6 in 10 victims prefer shorter prison sentences and more spending on prevention and rehabilitation to prison sentences that keep people incarcerated for as long as possible.
- By a margin of 4 to 1, victims prefer increased investments in drug treatment over more investment in prisons and jails.
- By a margin of 2 to 1, victims prefer increased investments in community supervision, such as probation and parole, over more investments in prisons and jails.

- 7 in 10 victims prefer that prosecutors focus on solving neighborhood problems and stopping repeat crime through rehabilitation, even if it means few convictions and prison sentences.
- 6 in 10 victims prefer that prosecutors consider victims' opinions on what would help them recover from the crime, even when victims do not want long prison sentences.

The report also found that victims' views remained consistent across demographics—that is, for each of the questions above, they found majority or plurality support across demographic groups, including age, gender, race, ethnicity, and political party affiliation. This skepticism of prisons is in line with most social science research, which has generally shown that mass incarceration causes more crime than it prevents, that institutionalizing young offenders makes them more likely to commit crime as adults, and that spending time in prison teaches people how to be better criminals (see, e.g., Weatherburn 2010).

It would seem, then, that those tough-on-crime proponents who invoke the names of victims of violent crime and claim to speak for them, such as Feinstein and Kyl, often misrepresent their actual preferences, attitudes, and desires. To say that approaches like the public health-quarantine model are "appallingly indifferent to the suffering of crime victims" is to discount what victims say they actually want. It also overlooks the fact that the best way to reduce crime and the suffering caused by it is to (a) prevent the crime from occurring in the first place by addressing the causal determinates of crime, and (b) to rehabilitate criminals so as to reduce the likelihood of recidivism. The public health-quarantine model attempts to do both, retributivism by its very nature does neither. Since retributivism myopically focuses on justifying backward-looking blame and punishment, it does not have the resources needed to address rehabilitation or preventative measures. I question, then, the claim that retributivism reflects a deeper concern for victims and their families. If one really cares about victims and their suffering, the best way to honor this concern is to reject retributivism and adopt a more holistic approach to criminal behavior that focuses on preventing crime, rehabilitating criminals, and reducing the number of people who become victims of violent crime.

Second, *even if* victims of violent crime wanted to see criminals suffer and were on the whole indifferent to concerns about safety and rehabilitation—contrary to what appears to be the case—it does not follow that we should inflict such harm and suffering nor does it follow that denying victims the satisfaction of seeing their perpetrators suffer would be a violation of their rights. As Walen accurately points out, "the view that it wrongs victims not to punish wrongdoers confuses vengeance, which is victim-centered, with retributivism, which is agent-centered: concerned with giving the wrongdoer the punishment *he* deserves" (2014). Paul Robinson (2008), for instance, has argued that retributivists must distinguish between vengeful and deontological conceptions of deserved punishment. The former urges punishing an offender in a way that mirrors the harm or suffering he/she has caused:

> Because of this focus on the harm done, the vengeful conception of desert is commonly associated with the victim's perspective. Retributive justice "consists in seeking equality between offender and victim by subjecting the offender to punishment and communicating to the victim a concern for his or her antecedent suffering" [(Fletcher 1999: 58).]…And the association with the victim's suffering, in turn, associates vengeful

> desert with the feelings of revenge and hatred that we commonly see in victims. Thus, punishment under this conception of desert is sometimes seen as essentially an institutionalization of victim revenge; it is "injury inflicted on a wrongdoer that satisfies the retributive hatred felt by the wrongdoer's victim and that is justified because of that satisfaction" [(Feinberg and Coleman 2000: 793)]. (Robinson 2008: 147-48)

The problem, however, is that justifying punishment on the grounds of vengefulness or the satisfaction of retributive hatred fails to take into account the blameworthiness of the offender. The deontological conception of desert, on the other hand, focuses at least not on the harm of the offense but on the blameworthiness of the offender, as drawn from the arguments and analysis of moral philosophy (Robinson 2008: 148).

> Thus, the criterion for assessing punishment is broader and richer than that for vengeful desert: Anything that affects an offender's moral blameworthiness is taken into account in judging the punishment he deserves. The extent of the harm caused or the seriousness of the evil done will be part of that calculation but so too will be a wide variety of other factors, such as the offender's culpable state of mind or lack thereof and the existing conditions at the time of offence, including those that might give rise to claims of justification, excuse, or mitigation. (Robinson 2008: 148)

To the extent, then, that retributivists want to appeal to moral blameworthiness rather than vengeful desires in justifying punishment, denying victims the vengeful satisfaction they seek would not be a violation of their rights.

This brings me to my next reply. Punishment inflicts harm on individuals and the justification for such harm must meet a high epistemic standard. If it is significantly probable that one's justification for harming another is unsound, then, *prima facie*, that behavior is seriously wrong (Pereboom 2016). But if free will skeptics are right, neither libertarians nor compatibilists satisfy this epistemic standard and hence individuals do not justly deserve to be punished. And if individuals do not justly deserve to be punished, there is no violation of the rights of victims to deny them the revenge they seek. Even retributivists would acknowledge that the desire for revenge and retribution has its limits. The principle of proportionality, despite its weaknesses, dictates that punishments that are disproportionate to the wrong done (whatever that ultimately amounts to) would be unjustified. Hence, if the victim of an armed robbery wanted to see their perpetrator executed, and this was deemed disproportionate punishment by the standards of retributivism, it would not be a violation of the victim's rights on that theory to prohibit said execution. By extension, if free will skeptics are right, and retributive punishment itself is unjustified, then to deny victims their desire for revenge (conceived here in a purely backward-looking, non-consequentialist sense) would likewise not be a violation of their rights. For victims to have the right to see suffering and harm imposed on their perpetrators, it would have to be the case that such harm was justified. According to free will skeptics, however, neither victims of violent crime nor the state acting on their behalf are justified in causing more harm than is minimally required for adequate protection.

Lastly, the public health-quarantine model is able, I contend, to deal with the concerns of victims, acknowledge the wrongs done them, and help aid in recovery. First, recall that the

Alliance for Safety and Justice Survey (2016) found that six in ten victims preferred that prosecutors consider victims' opinion on what would help them recover from the crime, even when victims do not want long prison sentences. Too often tough on crime advocates and overzealous prosecutors speak for victims without listening to what they really want or considering what would help them recover. As the survey indicates, many victims prefer that the criminal justice system focus more on preventing crime by investing in job creation, education, and mental health services, as well as rehabilitating criminals rather than punishing them. Since the public health approach to criminal behavior similarly advocates for these reforms, it has the virtue of being sensitive to the concerns of victims. Many victims of violent crime want above all else to know that meaningful efforts are being made to guarantee that others do not suffer in the same way they have. Retributive punishment is unable to provide this, and in many cases simply obfuscates the need to do so. The public health-quarantine model, on the other hand, is perfectly designed to address the forward-looking concerns of victims and it is able to do so a manner that is acutely sensitive to the harms done them.

Contrary to what some critics have argued, free will skepticism is consistent with acknowledging the moral wrongs done to victims. As Pereboom and I have argued:

> Accepting free will skepticism requires rejecting our ordinary view of ourselves as blameworthy or praiseworthy in the basic desert sense. A critic might first object that if we gave up this belief, we could no longer count actions as morally bad or good. In response, even if we came to hold that a serial killer was not blameworthy due to a degenerative brain disease, we could still justifiably agree that his actions are morally bad. Still, secondly, the critic might ask, if determinism precluded basic desert blameworthiness, would it not also undercut judgments of moral obligation? If 'ought' implies 'can,' and if because determinism is true an agent could not have avoided acting badly, it would be false that she ought to have acted otherwise. Furthermore, if an action is wrong for an agent just in case she is morally obligated not to perform it, determinism would also undermine judgements of moral wrongness (Haji 1998). In response, we contend that even if the skeptic were to accept all of this (and she might resist at various points; cf. Pereboom 2014a: ch.6; Waller 2011), axiological judgments of moral goodness and badness would not be affected (Haji 1998; Pereboom 2001). So, in general, free will skepticism can accommodate judgments of moral goodness and badness, which are arguably sufficient for moral practice. (Pereboom and Caruso 2017)

There is nothing preventing free will skeptics, then, from acknowledging the moral wrongness of criminal acts. There is also nothing preventing them from acknowledging the harm done to victims by these morally bad acts. Given that free will skeptics can retain axiological judgments of moral goodness and badness, the public health-quarantine model can recommend that one way to help aid victims in recovery is to have the wrong done them acknowledged and a commitment made to rehabilitate the offender and protect others from similar crimes.

This brings me to my final point. On the forward-looking account of moral responsibility developed by Pereboom (2013, 2014), non-desert-based blame and the acknowledgement of wrong can be used for the purposes of protection, moral formation, and reconciliation. In the following section, I will suggest how forward-looking moral responsibility can be used to help

aid offenders in rehabilitation, but for the moment I will simply say that it can also be used to aid victims in their recovery and perhaps even achieve some form of reconciliation. *Restorative justice* models, for example, have been employed around the country over the last few decades with great success (see, e.g., Camp et al. 2013; Walgrave 2002). Restorative justice is an approach that emphasizes repairing the harm caused by criminal behavior by bringing together members of the community, victims, and offenders. As the Centre for Justice and Reconciliation describe it:

> Restorative justice views crime as more than breaking the law—it also causes harm to people, relationships, and the community. So a just response must address those harms as well as the wrongdoing. If the parties are willing, the best way to do this is to help them meet to discuss those harms and how to bring about resolution. Other approaches are available if they are unable or unwilling to meet. Sometimes those meetings lead to transformational changes in their lives.[6]

The restorative approach maintains that the best way to repair the harms caused by criminal behavior is to bring together all stakeholders for the purpose of making amends and reintegration. It focuses on repairing the harm caused by crime and reducing future harm through crime prevention.

Now it is true that most restorative justice methods require offenders to take responsibility for their actions and for the harm they have caused, but such responsibility *need not* be conceived in terms of basic desert. Most current restorative justice models probably do assume backward-looking blame and basic desert moral responsibility (e.g., Sommers 2016), but these are not essential components of the restorative approach. The same ends, I contend, can be achieved on a model that does not appeal to basic desert moral responsibility. A conversational model of forward-looking moral responsibility like that proposed by Pereboom (2013, 2014) could, for example, serve as a basis for an exchange between victim and offender in a way that does not invoke backward-looking blame or basic desert (see below). Such an exchange could aid both in the rehabilitation of offenders and in the recovery of victims. To use slightly different lingo, we can say that a restorative justice model consistent with free will skepticism could appeal to *answerability* and *attributability* conceptions of moral responsibility rather than *accountability.*

IV. Replies to Michael Corrado

Let me now address some recent objections by Michael Corrado (2016, forthcoming).[7] Corrado raises three main objections to the quarantine model, which leads him to reject it in favor of a compromise view, which he calls *Correction*. His position, while denying basic desert moral responsibility, endorses hard treatment of reasons-responsive criminals on the ground of moral educational benefit to the criminal and deterrence of future crime. Corrado's first objection is that the view Pereboom and I endorse, unlike his, makes no distinction between people who are dangerous and yet have the sort of control captured by the reasons responsiveness condition, and

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[6] http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/

[7] Most of the material in this section is drawn from Pereboom and Caruso (2017).

those who are dangerous but lack this sort of control, and instead treats all criminals on the model of illness. The second is that, given our view, too many people will be drawn into the criminal justice system, since merely posing a danger is sufficient to make one a candidate for incapacitation. The third objection is that those who are incapacitated would need to be compensated, and this would be prohibitively costly.

On the first concern, in *Living without Free Will* Pereboom does in fact distinguish the quarantine model from views according to which criminal tendencies are exclusively psychological illnesses modeled on physical illness (Pereboom 2001)—a point which we have both stressed (see Pereboom and Caruso 2017). It is true that on our view policies for making a detained criminal safe for release would address a condition in the offender that results in the criminal behavior. But such conditions are not restricted to psychological illnesses—they also include conditions that are not plausibly classified as illness, such as insufficient sympathy for others, or a strong tendency to assign blame to others and not to oneself when something goes wrong. What unites policies for treatment of criminals on our view is not that they assume that they are psychologically ill and therefore in need of psychiatric treatment. Instead, they all aim to bring about moral change in an offender by non-punitively addressing conditions that underlie criminal behavior.

What sets the illness model apart is that proposed treatment does not address the criminal's capacity to respond to reasons, but circumvents such capacities. For example, consider the Ludovico method, made famous by Anthony Burgess's book and Stanley Kubrick's film *A Clockwork Orange*. Alex, a violent criminal, is injected with a drug that makes him nauseous while at the same time he is made to watch films depicting the kind of violence to which he is disposed. The goal of the method is that the violent behavior be eliminated by generating an association between violence and nausea. Herbert Morris's objection to therapy of this sort is that the criminal is not changed by being presented with reasons for altering his behavior which he would autonomously and rationally accept. But Pereboom (2001) cites a number of programs for treating criminals that are not in accord with the illness model. The Oregon Learning Center, for instance, aims to train parents and families to formulate clear rules, monitor behavior, and to set out fair and consistent procedures for establishing positive and negative incentives. The method involves presentation of reasons for acting and strategies for realizing aims in accord with these reasons. This program is successful: In one study, youth in ten families showed reductions of 60 percent in aggressive behavior compared to a 15 percent drop in untreated control families.[8]

Pereboom and I also cite therapeutic programs designed to address problems for the offender's cognitive functioning (see Pereboom and Caruso 2017). A number of cognitive therapy programs are inspired by S. Yochelson and S. Samenow's influential work *The Criminal Personality* (1976, 1977), which argues that certain kinds of cognitive distortions generate and sustain criminal behavior. Kris Henning and Christopher Frueh provide some examples of such cognitive distortions:

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[8] Patterson, Chamberlain, and Reid (1982), cited in Walters (1992: 143). Cf. Patterson (1982), Alexander and Parsons (1982). For a review of studies on family therapy, see Gendreau and Ross (1979).

> Car thieves would be more likely to continue with their antisocial activities if they reasoned that *stealing cars isn't as bad as robbing people* (minimization of offense) or I deserve to make a couple of bucks after all the cops put me through last time (taking the role of the victim). Similarly, a rapist who convinces himself, she shouldn't have been wearing that dress if she didn't want me to touch her (denial of responsibility), would probably be at greater risk to reoffend than someone who accepts responsibility for his actions. (1996: 525)

In 1988, the State of Vermont put in place a therapeutic program inspired by the Yochelson and Samenow's cognitive distortion model. The *Cognitive Self-Change Program* was initially designed as group treatment for imprisoned male offenders with a history of interpersonal aggression, and it later included imprisoned nonviolent offenders. Henning and Frueh provide a description of the procedure:

> Treatment groups met 3-5 times per week. During each session, a single offender was identified to present a "thinking report" to the group. Typically, these reports documented prior incidents of anti-social behavior, although more current incidents were reported on when appropriate. At the beginning of each session, the offender would provide the group with an objective description of the incident. He would then list all of the thoughts and feelings he had before, during, and after the event. After the report was delivered, the group worked with the offender to identify the cognitive distortions that may have precipitated the antisocial response to the situation. Role plays sometimes were used during these sessions to develop a better understanding of the cognitions and emotions that led up to the offender's behavior. Once an offender learned to identify his primary criminogenic thought patterns, intervention strategies were discussed in the group to help him prevent such distortions from occurring in the future. These might include cognitive strategies (e.g. challenging one's cognitions, cognitive redirection) and/or behavioral interventions (e.g. avoidance of high-risk situations; discussion of cognitions and feelings with therapist, friend, or partner). (1996: 525)

Henning and Frueh found that in a group of 28 who had participated in this program, 50% (14) were charged with a new crime following their release. In a control group of 96 who had not participated, 70.8% (68) were charged with a new offense. 25% of offenders who had participated received a new criminal charge within one year, 38% within two years, and 46% within three. By contrast, in the comparison group 46% had been charged with a new crime within one year, 67% within two, and 75% within three. These results were found to be statistically significant.

Models of restorative justice proved another alternative for rehabilitating criminals in a way that respects the reasons-responsiveness of agents. It also has the additional benefit of addressing the rights of victims by having the criminal admit the wrong done, acknowledge the harm caused, and agree to work toward reconciliation with the victim or the victim's families. As I said above, models of restorative justice can be made consistent with free will skepticism as long as they are employed in a way that does not appeal to backward-looking blame in the restorative process. Consider, for instance, the recent success of schools in using restorative methods as an

alternative to school suspension.[9] In traditional school-discipline programs, students face an escalating scale of punishment for infractions that can ultimately lead to expulsion. There is now strong research, however, that shows pulling students out of class as punishment can hurt their long-term academic prospects (Losen et al. 2015; Losen, Martinez, and Okelola 2014; Richmond 2015). Furthermore, data shows that punishments are often distributed unequally. More black students, for example, are suspended nationally than white students (U.S. Department of Education Office for Civil Rights 2014; Richmond 2015).

As an alternative, public schools from Maine to Oregon have begun to employ restorative justice programs designed to keep students in school while addressing infractions in a way that benefits both the offender and the offended. Here is one description of such a program:

> Lower-level offenses can be redirected to the justice committee, which is made up of student mediators, with school administrators and teachers serving as advisors. The goal is to provide a nonconfrontational forum for students to talk through their problems, addressing their underlying reasons for their own behaviors, and make amends both to individuals who have been affected as well as to the larger school community. (Richmond 2015)

Students are often given the option of participating in these alternative programs or accept traditional discipline, including suspension. As reported on in *The Atlantic*, "Early adopters of the practice report dramatic declines in school-discipline problems, as well as improved climates on campuses and even gains in student achievement" (Richmond 2015). Programs like this reveal that the more punitive option—e.g. expulsion rather than restorative processes—is often less affective from the perspective of future protection, future reconciliation, and future moral formation. They also reveal how rehabilitating individuals can be done in a way that appeals directly to their reasons-responsive capacities.

Contrary to Corrado's concerns, then, we maintain that methods of therapy that engage reasons-responsive abilities should be preferred. On the forward-looking account of moral responsibility Pereboom and I endorse (Pereboom 2013; 2014a: ch.6; Caruso 2016c), when we call an agent to account for immoral behavior, at the stage of moral address we request an explanation with the intent of having the agent acknowledge a disposition to act badly, and then, if she has in fact so acted without excuse or justification, we aim for her to come to see that the disposition issuing in the action is best eliminated. In normal cases, this change is produced by way of the agent's recognition of moral reasons to eliminate the disposition. Accordingly, it is an agent's responsiveness to reasons—together with the fact that we have a moral interest in our protection, her moral formation, and our reconciliation with her—that explains why she is an appropriate recipient of blame in this forward-looking sense. While many compatibilists see some type of attunement to reasons as the key condition for basic desert moral responsibility, we instead view it as the most significant condition for a notion of responsibility that focuses on future protection, future reconciliation, and future moral formation.

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[9] See "Alternative to School Suspension Explored Through Restorative Justice" (Associated Press), December 17, 2014; and "When Restorative Justice in Schools Works" (*The Atlantic*), December 29, 2015.

Still, a concern for many forms of therapy proposed for altering criminal tendencies is that they circumvent, rather than address the criminal's capacity to respond to reasons. On our view, forms of treatment that do address reasons-responsiveness are to be preferred. However, the fact that a mode of therapy circumvents rather than addresses the capacities that confer dignity on us should not all by itself make it illegitimate for agents who are in general responsive to reasons but not in particular respects. Imagine such an agent who is beset by bouts of violent anger that he cannot control in some pertinent sense. Certain studies suggest that this tendency is due to deficiencies in serotonin, and that it can sometimes be alleviated by antidepressants.[10] It would seem mistaken to claim that such a mode of treatment is illegitimate because it circumvents capacities for rational and autonomous response. In fact, this sort of treatment often produces responsiveness to reasons where it was previously absent (Pereboom 2001). A person beset by violent anger will typically not be responsive to certain kinds of reasons, to which he would be responsive if he were not suffering from this problem. Therapy of this sort can thus increase reasons-responsiveness. By analogy, one standard form of treatment for alcoholism—which many alcoholics voluntarily undergo—involves the use of a drug, Antabuse, which makes one violently ill after the ingestion of alcohol. By counteracting addictive alcoholism, this drug can result in enhanced reasons-responsiveness.

Furthermore, suppose that despite serious attempts at moral rehabilitation that do not circumvent the criminal's rational capacities, and despite procedures that mechanically increase the agent's capacities for reasons-responsiveness, the criminal still displays dangerously violent tendencies. Imagine that the choice is now between indefinite confinement without hope for release, and behavioristic therapy that does not increase the agent's capacity for reasons-responsiveness. It is not obvious that here the behavioristic therapy should be ruled out as morally illegitimate. One must assess the appropriateness of therapy of this kind by comparing it with the other options. Suppose, for example, that the only legitimate alternative to confinement for life is application of some behavioristic therapy. It is not clear that under such circumstances the moral problems with such a therapy are not outweighed—especially if it is carried out in a way that respects autonomy by leaving the decision up to the criminal.

Behavioristic therapies, however, are almost always suboptimal when compared with their alternatives—i.e., methods that directly appeal to a criminal's rational capacities or, when these fail, therapies that mechanically increase the agent's capacities for reasons-responsiveness. There are also additional alternatives to behavioral therapy that, at least in the future, may prove more successful in rehabilitating criminals. The use of neurofeedback, for instance, in correctional settings has been suggested as "an innovative approach that may ultimately lessen criminal behavior, prevent violence, and lower recidivism" (Gkotsi and Benaroyo 2012: 3; see also Evans 2006; Quirk 1995; Smith and Sams 2005). As Gkotsi and Benaroyo describe:

> Neurofeedback or neurotherapy is a relatively new, noninvasive method which is based on the possibility of training and adjusting the speed of brainwaves, which normally occur at various frequencies (Hammond, 2011). An overabundance, or deficiency in one of these frequencies, often correlates with conditions such as depression, and emotional

[10] Burlington Free Press (Associated Press), December 15, 1997, p. 1.

> disturbances and learning disabilities, such as Attention Deficit Hyperactivity Disorder (ADHD) (Greteman, 2009)…Therapists attach electrodes to the patients' head and a device records electrical impulses in the brain. These impulses are sorted into different types of brain waves. Using a program similar to a computer game, patients learn to control the video display by achieving the mental state that produces increases in the desired brain wave activity. Neurofeedback has gained recognition for its potential benefits for children with ADHD, alcoholics and drug addicts. It can also enhance athlete and musician performance as well as improve elderly people's cognitive function (Greteman, 2009). (2012: 3)

Douglas Quirk, a Canadian researcher, tested the effects of a neurofeedback treatment program on 77 dangerous offenders in an Ontario correctional institute who suffered from deep-brain epileptic activity. The results demonstrated reduction in the subjects' criminal recidivism and suggested that, "a subgroup of dangerous offenders can be identified, understood and successfully treated using this kind of biofeedback conditioning program" (Quirk 1995; as quoted by Gkotsi and Benaroyo 2012: 3). Additional studies by Smith and Sams (2005) on juvenile offenders with significant psychopathology and electroencephalographic abnormalities, and by Martin and Johnson (2005) on male adolescents diagnosed with ADHD also demonstrated reduced recidivism, improved cognitive performance, improved emotional and behavioral reactions, and inhibition of inappropriate responses.

More invasive than neurofeedback is another potential treatment: Deep Brain Stimulation (DBS). DBS has been used as a last-resort treatment of neuropsychological disorders including schizophrenia, Parkinson's Disease, dystonia, Tourette's syndrome, pain, depression, and Obsessive Compulsive Disorder. It involves the surgical placement of a device in the brain that sends electrical impulses to target areas that have been linked to the particular condition. Some neurologists and neuroscientists have recently proposed that DBS can be used for the rehabilitation of criminal psychopaths (Hoeprich 2011; Center for Science and Law 2012).

Since there are very few options currently available for the effective rehabilitation of psychopaths, which often leaves continued incapacitation as society's sole means to protection, some have argued that DBS may provide a better and more effective alternative (see Hoeprich 2011). As the Center for Science and Law describe:

> Psychopaths have been shown to have neurophysiological deficiencies in various brain structures compared to healthy human subjects. These structures include the amygdala (an important center for processing of emotionally-charged and stimulus-reward situations) and the ventromedial prefrontal cortex (suppression of emotional reactions and decision-making). DBS can potentially be used, then, in these areas to see if psychopathic tendencies can be suppressed. (2012)

There are, however, important ethical concerns with regard to the use of DBS for rehabilitating psychopaths (see Gkotsi and Benaroyo 2012), especially since it is highly experimental, with many reported negative side-effects, and is far more invasive than neurofeedback, which is generally believed to be a fairly safe procedure.

Pereboom and I propose, then, that rehabilitation methods that directly appeal to a criminal's rational capacities should always be preferred and attempted first (see Pereboom and Caruso 2017). When these fail, we contend that it is sometimes acceptable to employ therapies that mechanically increase an agent's capacities for reasons-responsiveness, but that these therapies should involve the participation of the subject to the greatest extent possible (e.g., talk therapies in conjunction with other forms of treatment), should involve the consent of the subject, and should be ordered such that noninvasive methods are prioritized. When all else fails and only more invasive methods are left—for example, DBS for psychopaths—important ethical questions need to be considered and answers to it weighed, but leaving the final choice up the subject is an attractive option.

Corrado's second objection is that too many people will be drawn into the criminal justice system on the approach Pereboom and I promote. First, Corrado intimates that many more people would be detained than is the case currently. Second, there is the issue of incapacitating those who pose threats but have not yet committed a crime. Corrado is reasonably concerned about the prospects of such a policy. On the first issue, in all of our writings on this topic Pereboom and I have always advocated for the *principle of least infringement*, which specifies that the least restrictive measures should be taken to protect public health and safety (see Caruso 2016; Pereboom and Caruso 2017). While we do believe that we should indefinitely detain mass murderers and serial rapists who cannot be rehabilitated and remain threats, we do not believe that nonviolent shoplifters who remain threats and cannot be rehabilitated should be preventatively detained at all, by contrast with being monitored, for example. Our view does not prescribe that all dangerous people be detained until they are no longer dangerous. Certain kinds of persisting threats can be dealt with by monitoring by contrast with detention. Moreover, other behavior that is currently considered criminal might not require incapacitation at all. Our view is consistent, for example, with the decriminalization of nonviolent behavior such as recreational drug use, and thus is consistent with many fewer people being detained than in the US currently.

In addition to monitoring and decriminalization, monetary fines could also serve as suitable sanctions for low-level crimes. When someone fails to heed a stop sign, for example, they put at risk the potential safety of others. The right of self-protection and the prevention of harm to others justify liberty-limiting laws backed by the threat of sanctions, but the sanctions in this case would need to be significantly low since our account prohibits treating individuals more harshly than is required to protect society. Just as it is illegitimate to treat carriers of a disease more harmfully than is necessary to neutralize the danger they pose, treating criminals more harshly than is required to protect society will be illegitimate as well. A forwarding-looking conception of moral responsibility grounding in future protection and moral formation could justify a suitable fine here, but not more punitive measures. Such small infractions are analogous to common colds. While they do put at risk the health of others, the harm they represent is not significant enough to justify quarantine. Of course, with regard to running a stop sign we might want to distinguish between first offense and habitual behavior since per incident risk is probably low but aggregates to a high probability of serious harms. Perhaps, then, we could justify increased sanctions over time for repeat offenders, included higher fines and eventually loss of one's drivers license.

On Corrado's second issue, the incapacitation of the dangerous who haven't committed a crime, on our view there are several moral reasons that count against such a policy. As Ferdinand Schoeman (1979) has argued and I have stressed (Caruso 2016), the right to liberty must carry weight in this context, as should the concern for using people as merely as means. In addition, the risk posed by a state policy that allows for preventative detention of non-offenders needs to be taken into serious consideration. In a broad range of societies, allowing the state this option stands to result in much more harm than good, because misuse would be likely. Schoeman also points out that while the kinds of testing required to determine whether someone is a carrier of a communicable disease may often not be unacceptably invasive, the type of screening necessary for determining whether someone has violent criminal tendencies might well be invasive in respects that raise serious moral issues. Moreover, available psychiatric methods for discerning whether an agent is likely to be a violent criminal are not especially reliable, and as Stephen Morse points out, detaining someone on the basis of a screening method that frequently yields false positives is seriously morally objectionable (Morse 1999; Nadelhoffer et. al. 2012).

For these reasons, I propose we adopt an attitude of *epistemic skepticism* when it comes to judging the dangerousness of someone who has not yet committed a crime. Given the limitations of our current screening methods, their invasiveness, and the likelihood of false positives, our default position should be to respect individual liberty and prohibit the preventative detention of non-offenders. Additionally, Jean Floud and Warren Young (1981) have argued that anyone who has not yet committed a crime should be entitled to a presumption of harmlessness, much as a person should be entitled to a presumption of innocence. Just as the presumption of innocence protects the unconvicted person against punishment, so the presumption of harmlessness protects the unconvicted person against preventive detention. I contend that these considerations are enough to block Corrado second concern.

What if, however, we someday develop more reliable neural tests for violent tendencies? Nadelhoffer et al. (2012), for example, has argued that in the future we may be able to determine with reasonable accuracy on the basis of neural factors whether someone is likely to commit violent crimes. Would our account endorse someone's preventative detention even if he has not yet manifested such violence, on the supposition that the violence would be serious and highly likely in his normal environment, and that less invasive measures such as effective monitoring or drug therapy are unavailable? Perhaps it would. But this should not count as a strong objection to our view, because virtually everyone would agree that preventative detention of non-offenders is legitimate under certain possible conditions. Imagine that someone has involuntarily been given a drug that makes it virtually certain that he will brutally murder at least one person during the one-week period he is under its influence.[11] There is no known antidote, and because he is especially strong, mere monitoring would be ineffective. Almost everyone would affirm that it would be at least prima facie permissible to preventatively detain him for the week.[12] Now

[11] Example drawn from Pereboom and Caruso (2017).

[12] Note that retributivists would have a hard time justifying incapacitating this individual on the grounds that he *deserves* punishment, since he has not yet done anything wrong. Yet the few retributivists I have talked to about this example have acknowledged that they too would detain the individual until the drug has worn off. This indicates to me that most retributivists are not

suppose that reliable neural screening reveals that an agent, if left in his normal environment, is virtually certain to engage in rape and murder in the near future. There is no known viable drug therapy, and mere monitoring would be ineffective. Should he be preventatively detained? Here it is important to understand that the incapacitation account will specify that the circumstances of such detention would not be harsh, and that allowing the agent to be reasonably comfortable and to pursue fulfilling projects would be given high priority. But even here there are countervailing moral considerations that must be taken into account. In many societies the danger of misuse posed by allowing the state to preventatively detain even highly dangerous non-offenders is a grave concern that stands to outweigh the value of the safety provided by such a policy.

Corrado's third objection has to do with the cost to society of implementing the public-health quarantine model. His argument runs as follows: When a person with cholera is quarantined, she is typically made to experience deprivation she does not deserve. Society benefits by this deprivation. It is a matter of fairness that society do what it can, within reasonable bounds, to make the victim safe for release as quickly as possible, and this will have a cost. If we quarantined cholera victims but were unwilling to provide medical care for them because it would require a modest increase in taxation, then we would be acting unfairly. Similarly, when a dangerous agent, whether or not he has already committed a crime, is preventatively detained, then supposing that the free will skeptic is right, he is made to experience a deprivation he does not fundamentally deserve, and from which society benefits. By analogy with the cholera case, here also it is a matter of fairness for us to do what we can, within reasonable bounds, to rehabilitate him and make him safe for release, and this too will have a cost. For a society or state to oppose programs for rehabilitation because it is unwilling to fund them would involve serious unfairness. Corrado maintains that this cost would be prohibitively high.

It is unclear to me, however, why Corrado thinks the public health quarantine model would be more costly than our current system. If healthcare costs are any indication, preventative care requires taxpayer money but in the long run significantly cuts healthcare costs overall. By analogy, I would argue that funding preventative measures that increase opportunities, address social injustices, provide medical care for the mentally ill and addicted, etc. would reduce the number of people drawn into the criminal justice system and significantly reduce the overall cost to society even if we factor in the cost of improving conditions and services for prisoners. Unfortunately, *a priori* reasoning isn't very helpful here and what we really need is a careful analysis of the comparative costs of both systems—something I will try to provide in the following section. Since Corrado's third objection draws on a famous criticism first introduced by Saul Smilansky, I will now turn to Smilansky's objection and address the empirical question of cost along the way.

V. Replies to Saul Smilansky

Saul Smilansky has presented a challenging objection to optimistic skeptics like myself who maintain that we are better off without free will and basic desert moral responsibility (Smilansky 2011, 2016). According to Smilansky, free will skeptics are forced to seek to revise the practice

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pure retributivists but are willing to supplement their account with additional justifications when needed, such as the justification provided by the quarantine model.

of punishment in the direction of *funishment*, whereby the incarcerated are very generously compensated for the deprivation of incarceration, since those cannot be deserved. Yet Smilansky argues that such a policy would be extremely expensive—in fact, the cost of funishment, compared to punishment, would be so high that it would be intolerable. Smilansky's argument can be summarized as follows:[13]

1. Murderers, rapists, violent bullies, thieves, and other miscreants need to be kept apart from lawful society; we have no real choice, for otherwise they will kill, rape, steal, and make life miserable for the rest of us.

2. Since free will skepticism holds that no one deserves the hardship of being separated from regular society, this hardship needs to be compensated for. Hence a great effort and expense must be made, in order that a person undergoing punishment will have a good life despite being separated from regular society, and deprived of the freedom and opportunity to move among the rest of us.

3. This effort at compensation morally must receive high social priority. We are at risk of ruining the lives of people who (again, assuming the skeptical perspective) in no way deserve this. Incarceration does not just occur. The criminals are proposed to become our victims: they will suffer grave deprivation and harm (in itself, and relatively to others on the outside), due to our own intentional actions, and because this serves our interests. We, as a society, are proposing to target and injure them in a special way, which they do not deserve, for our own purposes. In order to be permitted to do so, we must provide adequate compensation.

4. So, instead of punishment, we should have *funishment*: funishment would resemble punishment in that criminals would be incarcerated apart from lawful society; and institutions of funishment would also need to be as secure as current prisons to prevent criminals from escaping. But institutions of funishment would also need to be as delightful as possible. They would need to resemble five-star hotels, where the residents are given every opportunity to enjoy life.

5. This would go beyond material conditions: each criminal will need to be permitted considerable leeway in running his or her own personal life, as well as a large measure of freedom of social interaction (including frequent visits from outsiders).

7. Criminals currently have to balance the temptations of crime with the risks of punishment: the risk that, if caught, they are likely to spend many of the best years of their lives in miserable, ugly, harsh, nasty, violent, and otherwise highly unpleasant institutions. Some people nevertheless take the risk, while many others are deterred. But, once funishment replaces punishment, matters change radically.

[13] This is drawn directly from Smilansky's own summary in (2016) but with one change: I have replaced his reference to "hard determinism" with "free will skepticism" so as to remain consistent with my preferred terminology.

8. The potential offender knows that, if he is not caught, he can enjoy the spoils of his crime. But even if he is caught, he faces only some time in an institution of funishment, which—apart from being separated from lawful society—will be like a fabulous holiday. Funishment will greatly weaken the deterrence of institutions of punishment.

9. The claim that a system which could threaten potential offenders with, at worse, funishment, would be challenged in its efforts to deter, while empirical, can hardly be controversial. Modern societies are finding it difficult to deter many people even with present, highly unpleasant prisons; a turn towards funishment must greatly weaken deterrence. Following free will skepticism would lead to a flood of crime. The number of people who would need to be kept apart from lawful society would increase enormously. Many people who would otherwise not have become involved in crime, nor ever suffer detention, would be caught up in that very life. In the meantime, the rest of us would be living in the worst possible world: suffering unprecedented crime waves while paying unimaginable sums for the upkeep of offenders in opulent institutions of funishment.

10. Even in terms of free will skepticism, all this is a very bad state of affairs. Free will skeptics have sought to limit the number of people with which the justice system must deal, to reduce public hatred of offenders, and to beneficially reform the social conditions that generate crime. But free will skepticism itself defeats all those idealistic goals. If implemented, the view would generate more rather than less crime, more criminals would be caught up in the system and incarcerated apart from society (albeit under improved conditions), and public sentiment would hardly move towards an offender-sympathetic stance, once crime blossoms, and the taxation required to finance the regime of funishment mushrooms. This makes a backlash against funishment very likely.

11. In any case, a non-retributive order in line with free will skepticism would be nightmarish, even for free will skeptics, if correctly implemented. Free will skeptics themselves cannot desire the results of the reforms required by their own position (rising crime, much higher levels of incarceration, etc.). Free will skepticism is, in practice, self-defeating.

This argument represents a serious challenge to my view, but one that is significantly different than the kinds of objections addressed in Sections II, III, and IV. Those objections feared that the public health-quarantine model would lead to cruel and inhumane treatment of prisoners. This objection maintains the exact opposite—that free will skepticism will lead to funishment where criminals are provided with accommodations resembling "five star hotels." I find it a bit amusing that the quarantine model has been charged with such diametrically opposed concerns. It appears critics cannot decide whether to accuse it of being too harsh or too lenient. Setting aside, though, the seemingly inconsistent nature of these criticisms, I will now address Smilansky's objection in detail and argue that it fails for three main reasons.

First, as Smilansky acknowledges, it is an empirical question whether strong punitive measures better deter crime than the alternatives. If Smilansky is correct, funishment will not have the

deterrence factor needed to prevent society from falling into the abyss. For Smilansky, harsh and unpleasant punishment is required to deter crime. In fact, Smilansky states in premise (7) that even the potential cost of spending the "best years of their lives in miserable, ugly, harsh, nasty, violent, and otherwise highly unpleasant institutions" (2016) is often not enough to deter criminals in our current system. If we were to improve these conditions to the point of funishment, he argues, where accommodations would resemble "five-star hotels" (2016), all or most deterrence would be lost.[14]

I would like to challenge this empirical claim by examining some real-world examples and by drawing attention to the importance of prison design and environment on inmates' behavior. To begin we need to acknowledge that, with few exceptions, typical U.S., U.K., and Australian prisons are harsh, restrictive institutions, designed to enable maximum control over inmates' behavior at any time. As Lutham and Klippan write: "Their scale and appearance instill mistrust and anonymity…The ability to personalise space, have ownership and have personal control over one's situation is intentionally absent. Mostly, these are overtly punitive environments, unlike any other" (2016). These "cold" prison environments have an effect on the people inside them and they are typically not good. Just consider the rates of suicide and self-harm in U.S. prisons. According to the federal Bureau of Justice Statistics, suicides account for more deaths in state and federal prisons than drug and alcohol intoxication deaths, homicide, and accidents combined. And things are even worse in county jails where the suicide rate was 46 per 100,000 in 2013.[15] U.S. prisons are also breeding grounds for violence (Bowker 1980; Irwin 1980; Johnson 1987), which is not surprising given that they typically confine large numbers of people in overcrowded quarters and in conditions characterized by material and social deprivation (Bowker 1980; Toch 1985; Wolfgang and Ferracuti 1976; Wortley 2005).

In his book *Situational Prison Control* (2005), former prison psychologist Richard Wortley articulates strategies to reduce negative behavior in prison contexts, including through physical design. He suggests (a) setting positive expectations through domestic furnishings that confer trust; (b) reducing anonymity through small prison size; (c) personalizing victims through humane conditions; (d) enabling a positive sense of community through ownership and personalization of the space; and (e) reducing provocation and stress by designing in the capacity for inmates to enact control over environmental conditions and personal space. The current model of U.S. correctional facilities is the antithesis of each of these strategies. Lutham and

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[14] It's an interesting question whether Smilansky's argument is consistent with prison reform at all, as he states it is (2016), since the argument seems to imply that each increment of improvement would result in a corresponding loss of deterrence. We could imagine that at one end of the punishment scale we had inquisition-like conditions, on the other end funishment. In between would be a sliding scale of humane treatment, comfort, levels of autonomy, living conditions, etc. While not committing Smilansky to the claim that the worst off conditions would deter the most, he would nonetheless have to acknowledge that there is some optimal or peak level that maximizes deterrence. Given this, it would seem that any deviation from this optimal or peak state would begin to bend the curve downward, resulting in a loss of deterrence.

[15] According to the Marshal Project, one reason why jails have a higher suicide rate than prisons is that "people who enter a jail often face a first-time 'shock of confinement'; they are stripped of their job, housing, and basic sense of normalcy" (Chammah and Meagher 2015).

Klippan correctly note, "When we create environments that fuel the negative behavious we naturally associate with criminals, we are caught in a vicious cycle: harsh community and political attitudes toward prisons and prisoners are perpetuated, and overtly punitive prisons continue to be built" (2016).

There are, however, some good examples of innovative prison design that exist in Scandinavian countries. These prisons resemble, in many ways, the conditions of funishment Smilansky finds problematic. Prisons such as Halden Prison in Norway, Leoben in Australia, and Enner Mark in Denmark are purposely designed to reduce crime. Lutham and Klippan explain:

> They do this by providing positive opportunities for inmates and building a great sense of optimism for their future…These spaces are designed to more closely reflect environments in the outside community. The design treats these people not solely as "prisoners" but also as community members—with all the social, vocational and emotional responsibilities that this entails. (Lutham and Klippan 2016)

A good example of this is the Norwegian prison island of Bastoy. By most accounts it is exactly what Smilansky has in mind when he speaks of funishment. Here, for example, is the BBC's description of life on Bastoy:

> Inmates…are free to walk around in a village-style setting, tending to farm animals. They ski, cook, play tennis, play cards. They have their own beach, and even run the ferry taking people to and from the island. And in the afternoon when most prison staff go home, only a handful of guards are left to watch the 115 prisoners. (BBC News 2016).[16]

The *Guardian* further describes Bastoy as "cushy" and "luxurious." In an article titled "The Norwegian prison where inmates are treated like people," they write:

> I found that the loss of liberty was all the punishment [the prisoners] suffered. Cells had televisions, computers, integral showers and sanitation. Some prisoners were segregated for various reasons, but as the majority served their time…they were offered education, training and skill-building programmes. Instead of wings and landings they lived in small "pod" communities within the prison, limiting the spread of the corrosive criminal prison subculture that dominates traditionally designed prisons. (James 2013)

And the *Huff Post* adds:

> Bastoy is an open prison, a concept born in Finland during the 1930s and now part of the norm throughout Scandinavia, where prisoners can sometimes keep their jobs on the outside while serving time, commuting daily. Thirty percent of Norway's prisons are open, and Bastoy…is considered the crown jewel of them all. (2016)

[16] BBC News, "Andrew Breivik: Just how cushy are Norwegian prisons?" March 16, 2016. Available: http://www.bbc.com/news/magazine-35813470

Another Norwegian prison that resembles funishment more than punishment is Halden Prison, a high-security prison near the Swedish border that aims to rehabilitate criminals with comfortable and thoroughly modern facilities. At Halden, prisoners have access to steel cutlery in the kitchens, saws, pliers, and metal files in the workshop, and a music studio with guitars, keyboards, drums, and a mixing deck. *Time* magazine reports, to ease the psychological burden of imprisonment, the planners of Halden spent roughly $1 million on paintings, photographs and light installations.[17] Every 10 to 12 cells share a kitchen and living room, where prisoners prepare their evening meals and relax after a day at work. None of the windows at Halden have bars. And in terms of recreational opportunities for prisoners:

> Security guards organize activities from 8:00 in the morning until 8:00 in the evening. It's a chance for inmates to pick up a new hobby, but it's also part of the prison's dynamic security strategy: occupied prisoners are less likely to lash out at guards and one another. Inmates can shoot hoops on the basketball court, which absorbs falls on impact, and make use of a rock-climbing wall, jogging trials and a soccer field.[18]

Halden's designers also preserved trees across the 75-acre site, whereas U.S. prisons are usually devoid of vegetation to maximize visibility. Lastly, to help inmates develop routines and to reduce the monotony of confinement, designers spread Halden's living quarters, work areas, and activity centers across the prison grounds.

These facilities are purposely designed with the philosophical goal of rehabilitation and reintegration squarely in mind. In fact, the Norwegian Correctional Service has officially adopted something they call the *normality principle*, which maintains that during the serving of a sentence "life inside will resemble life outside as much as possible."[19] It further states that, "No-one shall serve their sentence under stricter circumstances than necessary for the security in the community. Therefore offenders shall be placed in the lowest possible security regime." Lastly, it states that prison should be a restriction of liberty but nothing more , that is, "no other rights have been removed by the sentencing court." According to the normality principle, an offender should have all the same rights as other people living in Norway and life inside should resemble life outside as much as possible. All Norwegian prisoners, for example, have the right to study and they are all allowed to vote. Sentences are also kept short. On average they are no more than eight months long, and nearly 90% of sentences are for less than a year. Additionally, the longest sentence permitted by law is 21 years, but that can be extended in five-year increments if a prisoner is not rehabilitated and is considered a continued risk to society. Even Anders Breivik, the Norwegian mass murder who killed 77 people was sentenced to only 21 years. Since most prisoners will eventually return to society, Norwegian prisons prepare inmates for reintegration by mimicking the outside world as much as possible.[20]

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[17] See *Time* magazine's photo story, "Inside the world's most humane prison." Available: http://content.time.com/time/photogallery/0,29307,1989083,00.html

[18] Ibid.

[19] For more details, see the Norwegian Correctional Service's full document: http://www.kriminalomsorgen.no/information-in-english.265199.no.html

[20] The normality principle, I should note, is perfectly consistent with the public health-quarantine model. Built into it is the principle of least infringement and a concern for the rehabilitation and

Given that these Norwegian prisons resemble funishment in almost all salient respects—e.g., the living conditions resemble the outside world as much as possible and individual autonomy is maximized so that inmates have considerable leeway in running their own lives and interacting socially—Smilansky's argument would predict that crime in Norway must be rampant and out of control. The reality, however, is the exact opposite. The crime rate in Norway is relatively low in comparison to the U.S. and Western European countries.[21] For instance, the United States has 87% more crime than Norway.[22] Norway also has one of the lowest murder rates in the world. In 2009, Norway had .6 intentional homicides per 100,000 people. In the same year, the United States had 5 murders per 100,000 people, meaning that the U.S. proportionally had 8 times as many homicides. Norway's incarceration rate is also a fraction of that of the United States—which again runs contrary to Smilansky's prediction that "more criminals would be caught up in the system and incarcerated apart from society." For instance, the United States incarcerates more than 700 prisoners for every 100,000 citizens, whereas Norway incarcerates around 70 per 100,000.

What about recidivism? Well, when criminals in Norway leave prison, they tend to stay out. Norway's recidivism rate of 20% is one of the lowest in the world. The recidivism rate of Bastoy Prison, for example, is about 16%. By contrast, in the U.S. more than 76% of prisoners are re-arrested within five years. The recidivism rate in the U.K. is lower, about 45%, but still more than double that of Norway. These statistics reinforce what researchers are finally beginning to realize, that prison has at best a negligible—and at worst a damaging—impact on the likelihood a person will re-offend (see Weatherburn 2010). Furthermore, as Lutham and Klippan note:

> Though these less conventional prison environments feature much "softer" forms of security, there has not been a correlating increase in security incidents within them. Most investigations of these places indicate fewer incidents and more positive interactions between staff and prisoners. This contradicts the idea that "hard" prison design is necessary for behaviour control. (2016)

Empirically speaking, then, it is hard to argue that shorter prison sentences and "luxury" conditions on their own will increase crime. If Norway is any indication, this is simply not the case.[23] And given that this empirical claim comprises the core of Smilansky's objection, the

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well-being of criminals. It also states that the loss of liberty can be justified for the kinds of reasons specified in Section I, but that this does not extend to the loss of other rights, such as voter rights. I maintain that the normality principle is a good public policy principle and provides a helpful guide to prison design and the humane treatment of inmates.

[21] See the Norway 2015 Crime and Safety Report. https://www.osac.gov/pages/ContentReportDetails.aspx?cid=16970

[22] Source: http://www.nationmaster.com/country-info/compare/Norway/United-States/Crime

[23] Of course, Norway differs from the U.S. in a number of salient ways and this may in part account for the differences we see in crime, incarceration, and recidivism rates. Norway, for example, lacks the racial history of the U.S. It is also a more egalitarian society with less concentration of wealth at the top, very little poverty, universal healthcare, and more comprehensive government services. These difference, however, simply reinforce the notion that

argument fails to be convincing. I see no reason for thinking that free will skeptics would be required to provide *more* than the kinds of conditions provided in Norwegian prisons—which are perhaps the most humane and comfortable in the world. And given that such condition do not result in "unprecedented crime waves" or the "worst possible world" Smilansky predicts, we should conclude that such fears are overblown.

Let me now consider a slightly different objection. Smilansky also claims that adopting the quarantine model would require "paying unimaginable sums for the upkeep of offenders in opulent institutions of funishment" (2016). We can call this the *cost objection*, as opposed to the deterrence or rising-crime objection addressed above. As we saw in the last section, Corrado also presents a version of the cost objection. We can state the objection as follows: (1) According to my model, just as we have a duty to do what we can, within reasonable bounds, to make a person with cholera in quarantine safe for release as quickly as possible and to house them in confortable and reasonable conditions, we likewise have a duty to criminals to do what we can, within reasonable bounds, to rehabilitate them and house them in comfortable and reasonable conditions; (2) this will have a cost; (3) it would be seriously unfair for a society or state to be unwilling to pay this cost, especially since the deprivation experienced would not be deserved on my account; but (3) this would result in "unimaginable sums" and be prohibitively expensive.

My first reply is that, *even if this were so* it would leave untouched the normative aspects of my argument. An analogy with public education is helpful here. Most people would agree with the following normative claim, which is meant to be analogous to premise (1) above: (1*) we have a duty to do what we can, within reasonable bounds, to provide access to public education for all—regardless of race, ethnicity, gender, class, sexual orientation, or ability to pay. Assuming (1*) for the moment, the analogous argument would run as follows: (2*) Paying for a system of public education will have a cost; and (3*) it would be unfair and unjust for a society or state to be unwilling to pay this cost. Now let us assume (as the above argument does) that the costs of public education became prohibitively expensive—perhaps even that it became impossible for states to cover said costs without overburdening taxpayers. Even if this were so, it would not follow that premise (1*) is false or that we should disregard matters of justice and fairness. At most it would reveal a practical barrier in the way of achieving justice, but not that denying children a public education was *itself* just. I would say the same for criminal justice. Even if it was practically difficult or even impossible to implement my public health-quarantine model because it was too expensive, an assumption I will challenge in a moment, it would not follow that harsh or excessively punitive punishment would suddenly become justified. Nor would follow that retributivism was justified—the cost objection simply has no bearing on these matters.

That said, would the public health quarantine model be prohibitively expensive? I contend that it would not. Let's drill down into the numbers. The American prison system is massive and extremely expensive—so massive that its estimated annual cost of $80 billion eclipses the GDP of 133 nations. Consider first the monetary costs to taxpayers. While the price of prisoners can

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a holistic approach to criminal behavior, like that offered by the pubic health-quarantine model, needs to deal not only with the treatment and rehabilitation of those we incapacitate but also with social justice—including racism, poverty, wealth inequality, access to healthcare, and the like.

vary greatly from state to state, a Vera Institute of Justice (VIJ) study of 40 states found the cumulative cost of prisons in 2010 was $39 billion.[24] That's $5.4 billion more than the $33.5 billion provided by corrections budgets—an interesting accounting trick. The annual average public cost in those same 40 states was $31,286, with some states on the high end paying as much as $60,000 per prisoner annually. By comparison, the average cost per public school student nationwide was $11,184 in 2010. That means it is significantly cheaper to educate a child for a year than to house someone in prison. According to the Justice Department, the nationwide expense of incarceration in both state and federal budgets in 2010 was about $80 billion.[25] While it is true that Norway's per prisoner costs are higher than the U.S.—for instance, housing a prisoner in Halden prison runs $93,000 per inmate per year—this does not mean that the system as a whole is more expensive. The New York Times (2015) estimates that if the United States incarcerated its citizens at the same low rate as Norwegians do, it could spend that much per inmate and still save more than $45 billion a year.[26]

Furthermore, per prisoner annual costs are only part of the story, there are also hidden costs society pays for incarceration and in the United States we pay a huge price for a largely ineffective system. As a report put out by the Pell Center for International Relations and Public Policy explains:

> The costs associated with incarceration and recidivism are not just financial. The toll on prisoners and their families is impossible to calculate. Loved ones can suffer from economic strain, psychological and emotional distress, and social stigma. Prisoners endure isolation from their families and the community. They are often housed in overcrowded and dangerous prisons. The stress of surviving in prison can lead to depression and anxiety. Inmates may leave prison worse off than when they arrived, which can be detrimental to communities and society as a whole. (2014, 2)[27]

In Norway and other Scandinavian countries, the emphasis is on rehabilitation and re-socialization rather than just punishment. As a result, they provide work training and other educational opportunities for prisoners. This has proven to be extremely effective in reducing the rate of recidivism. Incarceration is also used less frequently and for shorter periods of time. By comparison, in the U.S. people are often imprisoned for crimes that would not lead to

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[24] Christian Hendrickson and Ruth Delaney, "The Price of Prisons: What Incarceration Costs Taxpayers," Vera Institute of Justice, Center on Sentencing and Corrections, January 2012 (updated July 20, 2012). Accessed November 11, 2013, http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated version_072512.pdf.

[25] U.S. Department of Justice, "Smart on Crime: Reforming the Criminal Justice System for the 21st Century," August 2013. Accessed November 13, 2013, http://www.justice.gov/ag/smart-on-crime.pdf.

[26] Jessican Benko, "The Radical Humaneness of Norway's Halden Prison," March 26, 2015. http://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html?_r=1

[27] Carolyn W. Deady, "Incarceration and Recidivism: Lessons From Abroad," March 2014: http://www.salve.edu/sites/default/files/filesfield/documents/Incarceration_and_Recidivism.pdf

imprisonment in other countries, such as passing bad checks, minor drug offenses, and other non-violent crimes. Also, prisoners in the United States are often incarcerated for a lot longer than in other countries. This emphasis on punishment rather than rehabilitation leads not only to increased costs associated with incarcerating more people for longer periods of time, but it also comes with a number of hidden and less-obvious costs. One is that prisoners are often released with no better skills to cope in society and are offered little support after release, increasing the chances of reoffending. This results in reduced public safety, higher rates of recidivism, increased unemployment, and numerous financial and emotional costs to the families of those imprisoned.

In 2015, the Ella Baker Center for Human Rights published a report investigating the criminal justice system's long-term effects on inmates, families, and society. The report found that the economic, social, and health-related burdens communities bear from incarceration result in "increased poverty, destabilized neighborhoods, and generations of trauma." The costs of even a minor offense can add up in thousands of dollars of debt, mental health issues, and the specter of a permanent record. The burden of judicial punishment, the report finds, is carried not only by offenders but also their families. For instance, families lose a source of income, must find a way to pay off legal fees, and must pay to stay in contact with their incarcerated loved one. And since no family or individual is an island, the economic setbacks can spread to the entire community. These costs pile up measurably at every stage of the system:

> While imprisoned, inmates' basic needs must be paid for by family, at absurd costs. Under these financial pressures, one in five families faces eviction during a loved one's incarceration because of housing unaffordability, and almost two in three struggle to afford other necessities. Economic strains continue after incarceration because of the stigma attached to a criminal record. 76 percent of former inmates found it "very difficult or nearly impossible" to get a job after prison, and less than half worked fulltime five years after release. Unpaid debts incurred during adult incarceration compound the effects of employment constrains, and 12 percent of former inmates are put back into prison for missing conviction-related debt payments.[28]

Ironically, government aid that could lift men and women back onto their feet during re-entry is denied even to minor offenders. In most states, past drug offenders are ineligible for federal welfare programs, and local housing authorities can deny public housing to individuals with a record. In the Ella Baker Center for Human Rights survey, they found that one in ten family members polled lost their public housing after a loved one with a record returned home. Unpaid criminal justice debts can also result in the denial of student loans, disability benefits, and Social Security.

Reports like this powerfully underscore the hidden costs of incarceration. When we lock somebody up, we destroy not just his or her economic and social opportunity, but in fact harm entire families and communities. Hence, we should not do so lightly. On the model I propose, we

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[28] Campaign for Youth Justice, "The Hidden Costs of Incarceration in the Adult System," September 29, 2015: http://www.campaignforyouthjustice.org/news/blog/item/the-hidden-costs-of-incarceration-in-the-adult-system

should only incapacitate individuals when they pose a serious threat to society and even then we should do so for the shortest period of time necessary and with a goal of rehabilitation and reintegration. While Smilansky and Corrado object that my model would be too costly for society, I contend that it is our *current* system of punishment that is actually too costly. When examined holistically, the public health-quarantine model promises to be a more cost effective and humane alternative. Consider, for instance, how the public health approach could address homelessness, and as a result reduce both the financial and human costs of incarceration and poor health.

Homelessness is a public health issue (see Donovan and Shinseki 2013). This is true in two directions: poor health is a major cause of homelessness *and* homelessness creates new health problems and exacerbates existing one. As the National Health Care for the Homeless Council (NHCHC) explains:

> An injury or illness can start out as a health condition, but quickly lead to an employment problem due to missing too much time from work; exhausting sick leave; and/or not being able to maintain a regular schedule or perform work functions. This is especially true for physically demanding jobs such as construction, manufacturing, and other labor-intensive industries. Losing employment often means getting disconnected from employer-sponsored health insurance. The lack of both income and health insurance in the face of injury or illness then becomes a downward spiral; without funds to pay for health care (treatment, medications, surgery, etc.), one cannot heal to work again. Of the 1 million personal bankruptcies in 2007, 62% were caused by medical debt. In these situations, any savings accumulated are quickly exhausted, and relying on friends and family for assistance to help maintain rent/mortgage payments, food, medical care, and other basic needs can be short-lived. (2011)

In the other direction, living on the street or crowded homeless shelters is personally stressful and made worse by being exposed to communicable disease, violence, malnutrition, and harmful weather exposure (O'Connell 2004; Singer 2003; Wrezel 2009).

> Hence, common conditions such as high blood pressure, diabetes, and asthma become worse because there is no safe place to store medications or syringes properly. Maintaining a healthy diet is difficult in soup kitchens and shelters as the meals are usually high in salt, sugars, and starch (making for cheap, filling meals but lacking nutritional content). Behavioral health issues such as depression or alcoholism often develop or are made worse in such difficult situations, especially if there is no solution in sight. Injuries that result from violence or accidents do not heal properly because bathing, keeping bandages clean, and getting proper rest and recuperation isn't possible on the street or in shelters. Minor issues such as cuts or common colds easily develop into large problems such as infections or pneumonia. (2011)

It is not surprising that those experiencing homelessness are three to four times more likely to die prematurely than their housed counterparts, and experience an average life expectancy as low as 41 years (Morrison 2009; Song et al. 2007).

Homelessness and incarceration are also mutual risk factors for each other (Metraux, Roman, and Cho 2007; Greenberg and Rosenheck 2008). Researches estimate that 25-50% of the homeless population has a history of incarceration (Metraux and Culhane 2006; Tejani et al. 2013). Additionally, a greater percentage of inmates have been previously homeless when compared to adults in the general population, illustrating that homelessness often precipitates incarceration (see Greenberg and Rosenheck 2008; Tsai et al. 2013; Greenberg and Rosenheck 2010). Greenberg and Rosenheck (2008), for example, found that homelessness was 7.5 to 11.3 times more prevalent among jail inmates than the general population. As the National Health Care for the Homeless Council writes:

> Existing homelessness is daunting regardless of one's criminal record. However, individuals with past incarceration face even greater barriers to existing homelessness due to stigmatization, policies barring them from most federal housing assistance programs, and challenges finding employment due to their criminal records (Tejani et al. 2013). To meet basic necessities amidst these barriers, previously incarcerated individuals sometimes engage in criminal activities to get by, perpetuating the cycle of homelessness, re-arrest, and incarceration. (2013)

If we want to break this revolving door of risk between incarceration and homelessness, we need to shift to an *interventionist* approach that is data driven, research informed, and prioritizes more immediate access to permanent housing. One such model is Housing First, an emerging, evidence-based best practice for assisting people experiencing chronic homelessness to obtain and maintain permanent housing—quickly, safely, and without prerequisites. As Donovan and Shinseki write:

> [T]he Housing First model also assists with access to health care, employment, and other supportive services that promote long-term housing stability, reduce recidivism, and improve quality of life. Investments in effective, evidence-based programs utilizing the Housing First model, such as rapid rehousing, Supportive Services for Veteran Families (SSVF), and the Housing and Urban Development Veterans Affairs Supportive Housing (HUD-VASH) programs, along with unprecedented partnerships between federal and local partners, have yielded substantial reductions in veteran and chronic homelessness. (2013)

Since the Housing First model was first introduced, and despite an affordable housing crisis, an economic recession, and elevated poverty, the number of chronically homeless individuals has continued to decline (see Donovan and Shinseki 2013). These gains are evidence that the model is working.

Providing the homeless with housing not only improves health outcomes and reduces the chances of incarceration and recidivism, it is also more humane *and* saves money. One recent report estimates that giving housing to the homeless is three times cheaper than leaving them on the streets. The Central Florida Commission on Homelessness (CFCH) conducted a study in 2014 and found that the region spends $31,000 a year per homeless person on "the salaries of law-enforcement officers to arrest and transport homeless individual—largely for nonviolent offenses such as trespassing, public intoxication or sleeping in parks as well as the cost of jail

stays, emergency-room visits and hospitalization for medical and psychiatric issues" (2014). By contrast, getting each homeless person a house and a caseworker to supervise their needs would cost only about $10,000 per person in Orange, Seminole, and Osceola counties, the counties included in the study. Additional studies around the country have also found a community cost savings associated with placement of chronically homeless individuals in housing compared to the cost of the same population while living on the streets and in the shelters. The CFCH report (2014) estimates that nationally the annual cost savings ranged from 79% in Los Angeles (Economic Roundtable 2009), 72% in Jacksonville (Nazworth 2014), 55% in Tulsa (Stromberg et al. 2007), 53% in Seattle (2009), and 49% in Louisville (Barber et al. 2008). These studies comparing the cost of public services used by chronically homeless individuals to the costs of providing housing plus services for the same population, show that developing affordable Permanent Supportive Housing options reduces homelessness and saves millions of taxpayer dollars over time, improving the quality of life for everyone (see CFCH Report 2014; Gulcur et al. 2003; Tsemberis 2014). This is just one example of how a public health approach can save money while producing better outcomes.

Let me end with one final reply. If we consider Smilansky's funishment objection in conjunction with his other views, especially his *illusionism*, a troubling moral concern emerges. Smilansky seems to hold that while individuals are not truly morally responsible in the basic desert sense, we should nevertheless maintain a system of retributive punishment despite its lack of justification. Smilansky (2000) has famously argued that our commonplace beliefs in libertarian free will and desert-entailing ultimate moral responsibility are illusions, but he also maintains that if people were to accept this truth there would be wide-reaching negative intrapersonal and interpersonal consequences. According to Smilansky, "Most people not only believe in actual possibilities and the ability to transcend circumstances, but have distinct and strong beliefs that libertarian free will is a condition for moral responsibility, which is in turn a condition for just reward and punishment" (2000, 26-27). It would be devastating, he warns, if we were to destroy such beliefs: "the difficulties caused by the absence of ultimate-level grounding are likely to be great, generating acute psychological discomfort for many people and threatening morality—if, that is, we do not have illusion at our disposal" (2000, 166). To avoid any deleterious social and personal consequences, then, and to prevent the unraveling of our moral fabric, Smilansky recommends *free will illusionism*. According to illusionism, people should be allowed their positive illusion of libertarian free will and with it ultimate moral responsibility; we should not take these away from people, and those of us who have already been disenchanted ought to simply keep the truth to ourselves (see Smilansky 2000, 2013).

While illusionism is something I reject (Caruso 2012, 2013, 2017), I think it is one thing to advocate for it when it comes to personal beliefs and another thing altogether to hold that we should promote illusionism within our institutions of punishment and the criminal justice system. I contend that it is wholly unacceptable to punish someone on retributivists grounds if we lack epistemic justification for believing that they have the kind of control in action needed to ground basic desert moral responsibility. Richard Double (2002) famously criticized libertarians for their "hard-heartedness" on exactly these grounds. I would extend that criticism to illusionism as well, since I think it is hard-hearted to maintain a system of retributive punishment when you yourself believe it is founded on false beliefs.

My argument for the hard-heartedness of illusionism is that Smilansky is committed to the following five claims, which together are morally unsympathetic and hard-hearted: (1) Most people believe in libertarian free will and that it is necessary for moral responsibility; (2) libertarian free will is an illusion; (3) if people came to accept (2) it would be devastating; hence (4) we should promote the positive illusion of libertarian free will; yet (5) keeping the positive illusion of libertarian free will alive requires keeping the notion of just deserts alive and with it institutional retributive punishment. Since Smilansky accepts (2) and acknowledges that libertarian free will is an illusion and hence cannot provide the justification needed to ground backward-looking blame and retributive punishment, I conclude that it would be hard-hearted for him to continue endorsing institutional retributive punishment.

Now, Smilansky could appeal to his other main doctrine, *dualism*, and argue that while our commonplace beliefs in libertarian free will and desert-entailing ultimate moral responsibility are illusions, certain compatibilist insights are also true. As Smilansky describes his dualism:

> I agree with hard determinists that the absence of libertarian free will is a grave matter, which ought radically to change our understanding of ourselves, of morality, and of justice. But I also agree with the compatibilists that it makes sense to speak about ideas such as moral responsibility and desert, even without libertarian free will (and without recourse to a reductionist transformation of these notions along consequentialist lines). In a nutshell,...'forms of life' based on the compatibilist distinctions about control are possible and morally required, but are also superficial and deeply problematic in ethical and personal terms. (2000, 5)

Unfortunately, I do not think this helps. Smilansky's dualism is simply too weak to *justify* institutional retributive punishment. Smilansky admits in the quote above that while his dualism allows him to adopt compatibilist ways of speaking about moral responsibility and desert, compatibilism nonetheless remains "superficial and deeply problematic in ethical and personal terms." Regardless, then, of which insights Smilansky wishes to retain from compatibilism, a view that admits hard-determinism (or hard-incompatibilism) contains important insights and truths, and that these insights "ought radically to change our understanding of ourselves, of morality, and of justice," is left in a seriously weakened position and without the justificatory power needed to defend our retributive practices. Smilansky's dualism falls far short of the high epistemic standard needed to justify harming another individual on the grounds of basic desert. My criticism, then, is that it is hard-hearted for Smilansky to continue to support institutional retributive punishment given his illusionism and dualism—since neither provides the epistemic justification needed.

VI. Replies to John Lemos

Let me now turn to a recent objection by John Lemos (2016). Lemos has argued that my view too easily gives way to the use of legal practices that would increase the number of innocent people being detained for crimes they did not commit. As such the view exhibits insufficient respect for the rights and dignity of innocent human beings. In particular, he notes that the primary motivation for quarantine is to protect the rest of society from harm. As such, there is kinship between this approach and deterrence theories of punishment. He appeals to a recent

criticism of deterrence theories that has been developed by Saul Smilansky (1990), who argues that if the sole motivation for punishment is deterrence, then we would be justified in lowering the evidentiary standards used for criminal conviction. In doing so, we could take more criminals off of the streets and this would increase the overall well-being of society while at the same time some more innocent people would end up being convicted and punished due to the use of a lower evidentiary standard. While Lemos acknowledges that the quarantine view is not a deterrence theory of punishment, he argues it is still motivated to protect society from harm. Thus, it can be argued that to better protect society from dangerous criminals the evidentiary standards for criminal conviction should be lowered so as to capture more criminals offering more protection for society.

In response to this objection, I would first like to reiterate a point made earlier. Neither Pereboom nor I set out our position in a strict consequentialist theoretical context. Rather, we justify incapacitation on the ground of the right to self-defense and defense of others. That right does not extend to people who are non-threats. The aim of protection is justified by a right with clear bounds, and not by a consequentialist theory on which the bounds are unclear. It would therefore be wrong, according to our model, to incapacitate someone who is innocent since they are not a serious threat to society (see Pereboom and Caruso 2017). Once this is fully appreciated, much of the force of Lemos' objection is lost. In fact, the public health-quarantine model provides a distinct advantage over consequentialist deterrence theories since it has more restrictions placed on it with regard to using people merely as a means. Concerns over the "use" objection, for example, count more heavily against punishment policy justified simply on consequentialist grounds than they do against incapacitation based on the quarantine analogy.

But to more fully address Lemos' concern, I would like to further explain what role I conceive evidentiary standards playing on my model. To begin, let me quote Stephen J. Morse on the criteria that the criminal law currently employs:

> Let us consider what the criteria are for allegedly deserved punishment. First, the agent must perform a prohibited intentional act (or omission) in a state of reasonably integrated consciousness (the so-called "act" requirement, usually confusingly termed the "voluntary act"). Second, virtually all serious crimes require that the person had a further mental state, the *mens rea*, regarding the prohibited harm. Lawyers term these definitional criteria for prima facie culpability the "elements" of the crime. They are the criteria that the prosecution must prove beyond a reasonable doubt. For example, one definition of murder is the intentional killing of another human being. To be prima facie guilty of murder, the person must have intentionally performed some act that kills, such as shooting or knifing, and it must have been his intent to kill when he shot or knifed. If the agent does not act at all because his bodily movement is not intentional—for example, a reflex or spasmodic movement—then there is no violation of the prohibition against intentional killing. There is also no violation in cases in which the further mental state required by the definition is lacking. For example, if the defendant's intentional killing action kills only because the defendant was careless, then the defendant may be guilty of some homicide crime, but not of intentional homicide. (2017)

With regard to the "act" requirement, I maintain that on the public health-quarantine model high evidentiary standards remain centrally important since they are necessary to protect innocent people who are non-threats from being incapacitated. Consider a murder case where there is a dispute over who shot the victim. My model would require just as high an evidentiary standard as the current system in establishing the facts of the case since to justify incapacitating someone it would need to be established beyond a reasonable doubt that they performed the act in question. The finding of facts remains extremely important since we need to know that we have correctly identified the person who is *causally* responsible for the shooting. This is the only way we can then precede to judge whether the individual is a serious threat to society and if the right to self-defense and defense of others justify incapacitation.

When it comes to judging *mens rea*, however, I have a rather radical proposal. I maintain that after the facts have established that we have identified the causally responsible agent, the defendant's state of mind at the time of the crime becomes more important in determining the continued threat of the agent and which sanctions, treatments, and forms of rehabilitation are most suitable than it is in establishing which punishment is deserved. Once we give up the notion of just deserts, the importance of establishing *mens rea* and distinguishing between, say, murder and negligent homicide becomes one of forward-looking relevance. Imagine, for instance, that a child is left in a hot car and dies as a result. After we have established who is causally responsible for the child's death (say, for example, the mother of the child), the agent's state of mind becomes relevant in determining their continued threat moving forward. If, say, the mother intentionally caused the death of her child and planned in advance to stage things so as to look like an accident, that is one thing. If, however, it was the result of a tragic oversight on the part of the mother resulting from lack of sleep due to a cold or flu that is another. The first would likely result in incapacitation and rehabilitation until we could be assured that the mother is no longer a serious threat to society, whereas the latter may not.[29] Furthermore, on my model we would adjust our methods of rehabilitation dependent on whether the mother is normally reasons-responsive or not (see section IV). Hence, determining an agent's state of mind at the time of a crime as well as their overall ability to be reasons-responsive remains extremely important on my account.

There is no reason for thinking, then, that adopting the public health-quarantine model would result in the lowering of the evidentiary standards used for criminal conviction. Both the "act" requirement and the *mens rea* requirement would remain important in determining whether the right of self-defense and defense of others can, in any given situation, justify incapacitation. If, for instance, an individual was incapacitated for an action or omission that they were *not* causally responsible for, my account would consider this a grievous injustice. To prevent such grievous injustices from occurring, high evidentiary standards should be maintained. Second, my account would continue to require prosecutors to prove *mens rea* since agents who commit first-degree

[29] Of course, much more would need to be known about these cases. In the latter case, for example, if it turned out that the mother's negligence was consistent with a persistent character flaw, we may conclude that mandatory counseling and/or monitoring would be justified.

murder or other intentional crimes will often be judged more dangerous than those who inadvertently break the law by accident or out of negligence.[30]

Now, Lemos may be willing to acknowledge these points but nevertheless insist that I am overlooking a bigger problem—i.e., that the way quarantine is actually implemented in public health lends itself to an analogous justification for incapacitating innocent people. In developing his objection, for instance, he writes:

> It is not true that in matters of public health we detain only those known to carry infectious disease. Rather, we also detain those who are likely carriers of the disease, as sometimes people may have a disease and spread it before showing symptoms. The United States Center for Disease Control (CDC) actually distinguishes between isolation and quarantine. ***Isolation*** separates sick people with a contagious disease from people who are not sick. ***Quarantine*** separates and restricts the movement of people who were exposed to a contagious disease to see if they become sick. Those quarantined are not necessarily carriers of the disease; they are people who've been exposed and are likely carriers. Furthermore, federal and state laws allow for legally enforced quarantine of people who were merely exposed and who may not actually be carriers…Thus, the quarantine model does not actually discourage quarantine of the innocent, rather it allows for it as long as those detained are likely to be criminals. Notice that this plays right into the hands of the kind of argument strategy employed by Smilansky. He argues that if no one is responsible in the basic desert sense and if the only point of punishment is to prevent crime then we might as well lower the evidentiary standards to get more criminals off the street. This is akin to saying that we should detain not only those who are known to be violent criminals but also those that are likely to be violent criminals. (2016)

Lemos is, of course, correct that the CDC and other public health organizations distinguish between isolation and quarantine. As it is applied in public health, quarantine does have a broader application. But in terms of the public health-quarantine model Pereboom and I defend, there are several good reasons for restricting the use of incapacitation to only those who have, beyond a reasonable doubt, committed a serious crime.

To reiterate some of the points made earlier: (1) Pereboom and I have both argued that the right to liberty should carry significant weight and not be overridden lightly—on the model I defend, for instance, I have attempted to highlight this by arguing that the principle of autonomy needs to be weighed heavily against the public health justification for quarantine; (2) since the kinds of testing required to determine whether someone is a carrier of a communicable disease are often not unacceptably invasive, yet the types of screening necessary for determining whether someone has violent criminal tendencies might well be invasive in respects that raise serious moral issues, the former are much easier to justify than the latter; and (3) since the available

[30] I should note that this will not always be the case. Someone who kills a family while driving under the influence, especially if this is after several previous drunk-driving infractions, may be a greater threat to society even though they lack *mens rea* than someone who intentionally steals a candy bar.

psychiatric methods for discerning whether an agent is likely to be a violent criminal are not especially reliable and are capable of producing false positives, we should adopt an attitude of *epistemic skepticism* when it comes to judging the dangerousness of someone who has not yet committed a crime. In addition to these three points, I would add that the cost of being quarantined for a short period of time to assess one's health pales in comparison to being incapacitated for a crime one did not commit. This places a much higher evidentiary burden, I contend, on justifying criminal incapacitation.

If I am held for a few hours, or even a few days, after getting off a plane because it is suspected that I was exposed to a contagious disease, this is surely an inconvenience. This inconvenience, however, is relatively minor and a price most of us are willing to pay to help protect public health and prevent communicable diseases from spreading. On the other hand, incapacitating an innocent person because it is suspected that they might be dangerous, or because lowering our evidentiary standards marginally improves overall safety, results in far more than inconvenience. For one thing, those who are quarantined are quickly released once it is determined that they are healthy. This would not be the case when an innocent person is wrongly convict for a crime they did not commit. Secondly, the violation of liberty is much greater in criminal incapacitation since it is usually of a longer duration and often accompanied by social stigmatization. For these reasons, I reject Lemos' false equivalency and maintain that the burden of proof must be significantly higher in cases of criminal incapacitation. From the fact that the right to self-protection and the prevention of harm to others may be able to justify quarantining people who are only potential threats when it comes to public health, it does not follow that it would likewise justify incapacitating innocent people when it comes to criminal justice. There are significant and important moral differences between the two cases that need to be taken into consideration and that ultimately demand a higher bar be applied in the latter case.

Let me conclude with one last reply. Lemos suggests that it would be "unjustified discrimination against criminals" (2016) if moral responsibility deniers like Pereboom and I were to argue that we should not lower the evidentiary standards to protect the freedom of those who have not committed crimes. This is because:

> On the responsibility denier's view, no one is responsible for what he does. On this view, the person who commits crimes is no more deserving of punishment than the person who never commits crimes. As I've argued, we could reduce crime more effectively by using lower evidentiary standards for criminal conviction and this would, of course, lead to punishment of more people who have not committed crimes. However, if the responsibility denier is correct in saying that no one is responsible, then, given the purpose of quarantine style criminal detention, it is unjust to expect only those who have actually committed crimes to be detained. Why should the criminals be the only ones to carry the burden of criminal detention for the sake of crime prevention if they are no more deserving of the detention than innocent people? (2016)

The answer to this question, however, should be obvious to anyone who acknowledges that the imposition of sanctions serves purposes other than the punishment of the guilty (see, e.g., Levy 2012; Corrado 2001, 2013, 2016; Tadros 2011). On the model defended here, the justification for why dangerous criminals should be the only ones to carry the burden of criminal detention is not

because they deserve it, not because it will serve as a general deterrent, but because only those who pose a serious threat to society can be incapacitated on the grounds of self-defense and defense of others.

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