

A Critique of Von Hirsch's Censure Theory

THOM BROOKS*

Abstract. Andreas von Hirsch's desert-based censure theory defends an influential penal theory centred on blame and proportionality. This article critically examines this theory and identifies three key problems relating to its justification of punishment and its distribution. The article argues that not all of these problems are resolvable, raising serious concerns about the tenability of censure theory in sentencing policy without significant modifications.

1. Introduction

Andreas von Hirsch's desert-based censure theory is a highly influential contribution to the field of penal ethics.¹ Its defence of blame and proportionality has become a widespread feature of various sentencing guidelines and von Hirsch is correct to argue that “the idea of the deserved, proportionate sentence has by now taken a substantial role in academic penological discussion” (von Hirsch 2017, 3).² This is not an accident, as it offers a powerful account of censure that has played a key role in shaping contemporary debates. Moreover, von Hirsch offers a position that allows us to consider desert alongside deterrence, addressing support for pluralism in penal theories without detracting from its desert-based core and, thus, bringing multiple penal purposes together into a pluralist theory of punishment.

His views have been developed over an impressive body of work, including several classic texts that are all widely studied by penologists and described as having “undoubtedly marked a significant turn in the development of liberal penal theory”

* Many thanks to Sebastian Jon Holmen, Thomas Søbirk Petersen, Jesper Ryberg, Frej Klem Thomsen, and an anonymous referee for comments on earlier drafts.

¹ It should be noted that Andreas von Hirsch's earlier works were under the name of Andrew von Hirsch. This article will refer in the main text to his current name—Andreas von Hirsch—and refer to his texts by the name used for each. On other leading proponents of censure-based theories, see Brooks 2021, 118–42.

² Cf. Boonin 2008, 86; Bottoms 2017, secs. 48, 79, 112; Matravers 2011, 35; MSGC 2015, 1, 6; and SGC 2004, sec. 1.4. See also von Hirsch on sentencing guidelines for England and Wales on proportionality in von Hirsch and Ashworth 2005, 1–2, 5, 80, 85; von Hirsch on Minnesota's sentencing commission in von Hirsch 1985, 95–100, 179–81; von Hirsch 2017, 113; 1993, 2, 39–40, 93; and von Hirsch and Ashworth 2005, 81, 216–7.

This is an open access article under the terms of the [Creative Commons Attribution](#) License, which permits use, distribution and reproduction in any medium, provided the original work is properly cited.

(Ashworth 2019, 94).³ Given its prominence, von Hirsch's censure theory has attracted critical attention—although much of this is focused on the rejection of desert-based approaches or concerns about the internal coherence of hybrid theories generally.⁴

While I am among the many who have been influenced by von Hirsch's important contributions to the philosophy of punishment, this article's primary focus is critical and it aims to offer a critique of his censure theory highlighting several problems.⁵ The article shall raise concerns with how von Hirsch conceives blaming, the use of proportionality in exclusively non-desert terms, and the problematic place of deterrence within his censure theory. The critique will make clear how and why these are concerns for von Hirsch's censure theory relating to the justification of punishment and its distribution. The article suggests specific reforms for how this theory might be restated. However, not all of these problems are resolvable and this raises new concerns about the tenability of von Hirsch's censure theory in sentencing policy without significant modifications.

2. Grasping Blame

Von Hirsch's desert model is built off of what he calls the "conceptual basis" for the principle of proportionality. It is described as "one that emphasises punishment's role of conveying *censure* or disapprobation of a convicted person for his or her criminal conduct" (von Hirsch 2017, 1, emphasis given).⁶ The attachment of blame to any punishment is a defining feature of censuring. For von Hirsch, "the penal sanction manifestly does convey blame" (von Hirsch 2017, 31).⁷ The issue is how we are to grasp the blame attached to criminal conduct in censuring.

Von Hirsch describes this blaming function as "evident," but also as an "assumption" (von Hirsch 1993, 9, 44). He notes that his theory "must thus assume that criminal conduct is, in some sense, wrongful" to be blameworthy (von Hirsch 2017, 31). This position denies that any non-blameworthy conduct should be criminal, because it would not deserve punishment by definition.⁸ Von Hirsch claims this is the criminal law's "critical edge" providing a reason for decriminalising conduct that cannot reasonably be accounted for as blameworthy.⁹ Only

³ Cf. Simester and von Hirsch 2014; von Hirsch 1976, 1985, 1993, 2017; von Hirsch and Ashworth 2005.

⁴ For example, see Andenaes 1982; Bennett 2019; Brooks 2021, 32–4; Canton 2019; Chau 2010; Lacey and Pickard 2015; Lippke 2006; Roberts and Dagan 2019; Tasioulas 2006, esp. 290–1; Thorburn and Manson 2007; and Walker 1992.

⁵ The most recent restatement of von Hirsch's censure theory is his *Deserved Criminal Sentences* (von Hirsch 2017). He describes it in the preface as providing "a restatement and explanation of the model's salient themes and of their conceptual basis." While this text will be the primary focus, the analysis will frequently cross-reference to past relevant work.

⁶ Cf. Simester and von Hirsch 2014, 212: "Criminal prohibitions and sanctions convey censure."

⁷ Cf. von Hirsch 1993, 9: "The penal sanction clearly does convey blame" and 13 ("the blaming function has primacy.")

⁸ See von Hirsch 2017, 31–2: "Criminal prohibitions of today have wide scope, however, and include some kinds of conduct that seem in no obvious way reprehensible. A censure-based theory of punishment, however, need not defend all such prohibitions."

⁹ Von Hirsch 2017, 32; cf. 51. For von Hirsch, this is important, as disapprobation of criminal conduct is what makes a fine different from a tax, for instance (see *ibid.*, 18).

blameworthy conduct should be criminalised and we express blame in punishing such conduct. Penal theories should ensure that desert is “given primacy” in sentencing, under principles such as that of “the seriousness of the offence as the primary determinant in the choice of sentence” (ibid., 7). In this way, we can ensure criminal conduct is understood as blameworthy above any other “determinant” (ibid.).

Von Hirsch defends a desert-based account, at least in part, because he claims it is more easily applicable than consequentialist accounts and does not rest “on obscure ‘metaphysical’ notions” (ibid., 4). One such example is traditional retributivism and its reliance on some form “of requital-for-evil” (ibid., 29).¹⁰ For von Hirsch, such “notions” are too imprecise and contested to serve as a satisfactory foundation for a penal theory that can be applied meaningfully in sentencing (ibid., 4). This problem of imprecision is found in non-desert-based theories, too. For example, von Hirsch repeatedly notes that there is a “tenuous connection” between punishment and deterrence, rendering preventative aims unreliable, and there is a “paucity of effective treatments” to support a rehabilitative aim (ibid., 7, 48).¹¹

Von Hirsch claims that the concept of desert provides “better practical guidance” than these alternatives (von Hirsch 2017, 7; cf. 1993, 1). This is because, he says, there is a broad consensus about desert and seriousness that we can discern through the use of our “common sense.”¹² We can justify the imposition of punishment in proportion to desert because, von Hirsch claims, “ordinary people, several opinion surveys have found, show considerable consensus about the comparative seriousness of crimes” (von Hirsch 2017, 63).¹³ He notes the lack of “great disagreement” amongst members of sentencing guidelines commissions as further evidence of this widespread consensus.¹⁴ This consensus about desert can guide us more clearly than the negligible predicted effects of deterrence.¹⁵ Von Hirsch says that when we consider “the comparative severity of a sanction” it helps us discern “the stringency of blame,” providing a more solid basis for the distribution of punishment than for more elusive

¹⁰ Cf. ibid., 109 (“rejects talionic conceptions of desert”) and 61 (“Proportionality in the Philosophy of Punishment”).

¹¹ Cf. von Hirsch 1993, 66–7, and von Hirsch and Ashworth 2005, 132. See also Ariel 2012.

¹² See von Hirsch 1993, 43 (“It should be possible, using common sense, to discuss what overall levels of punitiveness would create a reasonable set of disincentives backing up a censure-based system”) and von Hirsch and Ashworth 2005, 4 (“This comports with common-sense notions of justice”).

¹³ He cites Wolfgang 1964 and Stylianou 2003. Cf. von Hirsch 1993, 29, and Roberts and Hough 2005. For criticism, see Walker 1992, 537: “proportionality is a principle of limited helpfulness. It helps to eliminate the grosser sorts of inconsistency in sentencing by telling us to rank crimes and penalties in some sort of order [...]. It does not tell us, however, whether our rank orders should be based on retributive or utilitarian considerations. Nor does it tell us how to measure wickedness or severity, still less how to match one with the other.” For more recent studies about different public views on desert, see Hanna 2019, 109–27, and Marsh et al. 2019.

¹⁴ See von Hirsch 2017, 63. He cites Knapp, Tonry, and von Hirsch 1987, 96–101, and Frase 2013, chap. 3.

¹⁵ I return to this point in the next section.

grounds such as the promotion of crime reduction or rehabilitation (von Hirsch 2017, 51).¹⁶

The problem with this analysis is it does not prove its own case. For example, let us accept a broad consensus on a specific issue, such as that individuals convicted of murder deserve greater blame—and severer punishments—than those found guilty of other violent crimes and that there is a commonly shared view that the sentence should be life imprisonment. Von Hirsch claims that any such consensus like this is a reflection of the public's view about what is deserved punishment, and thus a judgement about what murderers *should* be punished. But it is not established that the public's view is not, instead, about what they believe is deserved *as the legal system operates*, and thus a judgement about how murderers *are* punished. In other words, von Hirsch runs together what is and ought to be, when these issues are instead separable.¹⁷

For another example to clarify this issue further, consider a survey of political affiliation where respondents report their support for different political parties. It is widely known that political identity is shaped through our family connections. Therefore, someone growing up in a family environment that supports a particular political party is more likely to support that party, too (see Aggeborn and Nyman 2021). It might be that the intergenerational agreement on political party affiliation is more correlation than causation (see Ojeda and Hatemi 2015). Several empirical studies have shown that public attitudes about legal punishment show support for proportionality, individuals might have different reasons for converging on a proportional scale arising from contrasting views of desert.¹⁸

In such examples, we need to grasp the extent to which any shared affiliation or commonality is socialised versus the degree to which it is determined organically and independent of the social environment. This is the difference between individuals agreeing on the amount someone is thought to deserve because this is learned sociologically versus what individuals independently converge on. If the former, any widespread agreement might be more a product of inculcating traditional values than a genuine meeting of independent minds in the way that von Hirsch assumes is commonplace.¹⁹

This illustration is used to highlight that blame can be understood in different ways.²⁰ Von Hirsch assumes that any findings of convergence are a sign of consid-

¹⁶ Censure's ability to help us individualise deserved punishment for criminal conduct is, in part, a key element in von Hirsch's critique of limiting retributivism, whereby desert is thought to only set the maximum and minimum of a sentence "for any offence" and unable to provide such individualisation, leaving the "fine-tuning" to "utilitarian principles." See von Hirsch 2017, 55–62, and von Hirsch and Ashworth 2005, 8–9, 137–8, 180–5.

¹⁷ To clarify, it is not assumed how blame should be determined, whether by a strict, positive-desert model (limiting retributivism) or an alternative approach. The point raised is that von Hirsch does not clearly distinguish between descriptive ("is") and normative ("should") propositions and, thus, ignores the fundamental point that the latter cannot be derived from the former.

¹⁸ For a general discussion of the empirical literature on public attitudes towards legal punishment, see Robinson 2015.

¹⁹ In his earlier work, the examples drawn on to show widespread public consensus on blame are 1960s studies of "a group of judges, college students and policemen" who would all have some familiarity with the workings of the criminal justice system and sentencing. Van Hirsch acknowledges that such studies have been seen as "unrepresentative" (von Hirsch 1976, 78–9).

²⁰ It has been argued that blame can take different forms, not only censure. I bracket this claim to focus above on von Hirsch's conception of blame held up by its own lights. See Telech and Katz 2022.

ered agreement and not merely a reflection of rote values. He sees any correlation of views as confirming a shared, normative position. Otherwise, blame would not track independently formed views of censure over time, but instead merely what the public have been conditioned to agree—where blame is socially conditioned and traditionally learned not unlike political identity.

Moreover, even if it does reflect how individuals believe we should punish, any such consensus does not yet reveal whether this agreement is based on a shared understanding of blame or an overlapping consensus of different penal views—and, if the latter, the consensus would not be evidence of the assumed widely shared common-sense view of blame. For example, individuals might find consensus in agreeing on the appropriateness of a life sentence for murderers. It would be a mistake to see this as evidence of a consensus about blame as agreeing penal severity is not an agreement about penal purposes. A retributivist and a deterrent proponent might each approach such cases from a different framework, but nevertheless each could converge on endorsing life sentences as deserved or as a satisfactory deterrent. Therefore, any consensus about *penal rankings* is not evidence of a consensus about *blame in proportionality*. More work must be done to establish that connection for it to be compelling. And without evidence of blame in proportionality, the link is not made, undermining a key plank of von Hirsch's penal theory.²¹

In conclusion, von Hirsch claims blaming is “evident” while also an “assumption” (von Hirsch 1993, 9 and 44). Blame is meant to track something substantial and less ethereal than “requit-for-evil” in traditional retributivist accounts and the imprecision of non-desert-based theories pursuing prudential aims (see von Hirsch 2017, 7, 29, and 48). There is no universal agreement amongst studies that the public views crime seriousness in the same way, as there are various cleavages in accordance with race, gender, and socioeconomic background, to name only a few factors where we see wide significant divergences.²² And where there is overlap, von Hirsch wants to claim this identifies a shared, substantive meeting of independent minds about what blame is.

But he does not address whether any such correlation is mostly a representation of what has been learned about how crime seriousness *is* determined rather than how it *should be* determined—as studies tracking the views of judges and police officers rather than the general public more broadly would suggest (see von Hirsch 1976, 78). As a result, his understanding of blame is underdeveloped and he does not establish that punishment does convey blame in the way this position is defended at the heart of his penal theory. Without the assumed consensus, ranking penal severity becomes improbable, if not impossible.

3. Proportionality and Penal Theories

Von Hirsch (2017, 1) claims that his “desert model” contains a second element, in addition to blame. This is “the principle of *proportionality*” (ibid., emphasis given).²³ He

²¹ To emphasise this point, the argument is not that commonality is insignificant, but that von Hirsch must go further than assume the normative significance of any commonality.

²² While he acknowledges “the complexities in the concept of seriousness” identified along these cleavages, von Hirsch claims we can all still make “common-sense judgments on the comparative gravity of offences and come to fairly similar conclusions” (von Hirsch 1976, 79).

²³ Cf. von Hirsch 1992 and Ryberg 2020.

defines it in this way: “a sentence’s severity should be made fairly proportionate to the seriousness of the defendant’s criminal conduct” and it should communicate the “disapprobation for various crimes according to their degree of reprehensibility” (von Hirsch 2017, 1 and 19).²⁴ For von Hirsch, the proportionality of criminal conduct seriousness reflects “crimes” of comparative degree of blameworthiness” (ibid., 4). We impose more severe punishment on an offender when we blame their criminal conduct more (ibid., 11). Therefore, proportionality is always looking “retrospectively” to our past conduct and it is not a “prospective means-ends relationship” (ibid., 21).

The problem with this analysis is that setting punishments in proportion to criminal wrongs is not the exclusive property of any penal theory, including desert-based theories (see Walker 1992, 537). While it is arguable which penal theory sets proportionality most convincingly, it is *not* arguable that non-desert-based theories can also support the distribution of punishment in proportion to crimes, too.

For example, prevention proponents advocate the setting of punishment’s severity in proportion to what is required for a satisfactory deterrent effect. Classic theorists of preventative punishment, such as Cesare Beccaria (1986, chap. XII, p. 23), have argued that “the purpose of punishment [...] is nothing other than to dissuade the criminal from doing fresh harm to his compatriots and to keep other people from doing the same.” Deterrent punishments can be set in proportion, but in a non-desert-based way. We could increase the amount of punishment in proportion to what would deter.

Similarly, rehabilitation proponents claim punishment is in proportion to what is required for an offender’s reform. For example, Plato claims that “in the eyes of the law, one man deserves a lighter penalty than another, not because of the amount of the theft, but in virtue of the probability that the one would still be curable, while another would not be” (*Laws XII*, 941d; trans. Plato 1997). Rehabilitative punishments can also be set proportionately according to prudential, not desert-based, criteria. We could increase the amount of punishment in proportion to what would more effectively rehabilitate. These briefly stated examples are made only to make the point that non-desert-based penal theories can set punishments with a view to proportionality, notwithstanding the merits or otherwise of how they understand proportionality.

Interestingly, in his earlier works, von Hirsch acknowledges the concept of proportionality in non-desert-based theories. For example, he notes that Jeremy Bentham’s utilitarian-based theory of deterrence justifies different punishments in proportion to its view of crime. Von Hirsch cites Bentham’s comment that “where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less” (von Hirsch 1992, 58, quoting Bentham [1780] 1982, 168). Von Hirsch (1992, 58) explains that “this points to a tariff of penalties, according to which the higher punishments would ordinarily be reserved for the more harmful acts.” In fact, he has noted “the first account of the principle of proportionate sanctions was utilitarian, and was provided over two centuries ago by Cesare Beccaria and Jeremy Bentham” (von Hirsch and Ashworth 2005, 132, emphasis added; cf. von

²⁴ Cf. ibid., 4, 21: “punishments, consequently, should be allocated consistently with their blam- ing implications.”

Hirsch 1985, 8, 31–2). Therefore, as von Hirsch has acknowledged previously, a non-desert-based theory can endorse some form of proportionality. Proportionality is not unique to desert-based theories alone.

This raises the issue of how these remarks should be understood in light of von Hirsch's later works which claim that the concept of proportionality is exclusive to desert-based theories. The best explanation is that, for von Hirsch, proportionality is seen as desert-based because it is best understood as part of a desert-based theory, not alternative theories. In other words, many different theories might utilise some view of proportionality, but it is most justified, for von Hirsch, in terms of proportionate desert and, therefore, proportionality should be seen exclusively as a part of desert-based theories. This is the case even though desert-based theories might understand proportionality in a desert-based specific way unique to these theories, and not directly proportionate to the anticipated risk an offender might present to the wider society as found in some non-desert-based accounts of proportionality.²⁵

This interpretation is supported by considering von Hirsch's critique of the way in which non-desert-based theories set proportionality. For example, von Hirsch claims that criminal conduct by its very nature deserves blame. Our punishments must be set in proportion to what amount of blame is deserved—and it cannot be “neutral” about blaming for wrongful conduct. Von Hirsch says: “A neutral sanction would treat offenders much as dangerous beasts—as creatures which need merely to be restrained or intimidated into compliance” (von Hirsch 2017, 18; cf. 35, 51, and von Hirsch and Ashworth 2005, 18–9). Proportionality is established by looking backwards to past wrongful conduct.

The problem with non-desert-based theories like deterrence or rehabilitation is that they set punishment in proportion to achieving future ends, but not in proportion—and “neutral”—to blameworthiness. Their proportionality is set by looking forwards. It is essential, for von Hirsch (1993, 6), that any justifiable penal theory can acknowledge “that criminal conduct is, in some sense, reprehensible,” which only desert-based theories of punishment do. Von Hirsch says that “treating the offender as a wrongdoer [...] is central to the idea of punishment” (ibid., 9). He claims “the wrongfulness of the conduct is an *indispensable* requirement of criminalisation,” which he calls “the Necessity Thesis” (Simester and von Hirsch 2014, 23, emphasis given). Preventative and rehabilitative approaches are thought to fail to account for this idea. Von Hirsch (1993, 13) notes that “prevention [...] cannot stand alone” and ignore the need to convey blame for a public wrong.

Since punishment should not be neutral about blameworthiness, as it is “indispensable,” proportionality must be desert-based by necessity. Any other way of setting proportionality mistakes this essential aspect of punishment (Simester and von Hirsch 2014, 23). This clarifies some of his criticisms of non-desert-based theories. For example, von Hirsch (1992, 58) says we should express “nervousness about some of the implications of penal utilitarianism” and, specifically, “around the punishment-of-the-innocent issue.” The issue is that non-desert-based approaches fail to note crimes as “wrong” in non-prudential terms (von Hirsch 1992, 69).²⁶

²⁵ My thanks to a referee for highlighting the importance of this point.

²⁶ Elsewhere, von Hirsch says that “prevention, on this account, cannot stand alone.” This is because it should be recognised that “the sanction conveys blame” (von Hirsch and Ashworth 2005, 23).

This claim, if we find it compelling, does not deny that various other theories have different ways of justifying proportional punishments—and so, *contra* von Hirsch, proportionality is *not* exclusive to desert-based approaches like von Hirsch's censure theory. Instead, his claim should be reinterpreted as saying that proportionality fits best with censure theory because other approaches set up proportionality in an objectionable way that fails to sufficiently account for desert-based considerations. In other words, von Hirsch might defend his theory on the grounds it has the most compelling account of proportionality, not that it is the only account of proportionality. This reinterpretation clarifies von Hirsch's position in a way that can bring consistency to his earlier and later work, while also acknowledging the fact that other approaches can account for proportionality, albeit in different ways, as von Hirsch has noted before.

In summary, much of von Hirsch's work is focused on the importance of proportionality for punishment. In most of his writings, proportionality is understood in an exclusively desert-based way and he objects to non-desert-based theories, in part, for their not accounting for proportionality. However, the argument is imprecise and draws on an important assumption about proportionality. The argument is imprecise because non-desert-based theories can set punishments proportionality—albeit in relation to prudential ends—and this point is rightly acknowledged in von Hirsch's earlier work.

However, in his later writings, von Hirsch views proportionality in a specific way that assumes we accept that censure is essential to punishment. If we accept this, then proportionality must be desert-based because any justifiable penal theory must be desert-based to account for the necessity of communicating censure. Therefore, von Hirsch should not deny *any* proportionality in non-desert-based theories, but instead make the argument that desert-based accounts offer a more *justifiable* view of proportionality. This refocuses the arguments around the necessity of desert rather than the exclusivity of proportionality to desert, which is where these arguments should be made. This changes how the justification of punishment linked with proportionality is conceived. It cannot be assumed that penal proportionality takes a single, desert-based form.²⁷

4. Defending Deterrence

Von Hirsch claims his censure theory is a hybrid theory that brings together desert with deterrence that he describes as “a dual theory of ‘censure plus deterrence’” (von Hirsch 2019, 87). It is also described as “a ‘modified’ desert model” (von Hirsch 2017, 26; cf. 53, 97–106).²⁸ He argues that desert and deterrence can come

²⁷ The change in how von Hirsch understands proportionality in his earlier versus later writings does not appear to be a change in emphasis or a shift in focus. The earlier work acknowledges non-desert-based forms of proportionality while the later work claims proportionality is essentially a desert-based conception.

²⁸ This raises the question of what is the distinction between a hybrid and a mixed theory. It appears that, for von Hirsch, “hybrid” theories are characterised by their “depart[ing] from the assumed primary guiding principle—in this case, proportionality—to achieve ulterior objectives” (von Hirsch 1993, 47). A modified view would not so depart. This is a contested view of hybrid theories as others would claim to accept a proportional relationship between crime and punishment albeit differently than how von Hirsch conceived their relationship. Cf. von Hirsch and Ashworth 2005, 136–7, and Simester and von Hirsch 2014, 6. Elsewhere, von Hirsch refers to these same hybrid theories as “‘mixed’ models” (von Hirsch and Ashworth 2005, 8). For a general discussion about hybrid theories, see Brooks 2021, pt. 2.

together coherently only under specified conditions. For example, it is said that “to some extent, desert theory permits consideration of other aims: namely, to the degree that this is consistent with the proportionate ordering of penalties” (von Hirsch 2017, 25). We must unpack how these two aims are understood to fit together.

The first point to make is desert is prioritised above any prudential factor. Von Hirsch notes that “the requirements of justice”—by which he means “desert”—“ought substantially to constrain the pursuit of crime prevention” (ibid., 12). Therefore, desert has “primacy” (ibid., 12; cf. von Hirsch and Ashworth 2005, 92–3, 134). We punish the deserving in proportion to the blameworthiness of their conduct first and foremost.

The second point to make is that deterrence plays a complementary role as a “supplement” to von Hirsch’s desert-based argument.²⁹ Firstly, the criminal law is innately preventative with its “preventive features in its very design” (von Hirsch 2017, 36; cf. 1993, 12). This is because when the state criminalises conduct backed by the threat of punishment this inherent threat is “aimed explicitly at discouraging the proscribed conduct” (von Hirsch 2017, 36). Deterrence plays a key role in justifying hard treatment. Von Hirsch says that “it provides an *additional* reason for compliance to those who are deemed capable of recognising the law’s moral demands, but who are also tempted to disobey them nevertheless” (2017, 19–20, emphasis given).³⁰ In this way, the criminal law addresses individuals as “fallible agents” who may require some “prudential inducements to help us resist criminal temptation” (von Hirsch 2017, 20).³¹ This provides a “collateral crime-prevention benefit” (ibid., 26; cf. Jacobs 2019, 34–8).

While there is a deterrent effect inherent in the system, it is crucial that the aim of punishment is not to deter, but to blame. Deterrence appears to act like an unintended side-effect of the criminal justice system subordinate to blame. Indeed, it might be argued that blame itself carries deterrent power insofar as we might wish to avoid being blamed for wrongful conduct and so act accordingly. Blaming is not entirely separable from deterring.³²

Notwithstanding its apparently secondary role, the presence of deterrence is crucial to the justification of one important aspect of the criminal justice system—namely, its use of hard treatment—as a mode of censure. It is crucial, for von Hirsch, that deterrence is no more than an effect of the criminal justice system and not its aim. He claims using deterrence as an aim would treat offenders like “beasts in a circus” (von Hirsch 2017, 35; cf. 40, 62; 1993, 17). Instead, we should treat offenders as fallible moral agents and so censure is the appropriate penal aim. Punishment is justified for communicating blame and not so that it “enhances the crime-preventive utility of the penal system” (von Hirsch 2017, 49). If we were

²⁹ See von Hirsch 2017, 19, 37. Cf. von Hirsch 1985, 160–5, 171–4; 1993, 45; and von Hirsch and Ashworth 2005, 100: “sentences may (so long as they observe proportionality constraints) seek a variety of objectives.”

³⁰ Cf. von Hirsch 1993, 13: “The function of the disincentive is to provide a prudential reason for resisting the temptation.”

³¹ Cf. ibid., 38: “Persons, it is assumed, are neither like angels [...] nor like brutes [...]. Instead, human beings are moral but fallible creatures.”

³² I am grateful to a referee for highlighting this important distinction.

neutral about the wrong in crime, the criminal law would fail to treat individuals “as moral agents,” simply directing them to avoid what is proscribed without engaging them about its normative justification (see von Hirsch and Ashworth 2005, 30).

While deterrence is an innate and supplementary feature of the criminal law, it is also a necessary feature of it. Von Hirsch argues that the lack of any preventative effect would lead to our abandoning the use of a penal system altogether. He says that “had the criminal sanction no usefulness in preventing crime then there might be no need to visit deprivations on those who offend” (von Hirsch 2017, 19). Von Hirsch describes the inherent “crime-preventative features of the criminal law” as “vitally important” because “it is [...] essential that the criminal sanction should serve to help discourage [criminal] behaviour” (ibid., 37). He goes as far as saying that, if his theory was unnecessary for delivering on its “preventative purposes,” it “would permit the abolition of the institution of punishment” (ibid., 42).³³

One problem with this analysis is that it is unclear why deterrence has such normative significance for von Hirsch’s account. As noted above, he claims that the deterrent effect of any punishment is negligible at best and very difficult to discern, often “unavailable” or “uncertain.”³⁴ Elsewhere, he says that “there is actually little evidence” to support the view that punishment has any significant deterrent effect on criminal conduct (von Hirsch 2017, 48). It is because deterrence has little to no clear effect that von Hirsch claims, in part, that deterrence cannot be a primary aim for punishment and, instead, we must rely on a more solid foundation like blame for setting punishments.³⁵ Von Hirsch regularly characterises any link between punishment and its effect on reducing crime rates as “tenuous,” “marginal,” and “elusive” (von Hirsch 2017, 7, 10; 1985, 165; 1993, 56). Moreover, he claims “recent deterrence research, mirroring earlier studies, fails to disclose significant and consistent associations between severity levels (such as duration of imprisonment) and crime rates” (von Hirsch 2017, 10, citing Bottoms and von Hirsch 2010). In addition, von Hirsch argues that “sentencing policy is not a good tool for reducing criminality” (von Hirsch 2017, 122). For these reasons, it would appear that any consideration of possible deterrent effects is tangential to the justification of punishment more generally.

The inability to discern with any certainty or magnitude the effect, if any, in preventing future crimes should not become an issue for a censure theory that can justify punishments as blaming and set proportionality in light of blameworthiness. And yet it is von Hirsch’s understanding of how deterrence is relevant that raises a serious question about why the fact of a deterrence effect is a requirement for permitting “the institution of punishment” when any such effect is “tenuous,” “elusive,” or worse (ibid., 7, 10, 42; cf. von Hirsch 1993, 56). Von Hirsch’s position might, instead, be best justified on pragmatic, not normative, grounds. His

³³ Elsewhere, he claims that “punishment’s existence is justified on crime-prevention grounds” arising “through its censoring implications” (von Hirsch 1985, 49). Cf. von Hirsch 1993, 14: “would permit the abolition of the institution of punishment were it not needed for preventive purposes.”

³⁴ Von Hirsch 1993, 43, 66. Cf. ibid., 97: “Sentencing policy is not a good tool either for reducing criminality or promoting wider social justice.”

³⁵ See von Hirsch 2017, 108–9, and von Hirsch and Ashworth 2005, 157.

censure theory is avowedly sensitive to “human fallibility” and assumes we “are neither like angels for whom purely normative appeals would suffice, nor like brutes which could be influenced only by threats” (von Hirsch and Ashworth 2005, 23). Human beings are “moral but fallible creatures” who are “capable of being motivated by normative appeals, but sometimes strongly inclined to offend nevertheless” (ibid., 23). Deterrence plays a crucial role in providing a prudential disincentive where normative appeals fall short.³⁶

While von Hirsch's censure theory appears to claim blame is necessary, but insufficient, to justify punishment without its supplementation from some deterrent effect, this position should be revised. This raises an objection, as noted by John Tasioulas (2006, 290), “that censure is drastically down-graded within the theory, since it cannot by itself justify the most distinctive and potentially disturbing feature of punishment, i.e., the infliction of hard treatment.” This is especially a concern insofar as deterrence can appear to play more than a merely prudential role in justifying von Hirsch's censure theory.

This problem is more glaring when we consider how censure as a hybrid theory might support choosing among different penal options. For example, von Hirsch says that where the appropriate amount of blame might be distributed through two different outcomes—where one might be less punitive or have some extra potential for deterrence—we might choose either. For example, he says that “crime control *may* be invoked in deciding the comparative severity of sentence [...] when this would not disturb the proportionate ordering of punishments” (von Hirsch 2017, 59, emphasis added). “Substitution” of one form of punishment for another—such as a non-custodial sentence substituted for imprisonment—“would be permitted among sanctions of comparable degrees of onerousness” only (ibid., 88). Preventative factors *might* be relevant in setting the *form* of punishment provided it does not alter punishment's *amount* which is set through deserved censure.³⁷ Moreover, von Hirsch adds: “substitutions of penalties of equivalent onerousness would be permissible, *but only when there were special reasons*” (ibid., 88, emphasis added).

This position makes sense if the sole aim is to censure conduct through proportionate blame. From the standpoint of blaming, different kinds of responses that are broadly equivalent in expressing blame have equal weight in terms of blameworthiness. It is effectively a matter of indifference, for von Hirsch, which form of punishment we might choose among options that express similar blameworthiness. He says: “When two kinds of penalties have approximately the same penal bite, however, parity is satisfied—in which event one penalty *may* be chosen over the other on preventive grounds” (von Hirsch 1993, 60; cf. 68–70). However, we are under no obligation to take non-desert-based factors into account. The language is specific: We *may*, not *must* (or even *should*).³⁸

However, this position is problematic if we take the avowed hybrid nature of censure theory more seriously. If two penal outcomes expressed equal blame but one option had greater preventative appeal, then we *ought* to be compelled by

³⁶ I am especially grateful to a referee for highlighting this important point.

³⁷ See von Hirsch 2017, 89: “The principle of proportionality addresses the *severity* of penalties, not their particular forms” (emphasis given).

³⁸ Michael Tonry (2006, 22) claims that von Hirsch's model allows “interchangeability only at the margins between types of punishments.”

von Hirsch's censure theory to select it. We would respect the primary purpose of punishment to express blame in proportion as both options do so equally, but we would further respect the secondary, and necessary, rationale to enable crime reduction.

In fact, Von Hirsch is clear that proportionality "addresses the *severity* of penalties, not their particular form" (von Hirsch 2017, 89, emphasis given). He permits the "substitution" of one form of punishment for another "among sanctions of comparable degrees of onerousness" (ibid., 88) and he claims that it "operates only *within* a censoring framework" (von Hirsch 1993, 14, emphasis given).³⁹ Moreover, he is committed to reducing overall punitiveness in the criminal justice system—"parsimony of punishment counts"—claiming his desert-based censure theory does just that, stating that "the direction of sentence levels should be downward" as part of his "proposed decrementalism" (von Hirsch 1993, 4 and 46; cf. 41; 2017, 115–8; von Hirsch and Ashworth 2005, 84–5). Therefore, von Hirsch's censure theory ought to hold that when we have two penal options expressing the same blameworthiness, then we should be compelled to choose the option with the greater expected preventative effect, if he wishes to continue claiming the necessity of the criminal law having an overall deterrent effect.⁴⁰

The fact that we are *not* compelled to choose the option that best promotes crime reduction, if both options are in proportion to deserved blame, appears to undermine von Hirsch's claim that prevention has an essential role to play in justifying the overall criminal justice system.⁴¹ If deterrence has a secondary importance to blame, then it should be recognised as a factor in selecting penal options subject to their expressing the same amount of blame. This revision of his censure theory best fits his conception of it—and it does not entail non-desert rationales are used to justify punishments of "substantially differing severity" for the same criminal conduct and, thus, respects von Hirsch's constraints on punishing.⁴²

In conclusion, deterrence is claimed to be an innate feature of the criminal law. Moreover, on von Hirsch's view, if the system did not reduce crime, it should be abolished. But as stated, there is no substantive role for deterrence to play, since its presence is merely assumed, deterrent effects are considered to be tenuous or uncertain, and we are free to choose among penal options that express the same amount of censure. It is unclear why deterrence plays a necessary role in justifying a criminal law built instead on censure. But if deterrence is to play a key function, then one mandatory reform of censure theory is that it should compel us to choose the option with an expected deterrent effect over others that do not from among penal options otherwise equal in expressing censure, where such options present themselves. This

³⁹ Cf. von Hirsch 2017, 97: "Thus when there is a choice between two non-custodial sanctions of approximately equivalent severity, proportionality constraints are not offended when one of these is chosen over the other on, say, rehabilitative grounds."

⁴⁰ If von Hirsch were to drop the necessity of the criminal law having some deterrent effect overall, then there would be no necessity in compelling the choosing of the option with an expected preventative effect amongst options expressing the same amount of censure.

⁴¹ A referee has suggested to me that punishing in relation to blaming or deterring can have the same impacts. But blaming and deterring have different justificatory sources, as von Hirsch recognizes, and so it is not a matter of indifference how they relate in setting punishments.

⁴² See von Hirsch 2017, 89: "A desert rationale does not permit crime prevention aims to be relied upon to decide among penalties of substantially differing severity."

should not be a matter of indifference as is the case at present in von Hirsch's account, but of penal justice. This revision would make better sense of the place of deterrence in his account of censure.

5. Conclusion

Andreas von Hirsch's censure theory is a highly influential contribution to penal ethics that has enjoyed widespread impact. Its claim that punishment is an expression of censure whereby offenders are punished in proportion to their blame has played a key role in shaping contemporary debates.

This article's primary focus has been critical of von Hirsch's censure theory across several key fronts. The first problem is von Hirsch's claim that the blaming function of punishment is "evident" (and an "assumption") that can be supported through considering our widely shared common-sense views on blame (see von Hirsch 1993, 9 and 44). In response, it was argued that the evidence of widely shared views is not compelling. There are significant differences in perceptions based on race, gender, and socioeconomic background, to name a few. Moreover, it is unclear whether a common view is a reflection of how individuals believe we *should* punish or how individuals *do* support punishments, as these are different positions that can come apart. Moreover, even if it does reflect how individuals believe we should punish, any such consensus does not yet reveal whether this agreement is based on a shared understanding of blame or an overlapping consensus of different penal views—and, if the latter, the consensus would not be evidence of the assumed widely shared common-sense view of blame.

The second problem is von Hirsch's claim that proportionality is desert-based and contrary to alternative penal theories. In response, it was argued that von Hirsch has accepted in his earlier writings that deterrence and rehabilitation theories have their own way of setting proportionality in terms of non-desert-based prudential considerations. Instead of arguing that proportionality is exclusively desert-based, von Hirsch should claim more modestly that desert-based approaches set proportionality more compellingly than non-desert-based approaches because they best ensure the centrality of blame for censuring criminal conduct. This is implicit in his argument and resolves a tension between his earlier and later work, where, in the latter, he denies non-desert-based theories can account for proportionality at all, while his earlier work accepts they rightly can.

A third, and final, problem is von Hirsch's claim that his censure approach is a dual theory of "censure plus deterrence" (see von Hirsch 2019, 87). While censure is prioritised, deterrence is seen as an innate feature of the criminal law and an overall reduction in crime is a necessary function. If it is lacking, von Hirsch says that it "would permit the abolition of the institution of punishment" (von Hirsch 2017, 42). If we had two penal options equal in their communicating censure, it is a matter of indifference which we might choose.

In response, it is argued that the necessity of a deterrent effect for the continued justification of punishment sits awkwardly with von Hirsch's constant remarks that any such effect is often "unavailable," "uncertain," and "tenuous" (see von Hirsch 1993, 43, 66; 2017, 7). This is because if it is difficult, if not impossible, to discern any such effect, then it renders problematic the justification of the system overall. Nonetheless, if the effect of deterrence has any such importance, then von Hirsch's censure theory

should be revised to compel us to choose the penal option with an expected deterrent effect from multiple options equal in communicating censure.

In *Censure and Sanctions*, von Hirsch (1993, 5) says of penal theory that “no one should delude themselves that there are neat solutions.” Von Hirsch has produced an invaluable body of work that has progressed our understanding of penal ethics and its application in substantive ways. While the many issues are complex, his censure theory is in need of significant revision to provide a neater solution to the many challenges facing any theory of punishment. This article is a critical, but constructive, contribution to that end.

Durham Law School
Durham University
Palatine Centre
Stockton Road
Durham
DH1 3LE
Email: thom.brooks@durham.ac.uk

References

- Aggeborn, L., and P. Nyman. 2021. Intergenerational Transmission of Party Affiliation within Political Families. *Political Behavior* 43: 813–35. <https://doi.org/10.1007/s11109-020-09628-z>.
- Andenaes, J. 1982. *Punishment and Deterrence*. Ann Arbor: University of Michigan Press.
- Ariel, B. 2012. Deterrence and Moral Persuasion Effects on Corporate Tax Compliance: Findings from a Randomized Controlled Trial. *Criminology* 50(1): 27–69. <https://doi.org/10.1111/j.1745-9125.2011.00256.x>.
- Ashworth, A. 2019. Deserved Censure, Hard Treatment and Penal Restraint. Chap. 6 in *Penal Censure: Engagements Within and Beyond Desert Theory*. Ed. A. du Bois-Pedain and A. E. Bottoms, 94–107. Oxford: Hart.
- Beccaria, C. 1986. *On Crimes and Punishments*. Trans. D. Young. Indianapolis, IN: Hackett.
- Bennett, C. 2019. How Should We Argue for a Censure Theory of Punishment? Chap. 4 in *Penal Censure: Engagements Within and Beyond Desert Theory*. Ed. A. du Bois-Pedain and A. E. Bottoms, 67–84. Oxford: Hart.
- Bentham, J. [1780] 1982. *An Introduction to the Principles of Morals and Legislation*. Ed. J. H. Burns and H. L. A. Hart. London: Methuen.
- Boonin, D. 2008. *The Problem of Punishment*. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9780511819254>.
- Bottoms, A. 2017. The Sentencing Council in 2017: A Report on Research to Advise on How the Sentencing Council Can Best Exercise Its Statutory Functions. Cambridge University Institute of Criminology.
- Bottoms, A., and A. von Hirsch. 2010. The Crime-Preventive Impact of Penal Sanctions. Chap. 5 in *The Oxford Handbook of Empirical Legal Studies*. Ed. P. Cane and H. M. Kritzer, 98–106. Oxford: Oxford University Press. <https://doi.org/10.1093/oxfordhb/9780199542475.013.0005>.

- Brooks, T. 2021. *Punishment: A Critical Introduction*. 2nd ed. London: Routledge.
- Canton, R. 2019. Censure, Dialogue and Reconciliation. Chap. 13 in *Penal Censure: Engagements Within and Beyond Desert Theory*. Ed. A. du Bois-Pedain and A. E. Bottoms, 253–75. Oxford: Hart.
- Chau, P. 2010. Temptations, Social Deprivation and Punishment. *Oxford Journal of Legal Studies* 30(4): 775–85. <https://doi.org/10.1093/ojls/gqq027>.
- Frase, R. S. 2013. *Just Sentencing: Principles and Procedures for a Workable System*. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199757862.001.0001>.
- Hanna, N. 2019. Hitting Retributivism Where It Hurts. *Criminal Law and Philosophy* 13(1): 109–27. <https://doi.org/10.1007/s11572-018-9461-1>.
- Jacobs, J. 2019. Censure, Sanction and the Moral Psychology of Resentment and Punitiveness. Chap. 2 in *Penal Censure: Engagements Within and Beyond Desert Theory*. Ed. A. du Bois-Pedain and A. E. Bottoms, 19–39. Oxford: Hart.
- Knapp, K. A., M. Tonry, and A. von Hirsch. 1987. *The Sentencing Commission and Its Guidelines*. Boston: Northeastern University Press.
- Lacey, N., and H. Pickard. 2015. The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems. *Modern Law Review* 78(2): 216–40. <https://doi.org/10.1111/1468-2230.12114>.
- Lippke, R. L. 2006. Mixed Theories of Punishment and Mixed Offenders: Some Unresolved Tensions. *Southern Journal of Philosophy* 44(2): 273–95. <https://doi.org/10.1111/j.2041-6962.2006.tb00102.x>.
- Marsh, N., E. McKay, C. Perry, and S. Cereda. 2019. *Public Knowledge of and Confidence in the Criminal Justice System and Sentencing: A Report for the Sentencing Council*. London: Sentencing Council.
- Matravers, M. 2011. Is Twenty-First Century Punishment Post-Desert? Chap. 2 in *Retributivism Has a Past: Has It a Future?* Ed. M. Tonry, 30–45. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199798278.003.0002>.
- MSGC (Minnesota Sentencing Guidelines Commission). 2015. *Minnesota Sentencing Guidelines and Commentary*. Saint Paul: Minnesota Sentencing Guidelines Commission.
- Ojeda, C., and P. K. Hatemi. 2015. Accounting for the Child in the Transmission of Party Identification. *American Sociological Review* 80(6): 1150–74. <https://doi.org/10.1177/0003122415606101>.
- Plato. 1997. *The Laws*. Trans. T. J. Saunders. In *Complete Works*. Ed. J. M. Cooper, 1318–616. Indianapolis, IN: Hackett.
- Roberts, J. V., and N. Dagan. 2019. The Evolution of Retributive Punishment: From Static Desert to Responsive Penal Censure. Chap. 8 in *Penal Censure: Engagements Within and Beyond Desert Theory*. Ed. A. du Bois-Pedain and A. E. Bottoms, 141–59. Oxford: Hart.
- Roberts, J. V., and M. Hough. 2005 Sentencing Young Offenders: Public Opinion in England and Wales. *Criminal Justice: International Journal of Policy and Practice* 5(3): 211–32. <https://doi.org/10.1177/1466802505055831>.
- Robinson, P. H. 2015. Empirical Desert. Chap. 2 in *Criminal Law Conversations*. Ed. P. H. Robinson, S. Garvey, and K. K. Ferzan, 29–66. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:osobl/9780199861279.003.0002>.

- Ryberg, J. 2020. Proportionality and the Seriousness of Crimes. Chap. 3 in *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* Ed. M. Tonry, 51–75. Oxford: Oxford University Press. <https://doi.org/10.1093/oso/9780190070595.003.0003>.
- SGC (Sentencing Guidelines Council). 2004. *Overarching Principles: Seriousness*. London: Sentencing Guidelines Council.
- Simester, A. P., and A. von Hirsch. 2014. *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*. Oxford: Hart.
- Stylianou, S. 2003. Measuring Crime Seriousness Perceptions: What Have We Learned and What Else Do We Want to Know? *Journal of Criminal Justice* 31(1): 37–56. [https://doi.org/10.1016/S0047-2352\(02\)00198-8](https://doi.org/10.1016/S0047-2352(02)00198-8).
- Tasioulas, J. 2006. Punishment and Repentance. *Philosophy* 81(2): 279–322.
- Telech, D., and L. D. Katz. 2022. Condemnatory Disappointment. *Ethics* 132(4): 851–80. <https://doi.org/10.1086/719512>.
- Tonry, M. 2006. Purposes and Functions of Sentencing. *Crime and Justice* 34: 1–53. https://scholarship.law.umn.edu/faculty_articles/495.
- Thorburn, M., and A. Manson. 2007. The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning. *New Criminal Law Review* 10(3): 278–310. <https://doi.org/10.1525/nclr.2007.10.2.278>.
- von Hirsch, A. 1976. *Doing Justice: The Choice of Punishments*. New York: Hill and Wang.
- von Hirsch, A. 1985. *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*. New Brunswick, NJ: Rutgers University Press.
- von Hirsch, A. 1992. Proportionality in the Philosophy of Punishment. *Crime and Justice* 16: 55–98. <https://doi.org/10.1086/449204>.
- von Hirsch, A. 1993. *Censure and Sanctions*. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198262411.001.0001>.
- von Hirsch, A. 2017. *Deserved Criminal Sentences: An Overview*. Oxford: Hart.
- von Hirsch, A. 2019. Censure and Hard Treatment in the General Justification for Punishment: A Reconceptualisation of Desert-Oriented Penal Theory. Chap. 5 in *Penal Censure: Engagements Within and Beyond Desert Theory*. Ed. A. du Bois-Pedain and A. E. Bottoms, 87–92. Oxford: Hart.
- von Hirsch, A., and A. Ashworth. 2005. *Proportionate Sentencing: Exploring the Principles*. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199272600.001.0001>.
- Walker, N. 1992. Legislating the Transcendental: Von Hirsch's Proportionality. *Cambridge Law Journal* 51(3): 530–37. <https://doi.org/10.1017/S0008197300084907>.
- Wolfgang, M. 1964. *The Measurement of Delinquency*. New York: John Wiley.