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Punishment and permissibility in the criminal law
Vincent Chiao¹

In a 2003 case, *Smith v. Doe*, the United States Supreme Court held that convicted sex offenders were not “punished” by Alaska’s “Megan’s Law.”² Under Alaska’s statute, known as ASORA, convicted sex offenders are required to keep authorities informed as to their domicile and physical appearance for 10 years or more, and personal information about them—including criminal histories, place of employment, and license plate numbers—is published on the internet. Despite the significant stigma and harassment that accompanies public registration as a sex offender, the Supreme Court took the view that because the statute was intended to be part of a merely “regulatory” regime aimed at fostering public safety, the statute was not punitive, hence was civil rather than criminal, and hence not subject to the federal Constitution’s ban on *ex post facto* legislation.

Six years earlier, the court decided *Kansas v. Hendricks*, which upheld a state statute authorizing the indefinite, and likely permanent, civil commitment of dangerous sex offenders nearing the end of their prison terms.³ According to Kansas’ Sexually Violent Predator Act (SVPA), prosecutors are informed when a person convicted of a sexually violent offense is nearing the end of his prison term, and are authorized to initiate civil commitment proceedings.⁴

The culmination of those proceedings is a trial at which the state bears the burden of proof to

¹ Assistant Professor, University of Toronto, Faculty of Law. Many individuals have provided thoughtful and detailed comments on this paper. I wish to acknowledge, in particular, Kim Ferzan and two anonymous referees at *Law & Philosophy*; participants at a 2012 NYU Criminal Law Theory colloquium; and comments from Alan Brudner, Matt Lister, and Chris Robertson. Research for this paper was partially supported by the Reginald F. Lewis Fellowship, for which I am extremely grateful.

² *Smith v. Doe*, 538 U.S. 84 (2003).

³ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁴ Kan. Stat. Ann. 59-29a01 *et seq.* (1994).

show, beyond a reasonable doubt, that the defendant is a “sexually violent predator.”⁵ If the state carries this burden, the defendant is civilly committed for a year, at the end of which period the state again must show, beyond a reasonable doubt, that he continues to be a sexually violent predator. Given our inability to “cure” or “rehabilitate” pedophiles like Hendricks, Justice Kennedy acknowledged that the “practical effect” of the SVPA “may be to impose confinement for life.”⁶ Nevertheless, as Kennedy insisted in his concurrence to Justice Thomas’ majority opinion, the viability of Hendricks’ *ex post facto* argument—that the punishment for his crimes was being retroactively stiffened—depended on whether the SVPA imposed punishment, and whether it did that depended on whether the “object or purpose” of the legislation was to punish. Since the SVPA was plausibly motivated by non-retributive and non-deterrent rationales, it was not punishment; hence, the state was not moving against Hendricks criminally; hence his *ex post facto* and double jeopardy claims failed.⁷

Hendricks and *Doe* are among the latest in a long line of cases considering challenges to ostensibly civil penalties that are alleged to be nothing more than punishment in disguise and as such, entitled to heightened constitutional protection.⁸ Substantively, the civil-criminal distinction has been central to litigation concerning, among other topics, asset forfeiture, occupational disbarment, prison conditions, immigration, the denial of government benefits,

⁵ A person qualifies as a sexually violent predator if he or she “has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.” Kan. Stat. Ann. 59-29a02(a) (1994).

⁶ *Hendricks*, 521 U.S. at 372.

⁷ In fact, the U.S. Constitution includes two *ex post facto* clauses, both in Article I (§§9 and 10). The former applies to the federal government and the latter to the states. I do not distinguish between the two clauses here.

⁸ Although the Supreme Court recently considered a case involving the application of the federal Sex Offender Registration and Notification Act, 18 U.S.C. §2250 (2006), (SORNA) to pre-enactment conduct, it ultimately ducked the *ex post facto* issue, and decided the case on statutory interpretation grounds instead. See *United States v. Carr*, 130 S.Ct. 2229 (2010).

corporate fines, and drug taxes. Doctrinally, deciding whether a statute is civil or criminal is a threshold question to determining whether a defendant is entitled to claims under the *ex post facto* and Bill of Attainder clauses, as well as the Fifth, Sixth, and Eighth Amendments.⁹

The question these cases have forced the court to consider is: when is the state imposing a civil sanction rather than criminal punishment? The answer the court is committed to is, roughly: a statute imposes punishment if the legislature was motivated by a desire to punish the conduct targeted by it. Legislative intent can be overturned, but only if the petitioner can show, by the clearest proof, that the characteristics and effects of the challenged legislation are so facially punitive that the legislature's stated intent is not credible.¹⁰ This has since come to be known as the "intent-effects" test.¹¹

The intent-effects test reflects an underlying conception of punishment and, corresponding to that conception of punishment, a distinctive view about the limits of the criminal law. While legal theorists, like the court itself, have focused on the allegedly intention-sensitive character of

⁹ See, e.g., *Hudson v. United States*, 522 U.S. 93 (1997) (civil forfeiture); *United States v. Ursery*, 518 U.S. 267 (1996) (*in rem* forfeiture); *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994) (drug taxes); *Farmer v. Brennan*, 511 U.S. 825 (1994) (prison conditions); *Austin v. United States*, 509 U.S. 602 (1993) (civil forfeiture); *United States v. Halper*, 490 U.S. 435 (1989) (civil fines); *United States v. Ward*, 448 U.S. 242 (1980) (corporate fines); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation); *Flemming v. Nestor*, 363 U.S. 603 (1960) (social security benefits); *De Veau v. Braisted*, 363 U.S. 144 (1960) (employment restrictions for convicted felons); *Hawker v. New York*, 170 U.S. 189 (1898) (medical licensure). See also *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) (Posner, J.). Some appellate courts have attempted to synthesize these cases into a general doctrinal test. See, e.g., *Artway v. Attorney General of the State of New Jersey*, 81 F.3d 1235, 1263 (3d Cir. 1996); *Doe v. Pataki*, 120 F.3d 1263, 1272-1276 (2d Cir. 1997). Legal scholars have noted the rapid growth in the use of ostensibly "civil" sanctions as a stand-in for punishment proper. See, e.g., Kenneth Mann, "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law," *Yale Law Journal* 101 (1992): pp.1795-1873; Mary Cheh, "Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction," *Hastings Law Journal* 42 (1990): pp.1325-1413.

¹⁰ "If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [Congress's] intention to deem it 'civil.'" *Smith v. Doe*, 538 U.S. at 92.

¹¹ The test was first formally articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

punishment, I propose to examine the largely unexamined view that the limits of the criminal law are to be drawn with reference to the concept of punishment. In particular, I shall explore the possibility that what should matter for purposes of allocating constitutional rights is not whether the state is or is not punishing someone, but rather the severity of what the state is proposing to do, as measured by impact on certain types of fundamental interests. The motivation for this line of thought rests on my claim that the intent-effects test in fact depends on a highly controversial position in moral theory, namely, the view that an agent's intentions bear directly on what it is permissible for that agent to do.

In the first part of the paper, I argue that drawing the boundaries of the criminal law by reference to an intention-sensitive conception of punishment rests on the doctrine of double effect. Legal theorists who are skeptical of double effect reasoning owe us, I claim, an alternative account of the distinctiveness of the criminal law. I go on in the remaining sections to sketch the broad outlines of just such an alternative account—one that focuses on the objective impact of legislation on a class of protected interests, regardless of the state's motivations in enacting the legislation and, therefore, regardless of whether the state's actions qualify as punishment.¹² I conclude by suggesting how such a view might apply to cases like *Doe* and *Hendricks*, and conclude by noting some of its ramifications.

1.

The search for a "definition" of anything as complex and contested as punishment is likely to seem a piece of pointless conceptualism. But it is not. Both the Constitution and the common

¹² I note that I do not distinguish here between intention and motive. I use these terms interchangeably to refer to an agent's reasons for acting.

law distinguish the law of crimes from all other areas of law, reserving special procedural and substantive rights to those haled into court on criminal charges. It is therefore important to know when a case is “criminal” and when it is not. For instance, if what the criminal law is about is the administration of punishment, then we need to know whether, in cases where rights reserved for criminal defendants are being asserted, what the state is doing counts as punishment. Of course, in the vast majority of cases it is perfectly clear whether the state is or is not proceeding criminally. But the reason it is typically so clear is that in most cases the consequences the state is seeking to impose—imprisonment, probation, community service, fines—are broadly and unequivocally understood to be punitive, and hence indisputably within the scope of the criminal law. But in cases where it is not so clear—such as preventive detention, asset forfeiture, community notification, and so forth—settling on a definition of punishment becomes a matter of intensely practical significance.

Among legal theorists, a persistent theme has been that the concept of punishment must incorporate a reference to the state of mind of the person imposing the punishment. For instance, David Boonin has recently argued that punishment must be an intentional, rather than incidental, infliction of suffering.¹³ This does not mean that punishment is sadistic, that the suffering is intended for its own sake. It may be intended as a means to a non-punitive end such as rehabilitation, deterrence, or retribution. But for it to be punishment, rather than something else, the suffering has to be inflicted, as we say, “on purpose.” Boonin’s argument for this claim is that unless the suffering is intended, then all sorts of state action that is in some sense harmful—

¹³ *The Problem of Punishment*, (Cambridge: Cambridge University Press, 2008), ch.1, esp. pp.12-17. See also Doug Husak, “The Costs to Criminal Theory of Supposing that Intentions are Irrelevant to Permissibility,” *Criminal Law and Philosophy* 3 (2009): p.57; Meir Dan-Cohen, “Sanctioning Corporations,” *Journal of Law & Policy* 19 (2010-11): p. 38 (“deprivation is the acknowledged purpose of punishment, not just a regrettable side-effect.”)

building an airport in an established neighborhood, forcing people to pay fees for marriage licenses, civil commitment of the insane, and so forth—will implausibly have to be deemed “punishment.” Distinguishing punishment from mere harming on the basis of the punisher’s intention to inflict the harm will draw a more intuitively plausible line—distinguishing, as Holmes famously quipped, between being kicked and being tripped over.¹⁴

Drawing the line between punishment and non-punishment might, however, require more than simply ascertaining whether someone was made to suffer deliberately. The particular *reason* the person was made to suffer might matter as well. A coach might push an athlete to the point of exhaustion, on the theory that the suffering she experiences will contribute to making her a better athlete. It would be awkward to conclude that the coach is punishing the athlete, at least absent any reference to a belief on her part that the athlete had committed some infraction making her deserving of the harsh treatment. John Gardner defends a view along these lines in his illuminating introduction to the new edition of Hart’s *Punishment and Responsibility*.¹⁵ Gardner claims that characterizing an act as punishment implies that the agent acts, at least in part, on the basis of (what she at least perceives to be) a wrong committed by the person who she seeks to punish. As Gardner writes: “there are many possible reasons for punishing people, but the fact that a wrong was (supposedly or actually) committed is the only reason for punishing people of

¹⁴ Boonin describes the intentionality of punishment as “almost universally accepted in the literature on punishment.” Boonin, *The Problem of Punishment*, pp.13-14, n.14. The view even shows up in the writings of Judge Posner; see *Duckworth v. Franzen*, 780 F.2d at 652. For recent discussion, citing both of these sources and others, see Adam Kolber, “Unintentional Punishment,” *Legal Theory* 18 (2012): pp. 1-29.

¹⁵ H.L.A. Hart, *Punishment and Responsibility* (Oxford and New York: Oxford University Press, 2008).

which it is true that one is not punishing people unless one acts for this reason.”¹⁶ In other words, Gardner endorses:

(Principle R) A does not punish B unless A treats B’s actual or supposed prior wrongdoing as a reason for responding as she does.

As Gardner makes clear, subscribing to principle R does not entail that criminal sanctions must be defended from an exclusively or even predominantly retributivist point of view. All it entails is that for a defense of the use of those kinds of sanctions to count as a defense of state-sanctioned *punishment*, it must acknowledge at least some role for the belief that a wrong committed by the relevant person counts as a reason for applying the sanctions. It may not be much of a reason: as Gardner rightly points out, it may well be that a principle R-conforming reason is too modest on its own to justify any of our accustomed punitive practices, so a full blown defense of those practices might place significant, even overwhelming, weight on the prospective social benefits of such a practice. The claim is only that for a deterrence-rehabilitation-incapacitation based regime to also count as a punitive one, the motivations of the relevant institutions and officials must be as principle R describes.¹⁷ In this respect, principle R does not attempt to define non-retributive theories of punishment out of existence.¹⁸ It is consistent with principle R that A would not undertake punitive steps against B unless A believed doing so would deter others, or prevent B from committing future wrongs, or give expression to some important value. What principle R entails is only that A would not be

¹⁶ Gardner’s Introduction to *Punishment and Responsibility*, p.xxx. See also Doug Husak, “Lifting the Cloak: Preventive Detention as Punishment,” *San Diego Law Review* 48 (2011): p. 1182 (arguing that “a state response to conduct does not qualify as punitive unless it is designed to censure and to stigmatize,” in order to differentiate punishment from taxes, license revocations, and so forth.)

¹⁷ Gardner himself suggests that the retributive reason is perhaps not completely useless, that it might on its own justify some mild sanctions. Gardner’s Introduction to *Punishment and Responsibility*, p.xxxi.

¹⁸ As did the so-called “definitional stop” argument of an earlier generation. For the classic discussion, see H.L.A. Hart, “Prolegomenon to the Principles of Punishment,” in *Punishment and Responsibility*, p.6.

engaged in the practice of punishment unless she counted the wrongfulness of B's actions as adding something to the justification of her attempt to make him suffer.¹⁹

Principle R provides a vindication of the Supreme Court's consistent emphasis on state motivation when it is called upon to decide if some burden is a civil penalty or a criminal punishment. The Supreme Court has repeatedly insisted, in dozens of cases spanning the better part of a century and across multiple legal and factual contexts, that whether a statute is civil or criminal depends on whether it imposes punishment or not, and that whether a statute imposes punishment depends on whether it was motivated in a primarily retributive spirit.²⁰ Typically, in these cases if the state can mount a remotely plausible claim that its aims are predominantly "regulatory" rather than "punitive," the courts will construe the statute as civil, and hence as not giving rise to criminal rights under the *ex post facto*, double jeopardy, Fifth, Sixth, or Eighth Amendments, the right to proof beyond a reasonable doubt, government-funded lawyers, and so forth. Principle R helps explain why the doctrine should have this shape: the criminal law

¹⁹ The force of principle R can be clarified by an example. Suppose that you are told that by pressing this button, you will cause some people to experience pleasure and others to experience pain, but that on balance the pleasure will outweigh the pain. By principle R's lights, in choosing whether to press the button, you are not choosing between punishing and not punishing. If, however, you come to believe that the people who will experience the pain are those who have committed some wrongful act, and you believe that this carries at least some weight in favor of pushing the button—it is not completely neutral, like the fact that they all have blinked eight times in the last two minutes—then your decision becomes, under principle R, a decision about whether or not to punish. This remains the case under Gardner's ecumenical approach even if you ultimately decide that you will push the button only if doing so is likely to make people less likely to engage in wrongful acts in the future.

²⁰ At one point in time, the Supreme Court took, albeit briefly, a somewhat more expansive view. See *Halper*, 490 U.S. at 448 (stating that whether a penalty constitutes punishment depends on whether it "cannot be fairly said to solely serve a remedial purpose, but rather can *only* be explained as also serving either retributive or deterrent purposes.") I note that despite criticism of the outcomes in cases like *Hendricks*, legal theorists have tended to agree with the structure of the Supreme Court's reasoning. See, e.g., Husak, "Lifting the Cloak," at p.1181 (posing the question, "how do we know whether a law enacted by the state qualifies as one of its criminal laws?," and answering it with the claim that "the criminal law just is that body of law that subjects person to state punishment. If punishment is the sanction the state is authorized to inflict for violations of a rule, it follows that that rule is part of its criminal law.")

punishes rather than prices; and what it takes to punish is, among other things, to act on the basis of a principle R conforming reason.

Despite its not inconsiderable intuitive appeal, this way of drawing the distinction between criminal punishments and civil penalties ought to be more controversial than it is. This is not, or not just, because lawyers are likely to obfuscate when called upon to describe the state's motivations in enacting a challenged piece of legislation.²¹ In any concrete case, the state's motivations may be more or less clear. The more fundamental question is whether the state's motivations ought to have this kind of role in shaping the doctrine in the first place. This question ought to be controversial because relying on principle R to distinguish criminal punishments from civil penalties presupposes a highly controversial position in moral theory—namely, that an agent's motivations bear directly on the permissibility of what that agent proposes to do. This is a view most closely associated with the doctrine of double effect, a topic that is, and has long been, intensely controversial in moral theory. Notably, some philosophers and legal theorists have recently argued that while an agent's intentions may matter to other dimensions of moral assessment, they do not directly influence the range of permissible acts open to the agent in a given context. This is the view that intentions are irrelevant to permissibility, or IIP for short.²²

The doctrine of double effect states, roughly, that an agent may permissibly perform an action that has both a harm-producing and benefit-producing consequence if bringing about the

²¹ See, e.g., Wayne Logan, "The *Ex Post Facto* Clause and the Jurisprudence of Punishment," *American Criminal Law Review* 35 (1997): p.1313.

²² There is a vast literature on double effect. For a critical overview, see Alison McIntyre, "Doing Away with Double Effect," *Ethics* 111(2) (2001): pp.219-55, and, for a more sympathetic take, see *Double Effect Reasoning*, T.A. Cavanaugh (Oxford and New York: Oxford University Press, 2006). For a recent defense of IIP, see Tim Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge: Harvard University Press, 2008), and for an argument directed specifically at the context of state action, see David Enoch, "Intending, Foreseeing, and the State," *Legal Theory* 13 (2007): pp.69-99.

harm is not a means to bringing about the benefit, but is rather a side effect of doing so.²³ Thus, while it would be impermissible to relieve the suffering of a terminally ill patient by acting with the aim of shortening his life, as in *One Flew Over the Cuckoo's Nest*, it would be permissible to do so by administering an analgesic that causes an equivalent shortening of the patient's life "as a side-effect."

The appeal of the doctrine of double effect is based largely on pairs of examples that tend to elicit widely divergent reactions, but which seem to differ in nothing but the agent's intent. Well-worn examples include the contrast between strategic and terror bombing in war time (holding constant the expected civilian deaths); or the contrast between diverting a trolley that is otherwise en route to disaster with the knowledge that doing so will cause a bystander's death, and stopping the trolley by throwing a bystander into its path. The doctrine of double effect draws support from these cases by explaining that what it is permissible for an agent to do depends on what that agent's intentions are, in that whether it is permissible for an agent to perform an act with both good and bad consequences depends on whether she proposes to bring about the good by means of the bad, or if the bad is strictly unintended. Since one may conceivably subscribe to this more general proposition without subscribing to all the specific applications with which the doctrine is characteristically associated, I shall refer to this as "double effect reasoning."

Despite the force of these intuitive contrasts, it is not difficult to see why double effect reasoning remains intensely controversial. In making permissibility contingent upon an agent's

²³ There are a myriad of more nuanced, and more or less complicated, versions of this doctrine, and this statement is not meant to be canonical. A fuller specification would include a proportionality constraint to rule out cases in which a person causes a great loss as a side effect of a trivial benefit, as well as a more specific treatment of the kind of weight that the intention-foresight distinction is meant to carry in practical deliberation. I leave those issues aside here.

intent, double effect reasoning runs counter to a natural understanding of moral norms as, in the first instance, specifying what one may or may not *do* rather than what one may or may not *intend*. As Jonathan Bennett puts the point:

the morality I consult as a guide to my conduct does also guide my intentions, but not by telling me what I may or may not intend. It speaks to me of what I may or may not do, and of what are or are not good reasons for various kinds of action; and in that way it guides my intentions without speaking to me about them.²⁴

From this point of view, double effect reasoning grants agent intentions the wrong kind of significance insofar as it grants an agent's intentions the same kind of salience in the deliberative process as considerations of the consequences and acceptability of what the agent proposes to do. It may be that an agent is led to obey a moral norm for selfish or otherwise unsavory reasons. That fact about his motivations tends to show the agent in a bad light, as selfish, cowardly, or whatever. But, from this point of view, that fact does not tend to show that the act itself was therefore impermissible for him to perform. Such an agent may not, as it were, receive any moral credit for his action, given his poor motivation. But that is distinct from the question of whether the act was permissible for him to perform.

Double effect reasoning is unavoidably implicated in the use of a principle R-conforming concept of punishment to draw the constitutional distinction between civil and criminal law. This is because the primary function of this distinction in constitutional law is to allocate rights against the government, for instance the right against retroactive legislation or twice being placed in jeopardy for the same offense. These rights, in other words, limit what it is permissible for government to do. Therefore, by allocating these rights on the basis of legislative intent, the intent-effects test makes legislative intent matter directly to what it is permissible for the state to

²⁴ Jonathan Bennett, "Morality and Consequences," in Sterling McMurrin (ed.), *The Tanner Lectures on Human Values*, vol. 2 (Cambridge: Cambridge University Press, 1981), p.97.

do. Thus: the state (probably) may go forward if the harms from sex offender registries are foreseen as side-effects of an attempt to improve public safety, but (certainly) not if they are intended as means of expressing condemnation or exacting retribution. Just as, according to the doctrine of double effect, whether a bomber may release his bombs over a target depends in part on whether he does so intending to terrorize the population by killing civilians, or intending to destroy a munitions plant while foreseeing inevitable civilian deaths, whether the state may impose these burdens retroactively depends on whether, in doing so, it intends to chastise or to regulate.

This point can be brought out more fully by bearing in mind that the role of the civil-criminal distinction in these cases is to allocate different types of rights among litigants. As I noted earlier, these are rights such as the right against being prosecuted twice for the same offense, the right to state-funded counsel, and so forth. The impact of these “procedural” rights is not always to prohibit the state from achieving certain outcomes, but it *is* to prohibit the state from achieving those outcomes in particular ways. Perhaps there is nothing *per se* wrong with putting someone into preventive detention, but there might nonetheless be something wrong with doing so without certain types of evidence or procedural safeguards. Similarly, while criminalizing X may be within the legislature’s power, the rights reserved for “criminal” defendants establish that the state can only punish someone for X-ing if the relevant statute was on the books at the time of the relevant conduct, and only if the state can bring forward evidence sufficient to establish guilt beyond a reasonable doubt. By imposing duties on the state to act in certain ways, these rights thereby foreclose options that would otherwise be available. Cases in which the status of a state-imposed burden as ‘civil’ or ‘criminal’ is contested are thus in a fundamental way cases about the conditions under which it is permissible for the state to achieve

a desired outcome in the manner it proposes.²⁵ It follows that insofar as the availability of these rights rests on the quality of the state's motivation in enacting the legislation in question, then what it is permissible for the state to do is in a crucial respect defined by the reasons for which it acts. This is what double effect reasoning contemplates, and what proponents of IIP contest.

To be sure, even if intentions do not matter to permissibility in a direct manner, they may matter in a more indirect manner; and they may also be significant along other axes of moral assessment. For instance, a person may perform a permissible act out of despicable motives, and this would surely color our reaction to him, even if it does not affect the permissibility of the act. Analogously, a punitively motivated rule might have a different symbolic valence than it would were it motivated by a concern for public safety. A member of the political community might reasonably feel that justifying a controversial measure on punitive grounds would cast an unflattering light on the community; perhaps the institutions enforcing the rule would come to be seen as to that degree reactive and vengeful. The political symbolism and social meaning of a law might well depend on the state's advertised reasons for adopting it, and these reasons may make the difference in determining whether the sanctions that the law authorizes are or are not punishment. But whether or not a law imposes punishment could only bear on the question of whether it is permissibly enforced without providing the rights and restrictions of criminal process through an application of double effect reasoning.

Proponents of IIP need not insist that the agent's intent *never* bears on permissibility, only that it does not bear on permissibility in a direct way. This leaves open the possibility that it might bear on permissibility indirectly. For instance, Scanlon has suggested that a pilot's

²⁵ "In the manner it proposes" because most of the rights for which the civil-criminal distinction is at all salient are, in American law, procedural rather than substantive in nature. A different legal regime could entrench substantive rights instead of, or in addition, to procedural ones, in which case the civil-criminal distinction would allocate *those* rights.

intentions in bombing a legitimate military target—to destroy the enemy’s wartime capacity, or to terrorize civilians—might be indirectly relevant to whether it is permissible for him to proceed, insofar as a pilot bent on terrorizing civilians is predictably more likely to carry out the sortie in a way that results in a larger number of civilian deaths than a pilot who acts with the intention simply of setting back the enemy’s war-making capacity.²⁶ So in this way the pilot’s intention would bear on permissibility, although not of its own accord but rather because of what Scanlon refers to as its “predictive” value vis-à-vis the sortie’s expected consequences.

Is it analogously conceivable that a state that is set on inflicting harm on individuals for perceived wrongs is more likely to act excessively than a state that is seeking to (for instance) enforce safety or health standards? If so, then perhaps state motive might matter to permissibility in this indirect way. However, even if a punitive motivation *is* predictive of excessively harsh outcomes, it is not clear that judicial analysis of state motive would be the appropriate response. For, unlike the bomber pilot, where it is difficult to control for unwanted outcomes once permission is given and the pilot is in the air, in the context of state decision-making, courts review allegedly excessive outcomes directly, by entertaining facial and as-applied challenges to such legislation. So there is little need to rely on state intent as an *ex ante* predictor, when what it is supposed to be predictive of—rights-infringing legislation—can be reviewed directly to confirm consistency with protected rights.²⁷

²⁶ Scanlon, *Moral Dimensions*, pp.31-2.

²⁷ Perhaps sanction-imposing laws are more akin to what Scanlon calls “incentive threats,” such as “your money or your life.” As Scanlon points out, the permissibility of at least some incentive threats appears to rest on the intention of the person making the threat. For instance, an employer may be permitted to threaten to fire an employee if she does not increase her sales figures, but not if she does not sleep with him. Firing the employee, while generally within the discretion of the employer, would not be an available option if motivated in that way. Scanlon’s explanation for these cases—which I find quite plausible—is that they turn on the “claims of those who are victims of threats to be free from certain forms of control,” rather than the “illegitimacy of the agent’s reasons.” *Moral Dimensions*, p.87. Of course, courts could (and in rare occasions, do) ask whether the state should be in the business of making

Suppose that whether the state intends to punish or merely to “regulate” does *not* bear on the permissibility of a proposed course of (state) action. In that case, the appeal to state intention to determine which rights the state is constitutionally required to observe would be quite mysterious. It might, however, be objected that the focus on state intent has nothing to do with double effect reasoning, but is motivated rather by a concern with the stigmatic harms of a criminal conviction. The symbolic meaning of a statute is significantly driven by public understanding of whether or not that statute is intended to punish those to whom it applies; and perhaps, the objection might continue, robust constitutional protections in the criminal law are meant to protect those facing the prospect of such heavy stigmatic burdens. So, one might conclude, there is a reason to insist on proof of punitive intent prior to allocating constitutional criminal rights that is independent of double effect reasoning.

I have no quarrel with the empirical part of this claim; as I noted earlier, it is indeed plausible that public perception of a statute as punitive may color public reaction, both formally (e.g., by employers) and informally (by family, friends, and acquaintances), to a conviction under that statute. However, this objection fails to connect for two basic reasons. First, it fails as an explanation of why, in principle, a court might want to focus on state intent rather than look to the creation of stigma itself. Second, it is flatly inconsistent with what the Supreme Court has actually said about its interest in state intent.

First, while the concern with stigma might explain why legal doctrine should be responsive to sources of stigmatic harm, that concern does not explain why legal doctrine should take the indirect option of regulating stigma by regulating one of the means of generating it, rather than

incentive threats targeting various types of conduct, or whether doing so inappropriately invades a sphere of private autonomy. In contrast, however, the question the civil-criminal distinction raises is not *whether* the state may make the threat at all, but whether it may make it *unaccompanied* by the rights and restrictions of criminal process.

regulating it directly—particularly when indirect regulation of this form is known to be significantly under-inclusive. Suppose, that is, that we want to ensure that people who are likely to be severely stigmatized have the benefit of enhanced procedural protections; why, then, should we restrict those protections to cases in which the stigma was created by a criminal conviction, and exclude cases in which, perhaps equally severe, stigma results outside traditional criminal process? Consider again community notification requirements for former sex offenders. It would be quite implausible to claim that whether a person who is forced to broadcast his status as a former sex offender to his friends and neighbors is stigmatized depends on the motives a court attributes to the state legislature. Yet in this case, the intent-effects test only grants procedural protections to those who can prove a punitive state motive—a result that is perverse under the proposed explanation for the Court’s concern with state intent. As this example illustrates, if the underlying concern is to protect individuals from severe stigmatization, then using state intent as a form of proxy regulation is worse than otiose; it is downright counter-productive.

It is also not plausible to suggest that courts are unable to regulate stigma-creating legislation directly, and must for some reason resort to indirect regulation of state intent. For instance, in a case concerning a provincial government’s attempt to retain custody over a mother’s children, the Supreme Court of Canada held that the “stigma and distress” of having one’s children removed from one’s custody were sufficient to engage s.7’s security of the person interest.²⁸ There was no hint of a need to inquire into the state’s purposes in removing the child, whether it was to impose “punishment” or to promote the best interests of the child. Similarly, in *R. v. D.B.*, a case involving, *inter alia*, a reverse onus provision of the Youth Criminal Justice

²⁸ *New Brunswick v. G.(J.)*, [1999] 3 S.C.R. 46, at para. 61.

Act with respect to the lifting of publication bans for youth accused of serious crimes, the Court noted that publication “renders the sentence significantly more severe” on account of the “psychological and social stress” associated with being publicly labeled a criminal, and consequently held that the reverse onus provision violated s.7.²⁹ Similarly, in the American context, Justice Stevens suggested in his dissent to *Smith v. Doe* that the stigmatizing impact of community notification was, in his view, sufficient to “deprive the registrants of a constitutionally protected interest in liberty.”³⁰ Justice Stevens’ proposal, in other words, was to regulate stigma-imposing legislation directly, i.e., *as* stigma-imposing legislation, rather than engage in an inquiry into state intent. In short, there appears to be little reason to think that we are somehow in principle only able to regulate stigmatic harms through the indirect and under-inclusive lens of state intent.

Second, the United States Supreme Court has in any case flatly rejected the view that its reason for inquiring into state intent is to control for the possibility of stigmatic harm. Justice Thomas, writing for the majority in *Doe*, explicitly acknowledged that the challenged sex offender registry would result in stigma, and possibly “adverse consequences ... running from mild personal embarrassment to social ostracism,” and would expose the registrant to a significant degree of “humiliation,” particularly in light of the availability of the information on

²⁹ [2008] 2 S.C.R. 3 at paras. 84-87. Of course, the Supreme Court of Canada has been very clear that the Charter is sensitive to stigmatic harms in the criminal law, as well. See *R. v. Martineau*, [1990] 2 S.C.R. 633 at para. 12, and *Vaillancourt v. the Queen*, [1987] 2 S.C.R. 636 (holding that, on account of the stigma of being labeled a murderer, the Crown is required to prove subjective foresight of death as a minimum *mens rea* for murder).

³⁰ *Doe*, 538 U.S. at 111. The Alaska Supreme Court, when subsequently asked to determine whether ASORA violated Alaska’s own *ex post facto* ban – which the court had previously interpreted in light of federal law – balked at following the majority in *Doe*, and instead sided with the dissenters on account of ASORA’s stigmatizing impact. *Doe v. State*, 189 P.3d 999, 1009 (Alaska 2008).

the Internet.³¹ Nevertheless, the Court turned aside the petitioner’s argument on the grounds that the stigma of the registry was not “an integral part of the objective of the regulatory scheme,” and that the “purpose and principal effect of notification are to inform the public for its own safety, not to humiliate the offender.”³² Alaska’s intention was to provide a non-punitive “civil regulation,” and the fact that in doing so it severely stigmatized registrants did not support a ban on its retroactive application.³³ At the same time, Justice Thomas also acknowledged that, had Alaska’s legislature been motivated by a punitive intention, then the registry would have fallen clearly on the “criminal” side of the line, and been subject to the *ex post facto* ban, regardless of whether it created stigmatic harm.³⁴ In short, Justice Thomas (a) explicitly conceded that Alaska’s registration scheme imposes severe stigmatic burdens, but held that (b) it was not within the scope of the *ex post facto* clause because it was not punitively motivated, while acknowledging (c) that if it *were* punitively motivated, it would fall within the scope of the clause regardless of whether it was stigmatizing. A clearer and more thoroughgoing rejection of the claim that the intent-effects test is meant as proxy regulation of stigmatic harm is hard to imagine.

To sum up: not only does the attempt to explain the focus on legislative intent in terms of stigma fail to explain what it purports to explain, it is plainly inconsistent with how the Supreme Court has actually interpreted and applied the intent-effects test. As careful attention to the actual structure of Supreme Court doctrine reveals, punitive intent matters *directly* to the allocation of constitutional rights, not as an indirect proxy for stigma.

³¹ *Smith v. Doe*, 538 U.S. at 99.

³² *Id.*

³³ *Id.* at 105-06.

³⁴ *Id.* at 92 (“If the intention of the legislature was to impose punishment, that ends the inquiry.”)

Finally, one might perhaps argue that the Supreme Court's various pronouncements about the importance of punitive purpose in its civil-criminal analysis shouldn't be taken to reveal anything about the criminal, versus civil, law. Perhaps these pronouncements merely serve to express a more general principle of judicial deference to legislative decision-making.³⁵

The argument is too glib by half. Were the real concern one of pure deference to the legislature, it would be far easier for the Supreme Court to foreclose all such litigation by announcing that the relevant legal standard is: how did the legislature label the statute? Controversies under this sort of test would be hard to imagine, and deference to legislative rights-allocation would be complete. But no justice has ever gone quite that far. Although the label applied to the statute is usually cited in support of its putatively "civil" character, it is not dispositive. And the reason for this is clear. What matters is whether the legislature was motivated by a punitive purpose, not whether it intended to *call* the statute "criminal."

The same goes for the thought that the intent-effects test, whatever other faults it may suffer from, at least makes it easy for courts and litigants to know whether any particular statute is or is not punitive. Predictability and ease of administration are, of course, serious concerns which institutions and legal rules are rightly attentive to. However, they fail to explain the intent-effects test, for it would be far easier for the Supreme Court to defer to legislative labeling rather than get involved in the search for inevitably elusive state intent. This would be far easier to administer, as there are far fewer questions about how a legislature has labeled a statute than

³⁵ It is worth pausing here to clarify a methodological point. It is entirely possible that the proper attitude to Supreme Court doctrine is to disregard the merits of what is actually said and to instead speculate about personal or institutional motives for saying it. That is, evidently, not the attitude I adopt here. My approach takes the Court's doctrinal pronouncements at face value, and traces out their logical presuppositions, in this case to a well-recognized position in moral theory. As such, the possibility that none of the justices were personally moved to support the intent-effects test on account of a belief in double effect reasoning is neither here nor there. My argument is not fundamentally about what the Supreme Court's "incentives" are for choosing this or that doctrinal test; it is about the logical presuppositions of that test.

about what it intended in enacting it. However, the Supreme Court has consistently and expressly rejected this view of the intent-effects test, including in a very recent case.³⁶

Interestingly, neither courts nor commentators have appreciated the role of double effect reasoning in underpinning the Supreme Court's intent-effects test specifically, or its conception of what is distinctive about the criminal law more broadly.³⁷ Perhaps the reason for this is that the rationale for insisting on an inquiry into state intent is primarily seen as a consequence of principle R—that is, as inherent in the concept of punishment, not as the result of any exercise of moral reasoning. This may appear to be a firmer foundation for the doctrine, given that there is (maybe) more consensus on punishment's sensitivity to intentions than there is on the proper role, if any, of doctrines like that of double effect in moral reasoning. But this is pure illusion. Applying principle R in cases like *Doe* and *Hendricks* just is to settle questions of permissibility by reference to an agent's intentions in acting. It is an instance of double effect reasoning regardless of how it is packaged.

Naturally, this is not to say that the judges who write such decisions are themselves advocates of double effect reasoning, nor is it to say that the Supreme Court has explicitly endorsed the doctrine of double effect, or would endorse it if presented with the question.³⁸ It would of course be tendentious to insist that a court that applies the terms of a legal rule

³⁶ See *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2583 (2012) (“It is true that Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other. Congress may not, for example ... escape the Double Jeopardy Clause’s constraint on criminal sanctions, by labeling a severe financial punishment a ‘tax.’”) (Opinion of Roberts, C.J.) See also *Trop v. Dulles*, 356 U.S. 86, 94 (1958) (Warren, C.J., plurality opinion) (rejecting, in context of citizenship revocation, the government’s reliance on statutory labeling, and stating that “[m]anifestly, the issue of whether [a challenged statute] is a penal law cannot be thus determined.”)

³⁷ Two recent papers have, however, drawn this connection. See Husak, “The Costs to Criminal Theory of Supposing that Intentions are Irrelevant to Permissibility,” and Kolber, “Unintentional Punishment.”

³⁸ For a stimulating and sophisticated discussion of the impact of double effect reasoning in the Supreme Court’s First Amendment and physician-assisted suicide jurisprudence, see Seana V. Shiffrin, “Speech, Death and Double Effect,” *New York University Law Review* 78 (2003): pp.1135-1185.

necessarily endorses the presuppositions built into that rule. It may be that the statutory or constitutional provisions the judges are applying require them to distinguish cases based on the relevant actor's intent. (Though it should perhaps be borne in mind that the intent-effects test is a rule of the Supreme Court's own making.) At the constitutional level, this is most plausible in the Eighth Amendment context, since unlike the Fifth or Sixth Amendments, and the *ex post facto* and Bill of Attainder clauses, the Eighth Amendment specifically refers to "cruel and unusual punishments." So if an ordinary understanding of punishment imports a reference to an agent's aims, then there may at least be textual support for the emphasis on a "subjective" element in, for instance, Eighth Amendment prison conditions cases.³⁹ But regardless of whether the source is textual mandate or judicial decision-making, the point is that deciding which rights a defendant may claim against the state on the basis of the state's intentions is to presume—insofar as those rights set limits on permissible state action—that intentions directly influence permissibility. Even if not an appeal to the doctrine by name, this is an appeal to double effect reasoning all the same.⁴⁰

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³⁹ See, e.g., *Farmer v. Brennan*, 511 U.S. 825 (1994); *Estelle v. Gamble*, 429 U.S. 97 (1976); Sharon Dolovich, "Cruelty, Prison Conditions, and the Eighth Amendment," *New York University Law Review* 84 (2009), pp. 881-979.

⁴⁰ Suppose, for instance, that a legal rule classifies water as potable once it has been heated to 85F. Such a rule would appear to reflect the view that heating water to 85F is sufficient to kill dangerous parasites. But to say this much is of course not to say that the judges who apply the rule are themselves committed to the view that heating water to 85F renders water safe to drink. It is, however, to say that insofar as the legal rule is meant to ensure that water meeting the standard it sets *is* safe to drink, i.e., potable, it depends upon—and in that sense is committed to—the truth of the implied proposition. Analogously, a constitutional rule that classifies legal rules on the basis of the underlying state intent depends on the soundness of double effect reasoning because it makes what the state may permissibly do depend, in part, on whether the state intends the harm it inflicts or whether it is merely the foreseen side-effect of some other aim.

I have claimed that the United States Supreme Court has accepted an orthodox conception of punishment as intentionally inflicted hard treatment. I have also argued that, in doing so, the Supreme Court has made the availability of certain rights hinge on findings of state intention, and that this, in turn, reflects an implicit commitment to the proposition that what the state may permissibly do depends on what its intentions in acting are. I have pointed out that the soundness of double effect reasoning remains quite controversial among moral philosophers. I do not propose here to make any headway on the dispute between proponents of double effect reasoning and IIP. Rather, I shall turn to consider what this diagnosis means for theorists who reject double effect reasoning. Those who reject double effect reasoning and accept some version of IIP owe us, if this diagnosis is correct, a dramatically different explanation of how to decide when the rights of “criminal” defendants are triggered, and, more generally, of the distinctiveness of the criminal law.

I stress that there is more at issue here than simply the correct doctrinal test for whether a disputed case falls on the “civil” or “criminal” side of the line. As I have noted, there is little dispute about that in the vast majority of cases. The significance of cases like *Smith* and *Hendricks* lies rather in what they reveal about American constitutional law’s underlying conception of what the criminal law is about, and thus the ostensible point of distinguishing criminal from non-criminal matters. The view that has consistently garnered a majority on both the Supreme Court and in the scholarly literature is that the criminal law, unlike law in the civil mode, is necessarily punishment-imposing. Once that commitment is in place, the intention-sensitivity of punishment—principle R—then very naturally leads to the doctrinal emphasis on legislative intent that the Supreme Court has long insisted upon.⁴¹

⁴¹ Husak is particularly clear about this. Although “the *effects* of [civil commitment] may be indistinguishable from genuine punishments,” Husak argues, in the former case we would avoid the

Now, one conceivable response would be to reject the civil-criminal distinction as entirely illusory or pointless. But this might seem too breezily dismissive. After all, the distinction between civil and criminal law is deeply entrenched, of long historical pedigree, and is common to most, and perhaps all, Western legal systems.⁴² It would thus be surprising to learn that nothing can be said in favor of the distinction, or at least something more or less closely resembling it. Whatever philosophical scruples the current status quo view might raise, at least it has an account of the distinction's significance. I shall, therefore, pursue a different strategy.

As a description of everyday usage, I suppose it must be right to say that the sentence, "A punishes B," if true, entails that A has a particular attitude or characteristic set of attitudes toward B. So I shall concede that punishment, at least as we are accustomed to conceiving of it, must to that extent be a retributive practice—that is, a practice structured by principle R.⁴³ What I suggest we find less obvious is the proposition that the criminal law is essentially about punishment; that it is, in other words, essentially an institution for the imposition of punishment. Perhaps what is distinctive about the criminal law is not the *punitive* character of its sanctions, but the *severity* of its sanctions. From this point of view, the point of distinguishing between civil and criminal law is not to distinguish between those state actions that express punitive purpose and those that don't. It is to distinguish between those that are seriously invasive of basic individual interests and those that are not. On this view, the allocation of special rights to criminal defendants then falls naturally into place as a means of protecting individuals facing that

stigma and deprivation if we could, whereas that is basically the point of the latter. Thus, "what differs is the intention of those who impose the sanction." Therefore, Husak concludes, "punishment—and thus the criminal law itself—cannot be identified without reference to intentions." "The Costs to Criminal Theory of Supposing that Intentions are Irrelevant to Permissibility," p.58 (my emphasis).

⁴² Paul Robinson, "The Criminal-Civil Distinction and the Utility of Desert," *Boston University Law Review* 76 (1996): p.201.

⁴³ As even Judge Posner has suggested; see *Duckworth*, 780 F.2d at 652.

kind of an invasion of their interests. It is after all plausible that defendants in cases like *Smith* and *Hendricks* are only secondarily interested in whether they are being punished. Probably, they are primarily interested in claiming that what the state is doing to them—forcing them to register as sex offenders, incarcerating them in wildly dangerous conditions, seizing their assets—is constitutionally impermissible. The only reason punitiveness enters the picture for them is because of the Supreme Court’s insistence that ostensibly criminal rights are available only to those who are being punished.

A complete specification of the civil-criminal distinction along these lines would start with identifying specific individual interests, or at least a procedure for arriving at agreement about what belongs on such a list. Plausible candidates for inclusion on this list would be the interest in free association, freedom of movement and occupation, and the interest in bodily integrity. The stigma of being treated in certain ways might also stand to be considered in this regard, particularly in light of the impact of a criminal conviction on employment, housing, and so forth. Second, it would specify when setbacks to those interests are sufficiently serious that side-constraints on the state’s ability to create such setbacks to interests are appropriate. Third, it would contain an account of the rights appropriate to protect those interests, and a jurisprudence describing in detail how they apply in commonly arising situations.⁴⁴

The procedure just sketched is naturally conceived of as a problem for ideal theory. But it is not necessary, for my purposes here, to provide such a theory. First, because basic interests such as freedom of association and movement will likely be on any resultant list, we can use those as our primary examples, leaving the precise contours of the list unspecified for now. Second, we can turn to state and federal constitutions, and perhaps entrenched common law rules, as

⁴⁴ I am assuming that the interests in question are not fungible, and thus are not to be aggregated into an overall account of a person’s welfare. This is an important assumption, but not one that I can defend here.

providing an account of the rights meant to protect the interests defined in the first step. Thus, although we might imagine different rights than the ones we in fact recognize, at least in the United States consensus has settled on such rights as the right against conviction unless the state proves its case beyond a reasonable doubt, the right against self-incrimination, double jeopardy, provision of counsel to the indigent, the prohibition on retroactive and overly vague laws, and the like as the rights that are reserved for defendants facing serious deprivation at the hands of the state.

Perhaps none of this is terribly controversial. What may be controversial is the claim that deciding whether or not a defendant is entitled to claim a given right at no point requires deciding whether or not he is being punished. On this view, what matters is whether he is facing, in the relevant sense, a sanction that jeopardizes a protected interest to the relevant degree. An affirmative answer is sufficient to entitle defendants to raise claims based on recognized criminal rights. This account draws on the sense that the criminal law is an object of particular concern because of the harshness of the sanctions it metes out. That much seems intuitive. But the account foregoes any mention of the retributive motive in punishment, and with it the idea that crimes must be acts which provide a reason in favor of inflicting harsh treatment. This part may seem less intuitive, even flatly wrong. After all, authors like Boonin and Husak have pointed out that eliminating the element of subjective motivation from our conception of punishment is to make the conception of punishment implausibly expansive, encompassing any serious harm the state imposes on people, foreseen *or* intended. But, they might say, it would be absurd to say that when the Massachusetts legislature authorizes a new runway at Logan airport, it is thereby “punishing” all the city residents living under the proposed runway’s flight path—even though their quality of life is unquestionably diminished. Perhaps some of these residents would prefer a

short prison sentence, probation, or community service to living under the flight path of a major metropolitan airport, but that does not make the two equivalent from the point of view of punishment. Why not? Because the Massachusetts legislature is not motivated to act by the prior bad acts of those citizens.

My strategy allows me to neatly and entirely sidestep this objection. After all, I do not propose to adopt a purpose-neutral conception of punishment. As I said, I concede that any recognizable conception of punishment must be one that incorporates reference to the punisher's reasons for acting, and thus one that adheres to principle R. What I deny is that punishment, thus understood, is relevant to whether a challenged statute is "criminal" or "civil," and so relevant to determining what rights defendants may claim. So I agree that the unfortunate residents under the city's new flight path are not punished, and I agree that they have none of the rights criminal defendants typically have, e.g., a right to be provided with subsidized legal counsel in fighting the proposal, or to demand that the city prove the necessity of thus situating the proposed runway beyond a reasonable doubt. But my acceptance of the latter proposition is not conditioned on my acceptance of the former. It is conditioned on the proposition that the harm to them is neither of the right kind nor sufficiently serious to justify granting them those kinds of rights.⁴⁵

The proposal to decouple the legal category of the criminal law from the concept of punishment may come across as counter-intuitive. Certainly, it runs directly counter to the view that the function of the criminal law is to administer punishment: to determine who qualifies for it, under what conditions, and what kind and how much are appropriate. These are, of course, functions that the criminal law must fulfill. But they are functions that any body of law that

⁴⁵ One exception, as I have noted above, may be the Eighth Amendment, which, unlike the other rights-granting provisions in the Constitution, specifically refers to "punishment." So it may be that, as a pure doctrinal matter, Eighth Amendment rights – such as they are – would be unaffected by my proposal.

imposes significant burdens on individuals has to fulfill as well. It is undoubtedly true that a great deal of official, state-sanctioned punishment is conducted under the auspices of the criminal law. But this is not a conceptual truth. It is rather because the forms of state-sanctioned punishment to which we are accustomed tend to be so severe that heightened protections are appropriate for individuals threatened with them. Conversely, less invasive state action might well still be punishment, but would not, for that reason alone, entitle those subject to it to the criminal law's protections.

One advantage of the view I have sketched is that it dovetails nicely with received wisdom in other areas of the criminal law. Most obviously, consider the standard explanation for the insistence on proof beyond a reasonable doubt in criminal cases. According to this explanation, the consequences of a criminal conviction are typically so dire that we should prefer a bias in favor of false negatives over false positives—in terms of the famous Blackstone ratio, that we should prefer that ten guilty men go free than that one innocent man be convicted.⁴⁶ Everything here turns on how badly things will go for the miserable convict, and nothing on the fact that, in sentencing him, the court will be intending to express condemnation for his prior wrongful act. As with the standard of proof, the criminal protections I have been focusing on are similarly based on a concern with the likely consequences of a sanction on an individual. And since these consequences do not depend on the legislature's motivations, the class of defendants entitled to their protection should not depend on them either.

I have been focusing on cases in which it is not immediately apparent whether we should say the state is “punishing” people. However, the view I have sketched has broader implications.

⁴⁶ For illuminating discussion of the Blackstone ratio, and whether it is a ratio worth caring about, see Larry Laudan, *Truth, Error and the Criminal Law* (Cambridge: Cambridge University Press, 2008), chs. 2-4.

Most notably, it suggests that the current allocation of criminal rights is almost certainly both over- and under-inclusive. It is over-inclusive insofar as the outcome of nominally criminal proceedings can frequently be fairly minor sanctions, such as suspended sentences, probation, or fines. Stripping defendants in these sorts of cases of at least some of the panoply of criminal rights might make enforcement both cheaper and quicker.⁴⁷ Conversely, not all criminal process need be punitive, in the sense of motivated by retributive reasons. Perhaps some remedies are imposed for purely deterrent or incapacitative reasons, for instance strict liability regulatory offenses or “three-strikes” repeat offender laws. Moreover, there are ostensibly non-criminal proceedings in which a great deal may be at stake (immigration, occupational disbarment, severe stigmatic harms, and so forth); in these cases, extension of the protections of criminal procedure might well be appropriate.⁴⁸ It is entirely unclear why a person may be deported on the basis of clear and convincing evidence, when to sentence him to six months of probation requires proof beyond a reasonable doubt.⁴⁹ If it is unfair to retroactively increase a criminal fine for engaging in a prohibited activity, it is unclear why it should not also be unfair to retroactively authorize ruining a person’s life by publicly branding him a sex offender. There is, on the account I have

⁴⁷ One might object that removing, say, double jeopardy protection from defendants in low-level cases leaves those defendants vulnerable to continued prosecutorial harassment. The response is that in light of the relatively low stakes, this risk is no worse than it is in other, ostensibly civil, cases in which there are no double jeopardy protections but only the regular *res judicata* preclusion doctrines. Perhaps, if it were established that prosecutors—unlike civil plaintiffs and administrative agencies—are uniquely prone to harassing people, then double jeopardy protections would be appropriate even in low-level cases. But that would not be because the cases are criminal ones. It would be because the expected harm is greater.

In any case, I note that current law does not extend the full panoply of criminal protections to all “criminal” defendants. See, e.g., *Argersinger v. Hamline*, 407 U.S. 25, 38 (1972) (limiting right to counsel in federal court to cases where imprisonment is imposed); *Scott v. Illinois*, 440 U.S. 367, 374 (1979) (applying *Argersinger* to state courts); *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) (acknowledging that Sixth Amendment jury trial right does not apply to crimes carrying a maximum penalty of less than six months.)

⁴⁸ See Issachar Rosen-Zvi and Talia Fisher, “Overcoming Procedural Boundaries,” *Virginia Law Review* 94 (2008): p.139.

⁴⁹ *Woodby v. Immigration and Naturalization Service*, 385 U.S. 277 (1966).

sketched, no need to insist that these remedies are all instances of punishment under principle R before we can conclude that defendants facing them be the object of heightened legal concern. It is sufficient that they constitute serious invasions of basic interests.⁵⁰

I stress that it is not my aim here to propose an alternative doctrinal test for courts to adopt. My proposal is, rather, an alternative conceptual framework for thinking about the civil-criminal distinction, particularly as that distinction bears on the allocation of distinctive criminal rights. Nevertheless, it is worth situating this proposal in more standard doctrinal terms. The view I have sketched is perhaps best thought of as a proposal to rely on due process as the basis for the allocation of important substantive and procedural rights. Due process, on this view, would be engaged when certain types of basic interest—freedom of movement, severe stigma, and the like—are potentially subjected to serious state invasion.

It should be borne in mind that the functional significance of the civil-criminal distinction in American constitutional law is largely a result of judicial decision-making; it is not derived from some commandment somehow indelibly inscribed in the text of the Constitution. For instance, the ban on *ex post facto* legislation does not refer to either punishment or the criminal law; the right against double jeopardy is premised on the protection of “life or limb”; and the right to proof beyond a reasonable doubt was a common law requirement, later entrenched by due process.⁵¹ As a matter of constitutional common law, these rights could straightforwardly be extended in a more functional, interest-protecting manner. There would seem to be a choice in those instances, notably the Sixth Amendment and portions of the Fifth, where reference to the civil-criminal distinction is present in the text. Either due process could be invoked to create

⁵⁰ See Laudan, “Is It Time to Put ‘Proof Beyond a Reasonable Doubt’ Out to Pasture?,” available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815321, pp.18-20.

⁵¹ U.S. Const. art. I, §§9-10; U.S. Const. amend. V; *In re Winship*, 397 U.S. 358 at 361(1970).

essentially parallel rights, or the Court could formally, as a doctrinal matter, abandon its punishment-centered conception of the criminal law for a conception that considers a law to be “criminal” insofar as it threatens serious state invasion of basic interests. Either approach would have the effect of curtailing the significance of double effect reasoning by largely eliminating the significance of principle R for the allocation of rights; and either approach would achieve an allocation of rights that is driven by the protection of urgent interests rather than a formalistic conception of the criminal law.⁵²

By way of comparison, I note that the approach sketched here is consistent with the Supreme Court of Canada’s interpretation of s.7 of the Charter of Rights and Freedoms. The Supreme Court of Canada has held that a liberty interest under s.7 is engaged whenever incarceration is an option, even in regulatory contexts.⁵³ It has rejected the idea that fundamental rights-protecting instruments should be differentially applied on the basis of whether or not a litigant claiming s.7 protection is being “punished.” In *Charkaoui v. Canada*, a case challenging the use of secret evidence to detain permanent residents or foreign nationals, the government argued that s.7’s protection of life, liberty, and security of the person did not apply in the immigration context.⁵⁴ The Court rejected the government’s argument, and adopted Hamish Stewart’s claim that s.7 applies “whenever one of the three protected interests is engaged. Put another way, the principles of fundamental justice apply in *criminal* proceedings, not because they are criminal proceedings, but because the liberty interest is always engaged in criminal

⁵² Though, as I have noted, perhaps not entirely, given the explicit reference in the Eighth Amendment to “punishment.” But, as the Supreme Court has recognized, “punishment” is a broader concept than that of *criminal* punishment, and the Eighth Amendment thus applies outside avowedly criminal contexts. See *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (affirming that the excessive fines clause of the Eighth Amendment applies to *in rem* forfeiture proceedings, as the Eighth Amendment is intended to “limit the government’s power to punish,” and punishment embraces both civil and criminal actions.)

⁵³ *Reference re Section 94(2) of the B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

⁵⁴ *Charkaoui v. Canada*, [2007] 1 S.C.R. 350.

proceedings.”⁵⁵ Moreover, the Court has interpreted s.7 to require the state to provide rights analogous to those familiar in traditionally “criminal” contexts.⁵⁶

Finally, while this approach may seem quite alien to the United States Supreme Court’s current fascination with legislative intent, this was not always so. During the Warren Court era, and for some time thereafter, the Supreme Court relied on due process rather than the civil-criminal distinction to allocate rights typically reserved for defendants in “criminal” cases.⁵⁷ Justice Marshall gave eloquent expression to this view of the due process clause in a dissenting opinion to *Bell v. Wolfish*, a case concerning pre-trial detention. On Justice Marshall’s view, the “proper inquiry ... is not whether a particular restraint can be labeled ‘punishment,’” but “as with

⁵⁵ Id. at paras. 12-18 (citing Hamish Stewart, “Is Indefinite Detention of Terrorist Suspects Really Constitutional?” *University of New Brunswick Law Journal* 54 (2005): pp.235-250). See also *Charkaoui v. Canada*, [2008] 2 S.C.R. 326, para. 52 (reaffirming that s.7 applies in non-criminal, immigration contexts in which “serious consequences” for the liberty and security interests of the individual are at stake).

⁵⁶ See *New Brunswick v. G.(J.)*, [1999] 3 S.C.R. 46 (requiring, under s.7, provision of state-funded legal counsel in the context of a provincial government’s attempt to extend its custody over the appellant’s three children for an additional six months.)

⁵⁷ See *Application of Gault*, 387 U.S. 1, 27-28, 33-34, 41, 49-50 (1967) (holding that the serious interests at stake grounded due process claims to advance notice, provision of counsel, the privilege against self-incrimination in state juvenile delinquency proceedings, regardless of the “civil” label applied to those proceedings); *Specht v. Patterson*, 386 U.S. 605, 608-09 (1967) (holding that due process requires presence of the defendant, accompanied by counsel, an opportunity to be heard, to confront witnesses, cross-examine, and offer evidence in hearing under state sex offender act that authorized potential indeterminate life sentence, despite the fact that punishment under this act was not “designed not so much as retribution as it is to keep individuals from inflicting future harm”); and *In re Winship*, 397 U.S. at 366-368 (affirming *Gault*’s rejection of “civil labels and good intentions,” and holding that due process requires proof beyond a reasonable doubt in juvenile delinquency proceedings).

The Court has relied on due process to require heightened protections in non-criminal cases where the stakes are particularly high. See *Addington v. Texas*, 441 U.S. 418 (1979) (holding that due process requires clear and convincing standard in civil commitment hearings on grounds of individual liberty interests) and *Schware v. Board of Bar Exam. of State of New Mexico*, 353 U.S. 232 (1957) (holding that due process prohibited state from excluding someone from practicing his chosen profession on the basis of his membership in the communist party some fifteen years prior).

In other cases, the Supreme Court has used due process to extend the rights of criminal defendants in novel contexts. See *Marks v. United States*, 430 U.S. 188, 191-2 (1977) (relying on due process to extend ex post facto ban to judicially developed legal standards) and *Jackson v. Indiana*, 406 U.S. 715, 731 (1972) (holding that “indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial” is barred by due process).

other due process challenges, the inquiry should be whether the governmental interests served by any given restriction outweigh the individual deprivations suffered.”⁵⁸ The majority’s focus on “official intent” was, Justice Marshall added, “unrealistic in the extreme.”⁵⁹ Although this approach to the allocation of rights was gradually eclipsed by the Court’s increasingly insistent focus on state intent—an approach that, I have argued, starts with a principle R-conforming conception of punishment and ends up by building double effect reasoning into constitutional law—this consensus is relatively recent, and perhaps not entirely stable.⁶⁰

What does the approach I have sketched suggest for judicial deference to the legislature? If judicial deference is meant to be less than complete, then the approach I have sketched provides a principled basis for deciding, not *whether* the state may impose harsh sanctions (including stigmatic harms) on someone, but rather on *how* the state must do so. I have pointed out that a rule that makes the decision turn on the state’s intent rests on a quite controversial position in moral theory. But, as I have further pointed out, if we reject the view that the state’s intentions partially define the scope of what it is permissible for it to do, then we must find some other rule to use in deciding when deference is appropriate. The possibility considered here is that the rule for deciding when to defer be based on the impact of legislation on certain classes of protected individual interests, however that legislation happens to have been motivated. In fact, it is quite possible that a punishment-based conception of the criminal law is *less* deferential than the interest-based conception sketched here. For on the latter view, even a poorly motivated statute passes muster so long as the rights it allocates are commensurate with the burdens it imposes. In

⁵⁸ *Bell v. Wolfish*, 441 U.S. 520 at 564 (1979) (Marshall, J., dissenting).

⁵⁹ *Id.* at 565.

⁶⁰ See *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (extending Sixth Amendment requirement of effective assistance of counsel to advice regarding the possibility of deportation as a “collateral consequence” of a criminal conviction.)

contrast, the intent-effects test entails that a poorly motivated but only modestly burdensome statute would—in theory—be subject to searching judicial review, resulting in the allocation of significant constitutional rights to defendants against express legislative will.⁶¹

3.

The foregoing discussion may seem rather abstract. I now turn to consider what it suggests for concrete cases, applying it to the cases with which I started, *Doe* and *Hendricks*.

Consider first the issue of retroactive application of sex offender registries, at issue in *Smith v. Doe*. Conceptually speaking, these are easy cases. The first step is to identify the interests allegedly jeopardized by registration as a sex offender. These, we may assume, tend to fall under three headings: an interest in employment, in housing, and against social stigmatization (especially an increased risk of being the target of vigilante violence and harassment). There may be other harmful consequences to sex offender registration as well, but suppose that these are the most damaging ones. The next question is to what degree registration sets back those interests. This is, naturally, an empirical question.⁶² Let us assume that, at least for some non-trivial number of people, registration as a sex offender seriously harms core interests. Given these two

⁶¹ A parallel to a purpose-neutral conception can be found in the structure of rational basis review in equal protection doctrine. Actual state purpose is immaterial to rational basis review, since all the court is looking for is some legitimate good that the state may conceivably advance in a not too egregiously stupid or venal manner. It is not assessing the propriety of the actually effective motivation(s), assuming they are discernible. In other words, rational basis review tests the bounds of permissible state action, and ignores what actually motivated that action.

⁶² See J.J. Prescott and Jonah E. Rockoff, “Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?,” *Journal of Law and Economics* 54 (2011): pp.161-206 (finding a statistically significant negative correlation between registration laws and sex offense rates, but a countervailing significant positive correlation between community notification laws and recidivism). See also Kristen Zgoba, et al, “Megan’s Law: Assessing the Practical and Monetary Efficacy” at p.38, available at: <https://www.ncjrs.gov/App/publications/Abstract.aspx?id=247350> (finding broadly similar, albeit somewhat equivocal, results).

conditions, then someone obliged by the state to register as a sex offender faces a serious invasion of basic interests, regardless of what the legislature intended, and thus is entitled to raise *ex post facto* objections to retroactive application of the statute.

Would such a claim be successful? It seems clear that it would. The Indiana Supreme Court, en route to concluding that Indiana was barred from applying its sex offender registration statute retroactively, stated that, “the underlying purpose of [Indiana’s] Ex Post Facto Clause is to give effect to the fundamental principle that persons have a right to fair warning of that conduct which will give rise to criminal penalties.”⁶³ This was also the approach taken by Justice O’Connor’s majority opinion in *Rogers v. Tennessee*, in which O’Connor described the point of the federal Constitution’s ban on *ex post facto* legislation as providing fair notice that certain types of conduct (e.g., stabbing) are subject to criminal sanction.⁶⁴ The principle underlying this suggestion is a view of the criminal law as action-guiding: since it was entirely implausible to suppose that Rogers stabbed his victim in anticipation that he would die in fifteen rather than twelve months—that is, in anticipation of reduced liability on account of the common law “year and a day” rule—Rogers could not complain of unfair surprise when the Supreme Court of Tennessee abrogated the rule in his case, rendering him liable for second-degree murder.⁶⁵ But

⁶³ *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) at 377. Other states have recently come to the same conclusion. See *Maine v. Letalien*, 985 A.2d 4 (Me. 2009). As I noted earlier, the Alaska Supreme Court ultimately invalidated Alaska’s sex offender statute under Alaska’s own *ex post facto* clause. *Doe v. State*, 189 P.3d 999 (Alaska 2008).

⁶⁴ Here is O’Connor interpreting *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the leading case on the *ex post facto* clause: “its rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as these concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct.” *Rogers v. Tennessee*, 532 U.S. 451 (2001) at 459.

⁶⁵ Since extending the scope of the result element in homicide in this way means increasing the *ex ante* likelihood that any given act of stabbing will result in a legal homicide, it is not strictly true that the state court’s elimination of the year-and-a-day rule had *zero* bearing on *ex ante* deliberation. O’Connor’s argument thus seems to require something along the lines of a *de minimis* limitation: one only has a valid *ex post facto* claim if the change in the law effects a significant change in the expected costs of one’s acts.

once we have conceded that registering as a sex offender on a database accessible via the Internet constitutes a serious infringement of basic interests, then those consequences, no less than imprisonment or fines, must be counted as “criminal penalties” of which the state is required to provide fair notice. After all, the prospect of lifetime registration as a sex offender could just as much be expected to enter into the practical deliberations of a person on the verge of committing a sex offense as a term of years in the state penitentiary.

The motivation for sex offender registries, unlike that of imprisonment or fines, may not be retributive, and hence, according to principle R, may not properly be considered punishment. But the question is not whether they are punishment. The question is to what degree they can be expected to harm those subject to them. So given the assumptions I have described, these become easy cases as far as application of the doctrine is concerned. The difficulties with cases like *Doe* are largely empirical, and consist in ascertaining just how severely this kind of registration is likely to harm people. If the answer turns out to be “not that much,” then the conclusion should be that defendants in these cases have no protection under the *ex post facto* clause, given the *de minimis* character of the harm. And, once again, the conclusion would be in no way affected by, and at no point require any findings about, the legislature’s motivation in extending the registration requirement retroactively.⁶⁶

One may object here that the *ex post facto* clause does more than ensure fair notice. It also serves to restrict majoritarian abuse of unpopular individuals and groups, and thus requires reviewing courts to take a hard look at legislative purposes to ferret out “vindictive, malicious

⁶⁶ In the case of the federal sex offender statute—SORNA—Congress did not specify whether it was to apply retroactively, instead leaving it to the attorney general (Alberto Gonzales, at the time) to decide. See 42 U.S.C. § 16913(d). Gonzales decided to apply SORNA retroactively. See 28 C.F.R. §72.3 (2007).

legislation.”⁶⁷ This view is given support by Justice Chase’s opinion in *Calder v. Bull*: “With very few exceptions, the advocates of such laws [the laws banned by the *ex post facto* clause] were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any *ex post facto* law.”⁶⁸

This objection conflates an explanation for why a right was created with an account of how that right should be applied. Rather than granting reviewing courts a general purpose license to strike down vindictively motivated legislation, Chase’s claim is more naturally understood to suggest that, because poorly motivated legislators frequently rely on retroactive legislation, it would be desirable to make it harder for them to pass such legislation. The way the clause does this is by taking away an instrument of abuse favored by poorly motivated legislators.⁶⁹ It may well be that in addition to ensuring fair notice, the *ex post facto* clause is also designed as an impediment to legislative panics, and indeed, panics of the kind that arguably are behind much contemporary sex offender legislation. But it simply does not follow that a reviewing court must look at the legislature’s actual motivations to adjudicate an *ex post facto* claim.

Consider next cases in the mold of *Kansas v. Hendricks*. Hendricks’ allegations, recall, were that by civilly committing him immediately after his criminal sentence expired, the state of Kansas was retroactively increasing the punishment for his crimes; and that he was moreover

⁶⁷ This language comes from the petitioners’ brief in *Smith v. Doe*, 2002 WL 1275055 at 23. See also Logan, “The *Ex Post Facto* Clause and the Jurisprudence of Punishment,” at 1276-7.

⁶⁸ *Calder v. Bull*, 3 U.S. 386 at 389 (1798).

⁶⁹ For example: assassins frequently use silencers; therefore, we restrict the sale of silencers. Determining whether a given sale of a silencer conforms to those restrictions does not require investigating whether the purchaser intends to use it in an assassination. The transaction’s conformity or non-conformity with the regulation is *entirely* independent of the purchaser’s motivation.

being twice punished for the same offense. The state was, he argued, merely disguising the punishment under the guise of “civil commitment”; had they been forthright in acknowledging that the newly authorized commitment under the SVPA was expressly intended to enhance his punishment, then it would have been blocked by the federal constitution’s *ex post facto* and double jeopardy bans.⁷⁰

Certainly, Hendricks’ interest in not being confined against his will is fundamental, and given the likelihood that the confinement will endure until he dies, the contemplated setback is serious, even extreme. This does not mean, however, that the *ex post facto* and double jeopardy prohibitions prevent Kansas from using the SVPA to commit Hendricks and others like him. After all, the view is not that it is never permissible for the state to inflict a serious harm on an individual. The view is that the state may do so if it is consistent with, for instance, the right against retroactive legislation; and it is at least arguable that the SVPA is consistent with that right.

Consider the rationale for the *ex post facto* clause cited above, namely, that its role is to ensure that legislatures provide fair notice when they seek to impose stiff penalties, so that people are able to plan their actions accordingly. The question then becomes: does Kansas’ SVPA, passed while Hendricks was incarcerated, deprive Hendricks of fair notice of the true consequences of the crimes for which he was convicted? The answer to this question is arguably “no.” For the civil commitment that the SVPA authorizes is not simply an extension of the imprisonment he was already suffering. Rather, it requires Kansas to show beyond a reasonable

⁷⁰ Justice Kennedy seemed to suggest as much: “if the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function...On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.” *Hendricks*, 521 U.S. at 371 (Kennedy, J., concurring.)

doubt that he is likely to recidivate, and that he therefore poses a serious ongoing threat to the community. In other words, the basis for the commitment is not Hendricks' prior offenses, but rather the expectation that he will reoffend in the future. Hendricks' status as a sexually violent predator is thus distinct from, though it may be supported by, his prior criminal conduct.

Moreover, although Kansas' definition of a sexually violent predator applies only to those who have been previously convicted of a violent sex crime, it is not the case that all those convicted of such crimes are, therefore, sexually violent predators. The state has to show more than a prior conviction before it is authorized to commit him.

Kansas' SVPA stands in sharp contrast to the civil commitment statute struck down in *Baxstrom v. Herold*, a Warren Court case cited by Justice Thomas in *Hendricks*.⁷¹ In *Baxstrom*, the petitioner was a prisoner in a New York prison who, while incarcerated, had been certified as insane. In accordance with New York law, upon the expiration of his criminal sentence, the Department of Mental Hygiene determined in an *ex parte* hearing that Baxstrom should remain in the state hospital—run by the Department of Corrections and in which he had been placed years earlier—rather than be transferred to a civil hospital. Chief Justice Warren objected to New York's statute, but not on *ex post facto* or double jeopardy grounds. Rather, Warren's objection was that Baxstrom was not granted an adequate hearing at which he could contest the finding that he was so dangerous that he had to remain confined in a prison hospital. New York provided such a hearing to others the state sought to commit, and there was no rational basis for denying it to criminal convicts nearing the end of their prison sentences. What *Baxstrom* thus suggests is that a state may indeed confine an incarcerated felon who remains dangerous beyond the

⁷¹ *Baxstrom v. Herold*, 383 U.S. 107 (1965).

expiration of his sentence, but that it cannot arbitrarily deny those people a chance to prove their sanity and/or lack of dangerousness. But this is precisely what Kansas' SVPA provides.

In light of *Baxstrom*, the novel issue in *Hendricks* was thus not the *ex post facto* argument, but rather the substantive due process argument: may Kansas commit people on the basis of a finding of "mental abnormality" or "personality disorder" rather than (as in *Baxstrom*) a finding of insanity? Once we accept Thomas' argument that they may, the case is over, as *Baxstrom*'s holding entails that what matters is the reliability of our belief in a committed person's dangerousness, not whether the commitment occurs directly after the expiration of a criminal sentence or at some other point.

So the *ex post facto* clause arguably does not protect Hendricks, but this is not because he is being "regulated" rather than "punished." Hendricks would not be protected by the clause even if the legislature were exclusively and expressly motivated by a newly revised view of the just deserts of sex offenders. Rather, the clause does not protect him because the further incarceration is tied to a finding that he will re-offend if left to his own devices. Absent that finding, then the commitment surely would be barred by the *ex post facto* clause. As with *Doe*, the difficulties posed by *Hendricks* are largely empirical: how much confidence should we place in our predictions that someone is likely to recidivate and commit further heinous crimes? If the answer to that question proves to be "not very much," then civil commitment would be impermissible, and impermissible in its entirety, regardless of motivation.⁷²

⁷² A recent study found "no significant difference in re-offense rates between juveniles who qualified for registration [under the federal Adam Walsh Act] and those who did not." See Ashley Batastini, et al, "Federal Standards for Community Registration of Juvenile Sex Offenders: An Evaluation of Risk Prediction and Future Implications," *Psychology, Public Policy and Law* 17 (2011): p.465. Note that if it turns out that our predictions of future dangerousness turn out to be completely unreliable, then the better argument might be that statutes authorizing civil commitment should be invalidated on grounds of void-for-vagueness doctrine, rather than the *ex post facto* clause. For if it is shown that we simply cannot produce reliable predictions of future dangerousness, then committing people on grounds of "mental

It is important to note the structure of the argument here. The claim I am defending is not that, once we set aside the inquiry into legislative purpose, the *ex post facto* clause then blocks every second serious incursion into a person's basic interests. It is that defendants should not be prevented from asserting claims under the *ex post facto* clause simply because they cannot show that the legislature acted with a punitive motive in passing whatever statute is at issue.

Constitutional criminal rights, such as the *ex post facto* ban, should apply regardless of legislative intent. But that does not mean that every assertion of what those rights entail is a correct assertion. In some cases—perhaps, I have suggested, in *Hendricks* itself—the right does not protect what the defendant claims it protects. In that case, even though the defendant is facing a serious setback to basic interests, the rights of criminal defendants are of no use to him.

4.

I conclude with two clarifications and a brief observation.

First: what is the logical relation between the diagnosis of the intent-effects test as relying on double effect reasoning, and the proposal to draw the civil-criminal distinction on the basis of protected interests rather than “punishment”? The logical form is this: I claim that someone who accepts the intent-effects test must, even if only implicitly, rely on some version of double effect reasoning.⁷³ It follows that someone who rejects double effect reasoning must also reject the

illness” (or whatever) would in effect be arbitrary and capricious, and possibly grant authorities far too much discretion to commit whomsoever they please.

⁷³ I am, of course, discussing an institutional rule, one that might be expected to have, at least in some circumstances, profound implications for many people. So I do not suggest that consistency alone will, in all cases, provide a decisive reason for (or against) adopting this or that rule. But it would be a serious misunderstanding to construe the argument of this paper as advocating for a specific alternative doctrinal test that courts could simply adopt as a replacement for the intent-effects test. The argument of this paper is, rather, intended to give legal theorists reason to doubt whether the intent-effects test is consistent with

intent-effects test. I thus conclude that a theorist in that position should provide an alternative explanation of how to do what the intent-effects test does, namely, allocate the enhanced rights characteristic of the criminal process. Naturally, this does not rule out the possibility—nor could it, logically speaking—that there might be other reasons for dissatisfaction with the intent-effects test. My argument is not intended to suggest that the *only* reason one might have for wanting an alternative to the intent-effects test is because of skepticism about double effect reasoning; that claim seems clearly false, and I reject it.⁷⁴

Second, I have suggested that legal theorists wary of double effect reasoning have reason to decouple the concept of the criminal law from the concept of punishment by replacing the question “is X punishment?” with “does X amount to a serious invasion of basic interests?” as a criterion for adjudicating the boundaries of the “criminal” law. This is not meant to abolish the distinction between civil and criminal procedure, or between civil and criminal penalties; those categories remain important.⁷⁵ It is, rather, to suggest that insofar as there is anything importantly distinctive about “criminal” law, it is not in the content or subject matter of such laws—for instance, that they authorize state punishment for morally wrongful conduct—but in the provision of a distinctive regime of rights to an identifiable class of litigants.

Finally, a corollary to the argument I have presented is that the ongoing debates about criminalization may in an important sense be misconceived. Perhaps liberal polities should only criminalize conduct that results in certain kinds of harm, and perhaps they should only

a rejection of double effect reasoning, and, if it is not, to suggest how one might go about thinking about the functional role that the doctrinal test fulfills. It is not meant to provide an all-things-considered argument for or against any doctrinal rule.

⁷⁴ My thanks to Kim Ferzan and Amy Sepinwall for pushing me to clarify this point.

⁷⁵ In contrast, unbundling the regime of rights allocated to “criminal” defendants arguably *would* abolish the civil-criminal distinction. Compare on this point Rosen-Zvi and Fisher, “Overcoming Procedural Boundaries.” I express no view as to whether the bundle of rights allocated to criminal defendants should be disaggregated in the way Rosen-Zvi and Fisher suggest.

criminalize conduct when the harmful outcome can be fairly imputed to the person engaging in that kind of conduct.⁷⁶ But the reason this is a topic of particular interest to the criminal law is not because the criminal law is that branch of law designed to denounce, punish, and deter wrongful conduct. This may well be an accurate description of the substantive law of crimes, but it is likely to also be an accurate description of a maze of substantive “regulatory” offenses as well. Rather, the reason the appropriate scope of the criminal law is a distinct subject from the appropriate scope of government regulation generally is that the expected outcomes under “criminal” statutes are much worse than those under “civil” or “administrative” regulations. From the point of view of a protected interests view of the criminal law, even if only some version of retributivism fully captures our sense of what it is to punish someone, it will not be the fact of its retributive character that makes punishment so hard to defend. It will be that punishment is an instance of state action that seriously invades basic individual interests.

In commenting on Hart’s rejection of the doctrine of double effect, John Gardner has suggested that we “remind ourselves once again that punishment is intended by the punisher to inflict suffering on the punished, and that this element of intention can be expected to fortify any rule against its infliction, however that rule may otherwise be justified.”⁷⁷ This shows, Gardner continues, “how little space there is to raise special doubts about the morality of the criminal justice system (as compared to the civil justice system, the taxation system, etc.) once the moral difference between intended effect and known side-effects is denied or suppressed.”⁷⁸ Since I

⁷⁶ See, e.g., A.P. Simester and Andrew von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Portland: Oxford University Press, 2011), chs. 4 and 5.

⁷⁷ Hart, *Punishment and Responsibility*, Introduction, p.xli.

⁷⁸ *Id.*

agree with Gardner on at least *this* point, I also believe that what may have seemed at first glance to be a narrow doctrinal question—do convicted sex offenders have valid *ex post facto* claims?—in fact raises fundamental problems of policy and theory, with potentially sweeping implications for both. For if one is inclined to reject the Supreme Court’s implicit reliance on double effect reasoning and to accept instead that an agent’s intentions do not bear on the permissibility of what she proposes to do, then not only will one have reason to resist, as a doctrinal matter, long-standing jurisprudence on the allocation of criminal rights; one will also have reason to question that jurisprudence’s underlying conception of the criminal law itself.

Since I have not argued for or against any position on the underlying philosophical issue dividing proponents of double effect reasoning from proponents of IIP, I do not claim to have launched a decisive attack on the Supreme Court’s consistent emphasis on legislative intent. I have taken on the more modest project of showing that, despite appearances to the contrary, the inferences from criminal law to punishment, and from punishment to punitive purpose, are not forced on us. For although punishment may necessarily be governed by principle R, the criminal law need not be governed by punishment.