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ORIGINAL PAPER

Lowering the Boom: A Brief for Penal Leniency

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Abstract

This paper advocates for a general policy of penal leniency: judges should often sentence offenders to a punishment less severe than initially preferred. The argument's keystone is the relatively uncontroversial Minimal Invasion Principle (MIP). MIP says that when more than one course of action satisfies a state's legitimate aim, only the least invasive is permissibly pursued. I contend that MIP applies in two common sentencing situations. In the first, all sentences within a statutorily specified range are equally proportionate. Here MIP applies directly. In the second, judges reasonably believe that one of the sentences within the range is the most proportionate, but can't identify it with any certainty. In these cases of sentencing uncertainty, judges must be indifferent between their preferred sentence and a softer one, and this indifference triggers MIP. MIP thus frequently mandates some degree of leniency. I conclude with some comments on statistical uncertainty.

Keywords Sentencing · Punishment · Penal leniency · Proportionality · Minimal invasion principle

This paper advocates for a general policy of penal leniency. When I say that offenders should be treated leniently, I mean that a judge should sentence them to a punishment less severe than she initially preferred; on my account, leniency is relative to a sentencer's original determination. The keystone of my argument is an uncontroversial principle of liberal political morality called the Minimal Invasion Principle (MIP). MIP says that when states have at their disposal more than one action or policy that satisfies a legitimate legal or political aim, only the least invasive is permissibly pursued. The aim discussed in this paper is proportionate sentencing. My goal is to show that judges are almost always confronted with alternatives to their preferred sentence that satisfy this aim and are thus subject to MIP. My proposal diverges in important respects from two well-known ways of defending penal leniency. The first focuses on poor, black, Hispanic, and other socially disadvantaged

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offenders. On this approach, offenders' disadvantage undermines authorities' ability to justly blame them, and so sentencers must treat them less harshly than their advantaged counterparts. Different versions of this strategy can be found in the work of Duff (2001), Tadros (2009), Lewis (2016), and Shelby (2016). The second emerges from consequentialist concerns for efficiency, and holds that a state must take the least costly and least painful means to its ends. Roughly put, the idea is that whenever a criminal justice system can achieve its crime control goals by punishing less harshly, it must do so. This view is defended most vigorously by Morris (1974) and Frase (2012).[1] By contrast, my paper will have little to say about class or racial injustice (but see Sect. 4), and nothing at all to say about the right to blame.[2] And, as I will emphasize throughout, my argument is a deontological one, aimed at persuading nonconsequentialists. However, I readily acknowledge that the existing alternatives touch on vital issues, and my paper should be seen as offering an additional argument for leniency, not a competing one.

I contend that MIP applies in two common sentencing situations. In the first, all sentences within the statutorily specified range are, or seem to be, equally proportionate. Here MIP applies directly. In the second, more complex case, a judge believes one of the sentences within the range to be most proportionate, but isn't certain which one it is. The latter involves what I call sentencing uncertainty. When confronted with uncertainty, judges should be receptive to the idea that *some* sanction lower than the preferred sanction counts as an alternative. This is because they should have equal credences in the initially chosen penalty and some (perhaps very slightly) less severe alternative; that is, they should be indifferent between the relevant sanctions. Indifference implies that the two penalties are equally choiceworthy. If I'm right, MIP is triggered whenever uncertainty is present. As we shall see, uncertainty is pervasive in part due to the difficulties inherent in establishing the objective elements of an offense and the existence of the requisite mens rea. The Minimal Invasion Principle thus frequently mandates some degree of leniency. My paper concludes by showing how statistical uncertainty, such as that resulting from racial disparities in punishing, leads to leniency in a similar fashion.

1 The Minimal Invasion Principle

Here is the key principle:

[1] Morris and Frase identify as "limiting retributivists" rather than orthodox consequentialists. For them, sentencers should strive to achieve both consequentialist and retributivist goals. However, their arguments for leniency stem from consequentialist concerns, as I discuss in Sect. 2.1 below.

[2] I develop an argument for leniency for black offenders in Yost (2021).

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> **MIP**: When faced with alternative means of achieving a legitimate political or legal aim, and when one alternative is clearly less invasive than the others, authorities must choose the less invasive means.[3]

MIP is part of the bedrock of liberal political morality. Most if not all strains of liberalism hold that state coercion must admit of public justification. Accordingly, we can think of liberal states as those requiring authorities to justify their interference in, or domination over, citizens' lives and liberties. Owing to the value placed on freedom, liberals—be they libertarians, neo-republicans, or egalitarians—will deem these justificatory demands to be quite stringent. If a potential infringement of a fundamental right is on the table, the burden of justification will rise even higher. Importantly, when infringements on freedom are necessary due to a compelling and legitimate state interest, authorities must adopt the least invasive means of infringing thereupon. Authorities cannot justify interfering with citizens' lives any *more* than is needed to accomplish a particular aim. In this way, liberal political morality mandates minimal invasion of citizens' liberties. Accordingly, if two different policies or courses of action are equally likely to achieve the state's purpose, only the least invasive is permissibly pursued.[4] To take the more invasive path abrogates freedom for no reason, and this excessive intervention is unjustifiable. Given the freedom-hindering nature of coercion, MIP side-constrains all aspects of the state's coercive activity, including policing, trials, and legislative activity regarding criminalization and sentencing.

The aim I'll be considering is cardinally proportionate sentencing. A punishment is cardinally proportionate when its severity matches, or fits, the seriousness of the crime. What "fit" means is a thorny issue I will not tackle here. For simplicity's sake, I'll say that alternative means to the end of proportionate punishment exist when two custodial sentences of different durations satisfy proportionality.[5] If only a single penalty (e.g., no more or no less than 3.5 years in prison for a specific crime) is proportionate, then no proportionate alternative exists. Owing to this focus on cardinal proportionality, my project rests on a deontological penal scaffolding. Importantly, nothing I say here is incompatible with hybrid theories of punishment that permit consequentialist as well as desert-based considerations to influence sentencing, but my focus is on strict retributivist reasons for leniency. I will highlight the differences between a strict retributivist and a Morrisonian hybrid approach in Sect. 2.1, and I will briefly explore how my conclusions apply to hybrid theories in Sect. 5.3.

[3] I borrow this moniker from Hugo Adam Bedau (2002), although my characterization of the principle differs slightly.

[4] I have in mind alternative policies or courses of action that have the same chance of achieving a given aim. But MIP applies *a forteriori* when two different options have different chances of achieving a given aim and the less invasive option is *likelier* to achieve that aim.

[5] My view extends to fines as well as custodial sentences, but I will focus on the latter.

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2 Leniency Under MIP: Sentencing Ranges

MIP prescribes leniency in a variety of situations. There are different ways of mapping the terrain, and I will plot things out in terms of different postures a legal official might take regarding proportionate sentencing. In the simplest case, the sentencer rightly believes either that the facts of the offense suggest only an indeterminate range of sanctions or that desert is indeterminate (or vague) as a general rule. Here, more than one sentence duration is, or appears to be, proportionate to an offense. Because there is no single uniquely appropriate sentence, the lesser penalty is mandated by the straightforward application of MIP.[6]

Now, one might reply that the demands of cardinally proportionate sentencing are at odds with the existence of a range of sanctions. But this objection holds only if cardinal proportionality implies one right answer to the question of an offender's desert. I, along with many others deny this connection (see, for example, Hestevold 1983: 360; Scheid 1995: 407; Shafer-Landau 2000: 191; Kramer 2011: 121–124; Duus-Otterström 2013: 462, 470).

One way to reject the one right answer requirement is to insist that proportionality and desert are vague terms (Scheid 1995; Shafer-Landau 2000). Think of the sartorial version of "fit." Two shirts can both fit, even though one has sleeves that are slightly too long, and the other a collar that is a bit too tight. Neither fits better than the other, but the vagueness of fit does not prevent us from judging that a third shirt, which is several sizes too big, doesn't fit at all. Likewise, vagueness does not bar judgments that sanctions outside a range are unjustly harsh or lenient. As Scheid puts it, "if it is true that Joe deserves five years in prison, this claim is compatible with the claim that he deserves four-and-a-half years in prison; but it precludes a claim that Joe deserves five months or a year in prison" (1995: 407). If desert and proportionality are vague terms, then there are a range of sanctions that are proportionate to an offender's desert. All the sentences within a proportionate range are thus legitimate alternatives and subject to MIP.

Another defense of proportionate ranges appeals to epistemic considerations. The claim here is that if there is a uniquely cardinally proportionate punishment for a given offender, it is nevertheless unknowable. It is unknowable, and not simply

[6] Whenever a judge possesses confidence in the proportionality of a range, the candidate sanctions will not be spaced too far apart. If a very wide range is pinned to a specific offense, say probation to twenty years in prison for aggravated battery, it will include disproportionately lenient and/or disproportionately severe punishments. Confidence in the range will thus be unjustified. In a proportionate range, by contrast, the gaps between the candidate sanctions are relative to the absolute severity of the sanctions. Federal sentencing guidelines acknowledge this condition: "if a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment"; see 28 U.S.C. § 994(b)(2). So while the gaps between sentences of 51, 51.5, and 52 years are larger that those between sentences of 11, 12, and 13 months, the range is appropriately spaced and bounded. (As a general rule, the distance between the bottom and top of the range will be wider, in an absolute sense, the more severe the offense; the range for second-degree murder is likely denominated in years, while the range for misdemeanor assault in weeks).

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unknown, owing to our epistemic limitations (Kramer 2011: 123; see also Duus-Otterström 2013). Even if one is confident that an act of aggravated battery warrants a sentence in the ballpark of three years, it is hard to state with certainty that a sentence of three years and one month is more or less proportionate than a sentence of three years and two months, or a sentence of three years and two weeks, etc. To borrow Norval Morris and Michael Tonry's apt phrase, we simply lack the "moral calipers" to make such an assessment (1990: 84).[7] And if the uniquely proportionate punishment is unknowable, there is no reason to insist that identifying such a sanction is the goal of sentencing. Instead we look for a range of punishments that seem to be proportionate given our best epistemic efforts; this range in turn demarcates a slew of punishments that are definitely disproportionate.

The epistemic point rests on both psychological and evidential grounds. Our cognitive limitations hinder us from discerning which punishment is the uniquely best fit for a crime. In addition, legal facts sometimes fail to admit of any precise determination—taken together and balanced against each other, the evidence regarding an offender's mental state, the facts of her offense, the circumstances of the crime, and her criminal history just do not point to uniquely proportionate sentence. (I say more about this in Sect. 3.3.) Either way, we have reason to construe proportionality in terms of proportionate ranges. And cashing out proportionate sentencing in terms of ranges makes sentencing highly sensitive to the normative pressure exerted by MIP. Because multiple sanctions within a range satisfy the goal of proportionality, only the least severe is permissibly imposed.[8]

In the U.S. ranges play an important role in the sentencing guidelines employed by the federal government and many states. Sentencing ranges are typically built around offense conduct, prior criminal history, and provide for downward or upward departures. These considerations are organized in charts or grids that judges consult to find the permissible sanctions for an offense.[9] Within this statutorily defined range, judges have discretion to choose the penalty they find most appropriate. However, when I discuss sentencing ranges, I am referring to something slightly different—a moral or pre-institutional range. This is because my argument centers on moral rather than professional obligations. Ideally, statutory sentencing schemes will conform to pre-institutional ranges, but this ideal is not always achieved. I briefly comment on how judges should handle disproportionate ranges in Sect. 5.2.

7FL01 7FL02 7FL03 [7] The difference between the two paths towards sentencing ranges can be clarified by noting that the epistemic route is compatible with the conviction that every offense is associated with one truly proportionate sanction graspable by a godlike sentencer, while the vagueness route is not.

8FL01 8FL02 8FL03 [8] A detailed exposition of this view can be found in Yost (2019). George Schedler (2011) and Göran Duus-Otterström (2013) offer alternative arguments for generalized leniency, although these suffer from the shortcomings identified in Yost (2019).

9FL01 9FL02 9FL03 9FL04 9FL05 9FL06 [9] Before *U.S. v Booker* was handed down in 2005, these guidelines were mandatory in federal jurisdictions; post-*Booker* they are merely advisory. For an example of such a scheme, see https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-5. Some states have "indeterminate" sentencing systems. In an indeterminate scheme, a sentence of 5 to 15 years means that parole eligibility begins in the fifth year. In determinate schemes, a sentence has a fixed duration, selected from within a range. To simplify, I will assume a determinate scheme.

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To establish a framework for adapting and comparing the results of my discussion of ranges to more complicated arguments for leniency, I'll more formally represent the notion of a sentencing range with equally proportionate sanctions more formally. What I call a *simple range* looks like this:

(sentence1. sentence2. sentence3)

A more complete representation will incorporate a variable that represents the material and probatory likelihood that the range is proportionate:

p(sentence1. sentence2. sentence$_3$)

Of course, the range could include more candidate sentences or two at a minimum. Because conjuncts are used, p(sentence$_1$.sentence$_2$.sentence$_3$) is equivalent to p(sentence$_1$), p(sentence$_2$), and p(sentence$_3$). This represents the fact that a judge is justifiably confident that any of three sentences—e.g. just those sentences contained in a sentencing range, or some more specific range thereof—is proportionate, and that each is equally so. Because proportionality is equally distributed, alternative sanctions exist. And it is owing to these alternatives that MIP prescribes leniency.

I say "justifiably confident," because here and throughout I will employ another idealizing assumption, which is that judges and jurors deliver verdicts based on rational deliberative processes that are responsive to the evidence introduced at trial.[10] Actual legal practice often bears little resemblance to the ideal. A juror fixated on blood and vengeance will assert a defendant's guilt, even though facts presented at trial speak against it. A racist judge will insist that a black offender presents more of a danger to the community than he actually does, and hand down a longer sentence than is warranted. But I'm going to set aside these injustices. This is because my plea for leniency is not built on claims about legal officials' culpable failings. So unless explicitly noted, I will presume that a legal actor's confidence levels either track the objective likelihood that the selected sentence is proportionate, or track the objective likelihood that the selected sentence is proportionate given the evidence, or, least stringently, are justified on the basis of the evidence.

Nevertheless, one might worry that the borders of the simple range are dangerously porous. Given the vagueness or indeterminacy that motivates the employment of ranges in the simple range case, the judge seems to have reason to decrease the punishment indefinitely. If the lowest sanction assigns 11 months in prison to an offense, and if the judge is convinced that the offender's desert is indeterminate within that range, shouldn't she be indifferent between an 11 month sentence and a 10 month, four week sentence, and so on all the way down to a noncustodial sentence? (For more on indifference, see Sect. 3.3.) Does she have any reason for confidence in the stoutness of the borders? In response—and what I have to say here applies to homogenous uncertainty as well—the first thing to note is that even if she believes that proportionality is vague in this case, she is not thereby committed

[10] This paper will discuss trials by jury, but my argument applies, *mutatis mutandis*, to bench trials as well. In the latter, judges are finders of fact.

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to the proportionality of *any and all* sentences, including those outside the range.[11] That a concept is vague doesn't prevent its reasonable application. So the judge need not slide down a sorites series into a noncustodial sanction; she can apply a sanction that enjoys a robust confidence level. (In other words, a range with a vague border is tamed when it is embedded in heterogeneous uncertainty, which I discuss at Sect. 3.2.) Moreover, as a practical matter, vagueness poses little threat, insofar as the sentencer is typically constrained by statutory ranges with defined lower boundaries. See Sect. 5.2 for more on this point.

2.1 Sentencing Ranges and Limiting Retributivism

I want to say a few words about how my argument for leniency within simple ranges differs from that of Norval Morris's, as on first glance his view appears quite similar. Morris's "limiting retributivism" asserts that courts and legislators are incapable of precisely determining cardinally proportionate sanctions. He seems to adopt an epistemic interpretation of this claim—see his remark about moral calipers cited above—but he might also believe that desert is vague. In any case, he thinks the best we can do to achieve proportionality is to construct a scheme with broad ranges of "not undeserved" punishments. Every penalty within these ranges counts as equally proportionate. (Morris does not specify the breadth of these ranges, but they are likely wider than the ranges contained in contemporary sentencing schemes.) In addition, Morris advocates for a principle of parsimony, to which MIP bears a strong resemblance. The principle of parsimony states that sentencers should choose the least severe sanction that will serve the purposes of punishment (1974: 59). (For an overview of Morris's sentencing theory, see Frase 1997, 2004.)

So much for the similarities. The fundamental difference between Morris's view and my own lies in which considerations guide the selection of a penalty from within a range. For Morris, sentencing decisions may be—and should be—fine-tuned with respect to a smorgasbord of penological aims, including deterrence, incapacitation, uniformity, and parsimony. I, however, am working within a strictly deontological sentencing framework, in which consequentialist considerations are *not* to be recognized or employed at sentencing (though may be used to justify the practice of punishment). Note too the principle of parsimony follows from the utilitarian mandate to take the least costly means to socially valuable ends.[12] So, despite his professed hybrid retributivism, Morris's argument for leniency rests on consequentialist grounds. This will not impress the deontologist or nonconsequentialist. The rationale for MIP, on the other hand, is one the deontologist can accept, and the argument I offer is congenial to a strict conception of retributivism.

[11] Shafer-Landau argues that the vagueness of desert means that there is no fact of the matter about what an offender deserves, owing to second-order vagueness (2000). Kramer defends retributivists from the implications of this view (2011: 120–122).

[12] Frase develops the principle of parsimony into what he calls the "alternative means" principle of proportionality (2020: 105–6).

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In addition, the similarity between our views is apparent primarily in the case of simple ranges, where all the sanctions are thought to be equally proportionate. But none of the upcoming arguments for leniency (Sects. 3.1, 3.2, 3.3, 4) presume simple ranges, and so they are not even in the ballpark of limiting retributivism. These arguments are meant to account for the fact that sentencers do not always see themselves as presented with a simple range. They can adopt other standpoints on sentencing ranges, each of which requires its own argument for leniency.

3 Leniency Under Sentencing Uncertainty

For the rest of the paper, I'm going to presume that proportionality is *not* vague. If it is—if not even a godlike sentencer could discern the proportionate punishment for an offense—then the previous argument is all that is needed. Of course, to deny the intrinsic vagueness of proportionality is not to deny that committed, reflective judges might frequently have reasonable doubts about their ability to sentence proportionately. I'll call these cases of *sentencing uncertainty*. There are both epistemic and moral sources of such uncertainty.[13] An example of the former is when a judge doubts that the evidence offered at trial properly establishes a convicted criminal's mens rea. Even if a judge finds the evidence sufficient, he might still harbor moral uncertainty, or uncertainty about how to establish the duration of incarceration appropriate to the offense. Before discussing what these epistemic issues have to do with MIP and leniency, some preparatory remarks are in order.

I first need to quantify uncertainty. Uncertainty and certainty name different levels of confidence one has in one's beliefs. (I am using belief in a coarse-grained sense that encompasses related doxastic attitudes like assent.) I'll stipulate that certainty involves a degree of belief of 0.9 or greater, and that anything less counts as uncertainty. Stipulation is needed because "certainty" is not a legal concept. U.S. law does mandate that legal propositions be established via a specific confidence level on the part of judges or jurors. Said mandates are known as standards of proof. The job of standards of proof is to provide practical guidelines that inform judges and jurors when their confidence in a legal proposition is sufficiently likely to meet whatever epistemic standard (from mere belief to justification to full-blown knowledge) renders the proposition in question valid, such that acting on the basis of this confidence is permissible and blameless (see Laudan 2006; Walen 2015). The law contains various standards of proof, such as preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt (BARD). Different standards of proof articulate the relative weightiness of classes of legal propositions by pegging their validity to increasingly stringent epistemic standards.[14] The BARD

13FL01 [13] I take this way of drawing the distinction from Duus-Otterström (2013: 469 n23).

14FL01 14FL02 14FL03 14FL04 14FL05 [14] There is much disagreement about how this works. For simplicity's sake, I will adopt the view that the standard of proof states the level of justification (in light of the currency of justification, whatever it may be) needed to affirm the proposition full stop. So on the preponderance of the evidence standard, a juror's categorical belief about a disputed issue needs less justification than on other standards. This is roughly Ho's view (2008: 229 et passim).

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standard sets the highest epistemic bar for establishing legal propositions, and so it is the closest the law comes to what philosophers might think of as certainty. BARD applies to criminal convictions, because conviction on a criminal offense is a consequential matter involving significant government coercion and the temporary loss of fundamental rights. U.S. courts have demurred from specifying the degree of belief needed to place a proposition beyond reasonable doubt. Scholars usually venture 0.9 or 0.95.[15] I'll opt for the lower value to avoid controversy, but even this more modest constraint is in the ballpark of a plausible conception of certainty.

Now we have fallen into some deep epistemological waters. Most notably, theorists disagree about the nature of the cognitive achievement that is supposed to be secured by the law's epistemic standards. Is it belief alone? Belief plus a bit of epistemic support? Justification by the evidence? Justified true belief? Knowledge?[16] I will try to stay on shore as much as possible, in part because the outcome has little bearing on my proposal. I will simply flag my assumption that, at a minimum, the law's epistemic standard incorporates a demand that the fact-finder's belief be justified by the evidence. This presupposition is meant to account for an intuition I find non-negotiable. I think something has gone awry when (a) an innocent person is convicted, (b) the judge and jury are supremely confident in the innocent person's guilt, and (c) the evidence does not support the verdict. On a belief or belief-plus standard of proof, there is nothing legally invalid about the resulting conviction, nor are the finders of fact in any way blameworthy.[17] To me this unpalatable consequence offers a conclusive reason to adopt a justified by the evidence standard at the minimum. Of course, there may be good reasons to adopt a more demanding one.

Recall that I am employing an idealizing assumption, which is that judges and jurors deliver verdicts based on reasoning that is responsive to the evidence introduced at trial. So I presume that a sentencer's confidence levels either track the objective likelihood that a penalty is proportionate, or track the objective likelihood that a penalty is proportionate given the evidence, or, least stringently, are justified on the basis of the evidence. That is, I presume that a legal actor's confidence levels clear whatever epistemic bar they must clear to generate valid, justified legal propositions.

With these preliminaries out of the way, we can return to the central point. Sentencing uncertainty occurs when a judge is not certain that a sentence is proportionate to an offense, or when she has a < 0.9 credence in the sentence's proportionality. There are different kinds of uncertainty—homogenous uncertainty, heterogeneous

15FL01 [15] Walen (2015) has an interesting discussion of the history and normative underpinnings of the beyond
15FL02 a reasonable doubt standard. Laudan (2006) sorts through the normative desiderata of a standard of proof
15FL03 in general.

16FL01 [16] Pardo (2010) offers a helpful overview of this interesting and vexatious debate.

17FL01 [17] This is a more complicated matter than I am letting on. One might adopt a subjectivist view according
17FL02 to which internal epistemic justification is required. Accordingly, finders of fact would be blameworthy if
17FL03 their confidence was based on defective reasoning. On a purely subjectivist view, by contrast, finders of
17FL04 fact would be blameworthy only if their verdict failed to match their beliefs.

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uncertainty, and statistical uncertainty—each of which is associated with a slightly different argument for leniency.[18] I will discuss these in turn.

3.1 Homogenous Uncertainty

In *homogenous uncertainty*, sentencers believe that the proportionate sentence for an offender lies within a specified range, and that every sentence within the range meets the threshold of proportionality—that is, no sentence within the range is objectionably disproportionate. Here, each sentence within the range appears sufficiently proportionate to count as a legitimate response to the wrongdoing. But sentencers also believe that one candidate is *more* proportionate than the others, though they cannot determine which it is based on the facts presented at trial. In other words, these sentencers disclaim the vagueness of proportionality. Consider a judge who has a credence of 0.9 in the specified sentencing range for an offender, but suspects that one of the sentences is more fitting than the others. Her assessment must be expressed with disjuncts rather than conjuncts:

$$0.9(\text{sentence1} \vee \text{sentence2} \vee \text{sentence3})$$

She thinks the appropriate sentence is either the first, second, or third. At the same time—and here comes the uncertainty—she cannot produce a good enough reason to prefer one to the others. Notice that $0.9(\text{sentence}_1 \vee \text{sentence}_2 \vee \text{sentence}_3)$ is equivalent to $0.3(\text{sentence}_1)$, $0.3(\text{sentence}_2)$, $0.3(\text{sentence}_3)$.[19] This falls under the description of homogenous uncertainty, because the judge is *equally* unsure about the superiority, vis-à-vis proportionality, of each of the three punishments.

Now, each candidate inherits the proportionality-satisfying properties of the range. Despite the judge's inability to isolate the most proportionate, she should conclude that each of the sentences is as likely to serve penal justice as the others. Accordingly, MIP directs her to choose the least severe sanction, just as it does in a simple range.

3.2 Heterogeneous Uncertainty

In homogenous uncertainty, a sentencer sees no reason to prefer one sentence in a range to any of the others. By contrast, heterogeneous uncertainty obtains when a judge identifies one of sanction as likely more proportionate than the others. Here, too, she has justified confidence that the overall range is proportionate:

$$0.9(\text{sentence1} \vee \text{sentence2} \vee \text{sentence3})$$

But in heterogeneous uncertainty, a judge discerns reasons for preferring one option to the others. Let's say that a wrongdoer has been convicted of aggravated battery.

18FL01 [18] This list might not be exhaustive, but I do think it captures the main types.

19FL01 [19] Owing to the probability axiom of finite additivity.

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The judge arrives at a range including sentences of 2 years 6 months, 2 years 9 months, and 3 years. On the basis of facts presented at trial, she has a higher credence in the intermediate sentence:

0.25 (sentence1),	0.5(sentence2),	0.15(sentence3)
2 y, 6 mo	2 y, 9 mo	3 y

This is an interesting test case for MIP. On the one hand, the highest credence is quite low, perhaps low enough to vitiate the additional degree of belief in sentence_2 and transform the situation into one of homogenous uncertainty. On the other hand, settling on the least severe sentence might seem irrational, as the judge has reason to believe a harsher penalty is more proportionate. On this way of thinking, given her credence distribution, neither sentence_1 nor sentence_3 is a viable alternative, and MIP has no bearing on the matter. Leniency thus seems to be off the table.

But this approach misses an important alternative. Imagine a serious, reasons-responsive judge who wants to sentence a wrongdoer as proportionately as possible. After deliberation, she settles on the range and credences presented above. Now let's query her on her view of a *fourth* sentencing option, 2 years and 8 months. Recall that she only lightly favors 2 years and 9 months to 2 years and 6 months. So even if she maintains that preference, it will be difficult for her to avoid indifference between the former and 2 years and 8 months. Because indifference implies equal credences in the mooted options, MIP will tell her to choose the lesser sanction. The experiment can be repeated, with the introduction of a 2 years, 7 month option. At this point, the judge might draw a line in the sand.[20] But she has already been pushed off her starting point in the direction of leniency. And even if she balks at 2 years and 7 months, she might not balk at 2 years, 7 months and 2 weeks! My basic point here is that the judge should admit the existence of a simple range that encompasses one of the determinate options within the original range:

$0.25(\text{sentence}_1), 0.5(\text{sentence}_2.\text{sentence}_{2\text{-}n}, \ldots), 0.15(\text{sentence}_3)$

This simple range triggers MIP, directing the judge to choose the least severe sanction within it.

Lest one complain that I am rigging the game by assigning the second highest credence to the lesser sentence, consider a distribution weighted the other way:

$0.15(\text{sentence}_1)$,	$0.5(\text{sentence}_2)$,	$0.25(\text{sentence}_3)$
2 y, 6 mo	2 y, 9 mo	3 y

[20] I am not suggesting that the line is arbitrarily drawn. The judge has reason to draw it somewhere, given her lower credence in sentence_1, and indifference cannot bully her into doing otherwise. She might be unsure *where* to draw the line between sentence_1 and sentence_2, or *how close* to approach sentence_1, but she will not select sentence_1 itself, given her credence distribution.

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Here the pressure toward leniency will be relieved. Presented with a sentence of 2 years, 8 months, the judge will likely reply that she is more inclined to lengthen rather than shorten the duration. (If she considers a slightly harsher alternate sentence of 2 years, 10 months, and if she is indifferent between this option and 2 years, 9 months, MIP will lead her back to her initial decision.) However, there is going to be *some* sentence shorter than 2 years, 9 months that will generate indifference. Especially because a confidence level of 0.5 implies that it is as likely as not that the judge has *failed* to identify the uniquely proportionate sentence. And so we will get

$$0.15(\text{sentence}_1),\ 0.5(\text{sentence}_2.\text{sentence}_{2\text{-}n},\ \ldots),\ 0.25(\text{sentence}_3)$$

and MIP will apply within the simple range. (The size of the gaps matters. The larger the gaps between the sentences, and the larger the sentencing units—e.g., decades vs. days—the larger the values of n, and the more leniency, in absolute terms, MIP demands.[21])

One might maintain that this top-heavy distribution nevertheless poses a difficulty for my view. I've claimed that that MIP applies in such distributions because there is some range of sentences that enjoys equal credences and extends below the initially preferred sentence (here, sentence_2). However, one could question the rationality of leniency on the grounds that electing for a lesser sanction requires the sentencer to ignore important features of the situation at hand, namely, the risk of injustice. To explain, the further a sanction lies from the ideally proportionate sanction, the higher the risk of disproportionality. When the sentencer has a higher credence in the more severe side of a sentencing range (here anchored by sentence_3), moving in the direction of leniency might seem to carry a higher risk of injustice.[22] So, the objection continues, even if a rational sentencer has equal credences in sentence_2 and $\text{sentence}_{2\text{-}n}$, she might not find them equally choiceworthy, all things considered. Accordingly, MIP would not apply, and the more lenient $\text{sentence}_{2\text{-}n}$ would need to be discarded.

My response to this challenge is basically to double-down on the nature of sentencing ranges. Recall my assumption that every sentence within a range meets the threshold of proportionality; none are objectionably disproportionate. In the case under discussion, the sentencer reasonably believes that one of the sanctions within the range is *most* proportionate, but this belief does not shift the upper and lower thresholds. Failing to select the most proportionate sanction within that range will not be an injustice. With the threat of injustice off the table, all the sentencer has to go on are her equal credences, and MIP will apply.

21FL01 21FL02 21FL03 [21] Imagine a judge is considering sentences of 25, 30, or 35 years. She might settle on a sentence of 28 years. This two year reduction is more significant in absolute terms than MIP would demand in the aggravated battery example.

22FL01 22FL02 [22] This worry could also be expressed in terms of a divergence from expected utility, though my response would remain the same.

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3.3 Reasons for Indifference

My contention that MIP requires leniency in many, if not most, criminal cases leans heavily on this claim about indifference. So I want to offer reasons to accept it—four, to be precise. First let's turn our attention toward the mens rea element of (most) criminal offenses. Mens rea refers to a wrongdoer's culpable mental state. Most jurisdictions follow the categorization of culpability established by the Model Penal Code (1985): in decreasing order, a person acts *purposely* in doing x to bring about y when her "conscious object" is to bring about y. She acts *knowingly* when she is "aware that it is practically certain" that x will bring about y. She acts *recklessly* if she "consciously disregards a substantial and unjustifiable risk" that x will bring about y. She acts *negligently* if she "should be aware" of such a risk, even though she is not. Conviction on a more culpable mens rea triggers a harsher range of sanctions. Now, if you have spent any time teaching, or talking to a customer service agent, or watching presidential debates, you will likely be as skeptical as I am that a jury of our peers can adequately distinguish, at the conceptual level, between acting purposely and acting knowingly, or between acting knowingly and recklessly, etc., much less that they can consistently apply this distinction in practice. (I'm not maligning my fellow Americans. Such distinctions are really hard to draw, even for professional philosophers.) Let's tackle just a few examples taken more or less at random from New York's penal code. New York defines one type of public lewdness as "when [the offender] intentionally exposes the private or intimate parts of his or her body in a lewd manner or commits any other lewd act… in private premises under circumstances in which he or she may readily be observed from either a public place or from other private premises, and with intent that he or she be so observed" (NY Penal Law § 245). New York's "intentional" mens rea is the same as the Model Penal Code's "purposeful." So to convict on public lewdness, one must be confident beyond a reasonable doubt that the accused stripped down in front of their window *with the purpose* of being seen (as opposed to accidentally leaving the shades up, or leaving the shades open on the assumption that no one is strolling along outside). In many cases, it will be quite difficult to make such assessments on contextual features of the offense, given our inability to peer into other minds.

Similar issues crop up with respect to the objective elements of the offense. In New York, reckless endangerment comes in two degrees.

> § 120.20 *Reckless endangerment in the second degree.*
> A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.
> § 120.25 *Reckless endangerment in the first degree.*
> A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.

Here the difficulties of distinguishing differing mentes reae crop up again. But my present point regards the expectation that finders of fact distinguish between

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substantial and grave risks. Neither "substantial" nor "grave" are defined in New York's penal laws. Nor (I suppose) do most New Yorkers have a handle on the precise meaning of "grave," never mind the difference between grave and substantial risks. So a conviction of reckless endangerment in the first degree sounds like guesswork—but consequential guesswork, insofar as first-degree reckless endangerment is a felony, and thus subject to harsher sanctions than its second-degree variant, which is a misdemeanor.

These difficulties with defining and ascertaining the subjective and objective elements of an offense make it hard to pinpoint the likelihood of a particular sentence being the most proportionate. Minor differences in judges' degrees of belief are thus unlikely to track the differences in the chances of a sentence being the most proportionate. Judges ought, then, to be frequently open to indifference.

Notice, too, that on the various credence model belonging to heterogeneous uncertainty, judges must be able to introspect the value of their various degrees of belief. Whether judges, or anyone else for that matter, has this capacity is a matter of controversy among epistemologists and legal practitioners. The eminent jurist Learned Hand famously remarked that he couldn't tell the difference between a preponderance of the evidence (>0.5) and a beyond a reasonable doubt (≥ 0.9) standard of proof for criminal conviction (cited in Laudan 2006: 78). It's easy to imagine the incredulity that would ensue if, after he were asked to report his ≥ 0.9 degree of belief in the requisite mens rea and actus reus, he were asked to attach precise probabilities to the array of penalties in a statutory range. This observation reinforces the point made in the previous paragraph. Because even an ideal judge or juror will be skeptical of her ability to accurately report subtle distinctions between her credences, she will recognize that small differences in degrees of belief are unlikely to track the chances of a sentence being the most proportionate. And so the most rational course is to retreat to indifference.

Finally, we come to the application of the BARD standard itself. In a criminal trial, jurors are supposed to convict only if they believe beyond a reasonable doubt that the defendant displays the mens rea and actus reus belonging to the offense. Mock jury studies should give us pause. Jurors often interpret BARD as licensing conviction when there is, objectively speaking, only a preponderance of the evidence for the defendant's guilt (Walen 2015: 375). So they misconstrue the basic epistemic criteria governing their deliberation and, *a forteriori,* render verdicts that fail to meet those criteria. There is one other glaring problem: jurors, who are for the most part legal novices, doubtlessly have less ability to introspect their credences than professionals like Learned Hand. So how are they supposed to arrive at justified confidence in their verdicts? The upshot is that whenever a judge is the least bit circumspect about a jury's verdict, indifference should be easy to come by. (I should note that once a jury renders its decision, the question of an offender's guilt is, for legal purposes, conclusively decided. A convicted offender is considered guilty of her offense and not, say, 92 percent guilty. So my suggestion that a judge should let her misgivings about the jury affect her sentencing deliberation is controversial. But I think it is both natural and morally permissible, if not morally obligatory.)

These four considerations bolster the claim that there will almost always be a route to indifference, hence leniency, in situations of heterogeneous uncertainty. MIP will

not urge leniency when a judge is confident enough that no value of n will budge her,[23] and when this confidence is warranted. But for the reasons just discussed, such situations will be rare.

4 Leniency Under Statistical Uncertainty

There is a more complicated route from uncertainty to leniency. I have so far been occupied with what we might call uncertainty from *direct* sources, uncertainty about the proportionality of a sentence based on features of the crime and criminal proceeding that are available to finders of fact. Statistical uncertainty, by contrast, does not flow from evidence (or a lack thereof) regarding the offender and offense that is available to the finder of fact. It comes from the relevant statistical possibilities of error. For example, confessions are not the unimpeachable signs of guilt they are often thought to be. Confessions are surprisingly easy to coerce; detectives have well-known ways of persuading an accused that he is guilty, even when he's innocent.[24] Approximately 300 confessions have been shown to be false (Leo 2009). This is not a particularly high percentage, but the real incidence of false confessions is doubtlessly orders of magnitude higher. We will never have good data on the actual rate, because social science researchers interested in gathering it are usually refused access to the primary case materials needed to establish innocence. Even when they get their hands on the data, they must prove the confession is illegitimate despite the facts contained in the trial record. But the example still stands—in virtually any trial involving a confession, whether it is challenged or not, there remains the possibility that a decisive piece of evidence is fabricated. This possibility generates statistical uncertainty in cases that feature confessions, even though the degree of uncertainty is unknowable.[25]

We have a slightly better handle on the statistical uncertainty associated with racial bias. A multiagency study that followed federal offenders through the court system from arrest to sentencing and controlled for age, education, and criminal history found that black men receive sentences 13 percent longer than white men (Rehavi and Starr 2014: 1323).[26] Up to half of this disparity can be traced to the fact that prosecutors charge black people with crimes carrying mandatory minimum sentences far more frequently than whites; they face a 65 percent higher likelihood of being slapped with mandatory minimums (Rehavi and Starr 2014: 1323). Unless we swallow the utterly implausible premise that black offenders are intrinsically more likely to commit crimes carrying mandatory minimums, these data show that black

23FL01 [23] I.e., something along the lines of .05(sentence$_1$), .8(sentence$_2$), .05(sentence$_3$).

24FL01 [24] Davis and Leo (2012) discuss the tactics involved. Basically, investigators present the accused with
24FL02 fabricated evidence of his guilt, induce a dissonance between his belief in his innocence and his belief
24FL03 in the investigators' truthfulness, then suggest to him that she suffered momentary unconsciousness or is
24FL04 repressing the memory.

25FL01 [25] This type of statistical uncertainty could be virtually eliminated by videotaping interrogations and
25FL02 confessions.

26FL01 [26] For more on this point, see Yost (2021).

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offenders are punished more harshly than white offenders for the same offense.[27] In short, the data show that black offenders are overpunished.

At the same time, it is impossible to tell which black offenders are sanctioned proportionately, and which are punished too severely. This is partly for the obvious reason that statistical patterns offer no guidance in particular cases. In addition, judges and juries are in the dark about prosecutors' charging decisions and charging biases as well as their own unconscious biases. As a result, even though we know that racial bias adversely affects the conviction and sentencing of black offenders, no one knows which offenders suffer injustice and what amount of disproportionate sentencing they face.

There are, it seems to me, two general strategies for responding to statistical uncertainty. One is for a judge to reduce all her credences by some percentage pegged to the strength of the statistical uncertainty in question, as best as it can be assessed. For example, she might be required to discard her original distribution, say $0.2(\text{sentence}_1)$, $0.4(\text{sentence}_2)$, $0.3(\text{sentence}_3)$, in favor of a ten percent reduction, or $0.18(\text{sentence}_1)$, $0.36(\text{sentence}_2)$, $0.27(\text{sentence}_3)$. This would express her reduced confidence in each of her options. The other is to soften the initially chosen sentence.

The across the board approach has two difficulties. First, and most importantly, when a judge weakens all her credences equally, her initial preference remains the most choiceworthy, insofar as it retains the highest credence. But in the present example, uncertainty flows from the overpunishment of black offenders, which gives the judge reason to think that the selected sentence is too *harsh*. Affirming the status quo is an inadequate response to the attendant threat of injustice. (I'm assuming that statistical uncertainty generally pushes in the direction of leniency, even if there are some sources of statistical uncertainty that point in the opposite direction. I won't try to defend this assertion except to emphasize the relative severity of our state and federal penal codes relative to those of other wealthy liberal democracies.[28])

Statistical uncertainty might sometimes lead one to trim all one's confidence levels by the same amount. When I am trying to predict when my preschooler will be ready to go to bed, I am confronted with the possibility that something might have transpired at school to make her overtired and less likely to fall asleep unless I get her to bed early (e.g., she ran around more than usual) or that she needs to stay awake a bit longer (e.g., she consumed too much dairy and developed a stomachache she needs to process). Because I don't know, I ask my daughter about her day, but she is either uninterested in telling me or, as is her wont, spins a fanciful yarn. In *this* example, where the unknowns point in both directions, I should reduce my credences in each member of the range to the same degree. Practically speaking, I should hold firm and put my daughter to bed at the time I originally decided upon,

[27] Matters are likely much the same at the state level. See, for example, the *Sarasota Herald-Tribune*'s county-level investigation of sentencing patterns in Florida (Salman, Coz et al. 2016).

[28] Consider, for example, our penchant for sentencing nonviolent offenders to sentences of life without parole (2013). It seems to me that a legal system willing to waste human lives in recompense for trivial crimes such as possessing a crack pipe, selling $10 of marijuana, and siphoning gasoline from a truck should be seen as putting its entire fist on the side of severity.

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though with less confidence in my eventual success. But the statistical evidence I've discussed does not point in two directions. It suggests that sentencers' assessments of black offenders' culpability are systematically inflated. In such cases, the proper course of action is not to throw up one's hands and retain one's initial judgment, but to take a different path and opt for a lesser sanction within the range.

The second problem with the across the board approach is that it threatens incoherence. Because the judge's revised credences add up to 0.81, his confidence level in the sentencing range falls to 0.81.[29] This is, of course, insufficient to justify sentencing within the range. In addition, a 0.81 confidence level is incompatible with the judge's 0.9 credence in the proposition that the offender is guilty of the crime charged, which itself implies a 0.9 credence in the statutory sentencing range, at least in the idealized scenario under discussion.[30] The better response to statistical uncertainty is to reduce the initially preferred penalty.

It is worth noting that the leniency tied to statistical uncertainty might be more aggressive than that pertaining to indifference, insofar as indifference ranges are tightly linked to the originally chosen sentence. This confines leniency relatively narrowly; recall what indifference looks like: $0.3(\text{sentence}_1)$, $0.4(\text{sentence}_2.\text{sentence}_{2\text{-}n}, \ldots)$, $0.2(\text{sentence}_3)$. On the other hand, a sufficient amount of statistical uncertainty might require the judge to switch the credences belonging to sentence_1 and sentence_2 and ultimately settle on sentence_1. The result is a softer sanction than would be supported by indifference. Of course, things change if the second-highest credence is attached to a harsher sentence—e.g., $0.2(\text{sentence}_1)$, $0.4(\text{sentence}_2.\text{sentence}_{2\text{-}n}, \ldots)$, $0.3(\text{sentence}_3)$. Here the sentencer might need to settle on something between sentence_1 and sentence_2.

5 Some Remaining Issues

5.1 Uncertainty and the Legitimacy of Punishment

In many cases, a judge will have a fairly low credence in her preferred sanction, such that she finds it as likely as not that some *other* sentence is more proportionate. One might wonder whether it is permissible to throw someone behind bars for years on such flimsy grounds. I think that *if* the institution of punishment is itself legitimate—which it may not be—sentencing on the basis of a low credence is permissible, at least under my idealizing assumptions. Recall that sentencer must have a high degree of justified confidence in the range from which the imposed sentence is selected. Confidence will be justified only when none of the sentences within the range are disproportionate, and when each element of the offense has been proven beyond a reasonable doubt. (The former is a feature of a normative conception of

[29] Which implies that she has a .19 credence in the proposition that the sentencing range is disproportionate.

[30] This problem is a complex one, and I am presenting a rough sketch for the purposes of brevity.

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sentencing, the latter a constitutional mandate.[31]) Justified confidence in the conviction and the applied range implies that each penalty within the range meets the threshold of proportionality and is permissibly imposed. Now, so long as the judge stays within this range, she can try to tailor the sentence *more* proportionately, picking the sentence best suited to the particular circumstances of the crime and the offender. For the reasons canvassed above, this is a difficult task, and any ambitions along these lines will likely invite misgivings about their success. But skepticism about our ability to hit upon the most proportionate sentence can be insulated from skepticism about the legitimacy of the sentence selected.

5.2 Divergence Between Statutory and Proportionate Ranges

I have been using an idealizing conceit of morally appropriate sentencing ranges to develop my argument. A complete account of leniency in sentencing would need to examine the issues that arise when judges are limited to statutory ranges, as is the case in most U.S. jurisdictions. A few remarks in this direction will have to suffice for now.

The first point to note is that because sentencers are bound by statutory ranges (including allowable upward and downward departures), sorites problems disappear. Sentencers must ignore indifference at the margins of a range—or, more pertinently, the potential sorites slide toward nonpunishment—in order to deliver a legally valid verdict.

But these institutional constraints also complicate matters. It goes without saying that in the rough and tumble of reality, there are often significant incongruences between the statutory range for an offense and the morally appropriate counterpart. Mismatches occur when a statutorily specified sentencing range is disproportionate—when it punishes a crime type too severely (a 25 years to life sentence for petty theft[32]) or too leniently (a $100 fine for aggravated assault). In such cases, the penal statute is unjust, and a reasonable judge would find it so, even if he were certain the offender committed the proscribed crime. A mismatch also occurs when the range is morally proportionate for the crime type for which a defendant is convicted, but the judge believes the defendant to be guilty only of a less serious offense.[33] Finally, the door is opened for a mismatch when the statutory range is so broad that

31FL01 31FL02 31FL03 31FL04 [31] A caveat: in federal court, judges may, at sentencing, consider conduct for which a defendant has been acquitted by a jury, so long as consideration of this conduct does not raise the statutory range of the offense and so long as the conduct is demonstrated by a preponderance of the evidence. For more, see Foster (2018).

32FL01 32FL02 32FL03 32FL04 32FL05 [32] Pursuant to California's three-strikes law, Leo Andrade was sentenced to two consecutive terms of twenty-five years to life for stealing $150 worth of videotapes; his penalty surpassed those imposed on most rapists and many murderers. The Supreme Court declined to vacate his sentence, holding that a fifty-years-to-life term for what would otherwise be a misdemeanor theft is not cruel and unusual punishment (2003).

33FL01 33FL02 [33] Prosecutors have virtually absolute, unreviewable discretion to determine charges for the accused, and in virtue of political and professional incentives, more frequently overcharge than undercharge.

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it encompasses both proportionate and disproportionate penalties. This is often the case in sentencing schemes in the U.S.[34]

What should a judge do when confronted with an overly broad or a disproportionate range? The resolution of the first issue is fairly straightforward—the sentencer simply needs to identify the proportionate range within the statutory range and go from there. As for the second, many schemes allow judges to make upward or downward departures from the statutory range when aggravating or mitigating circumstances are present. Such policies aim to remedy the inevitable defects that accompany general rules, which, in their abstraction, can fail to accommodate morally relevant features of the offense. If a judge is faced with a disproportionate range as well as the possibility of a departure that satisfies proportionality, the solution is clear. But otherwise the judge's path is treacherous. If the range is too harsh, he should sentence the offender to the least severe penalty permitted by statute. It is tempting to say that he should reduce the sentence even further, but such acts of legal disobedience risk being overturned on review. Sorting out the interesting and important moral issues at stake must be left to a further investigation.

5.3 Deontology, Consequentialism, and the Criminal Justice System

To close, I'd like to remark on the impact of my deontological argument on legal practice. The criminal justice system in the U.S. is pluralist and does not adhere to purely deontological principles. Sentencing guidelines as well as case-specific sentencing determinations are encouraged to take consequentialist goals into account. I doubt this is a theoretically coherent approach, but it is what we have. Nevertheless, if my argument is correct, it exerts some prescriptive force on current arrangements. If a sentencer believes that proportionality is vague or indeterminate, she will apply MIP within a simple range.[35] Consequentialist considerations might then be used to increase the penalty. (Whether they might decrease the penalty depends on whether the system sides with Morris, who believes the presumptive sentence should sit at the bottom of the range, or Frase, who believes it should be in the middle (see Frase 2012: 52). In a Morrisonian system, the sentence cannot be reduced any further.) However, if a sentencer believes that proportionality is not completely vague or indeterminate, then the arguments from homogenous, heterogeneous, or statistical uncertainty will apply. The sentencer might then raise or lower the severity of the sanction for consequentialist reasons, but this adjustment will be relative to the baseline established by the arguments from uncertainty. My deontological argument thus has practical import even within a hybrid system.

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[34] I want to thank a reviewer for pressing me to clarify this point.

[35] Morris's principle of parsimony dictates the same outcome, though for different reasons.

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