DIGNITY AND DESERT IN PUNISHMENT THEORY

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Once upon a time, human dignity played a large role in the theory of punishment. Then punishment fell victim, both in theory and in practice, to the central philosophical mistake of the twentieth-century.[1] A criminal justice system based on human dignity and just deserts was replaced by a system of quarantine. We were left with an enormous state apparatus devoted to the efficient incapacitation of undesirable people. This regime still goes by the name of the criminal justice system, but it now has little to do with crime or justice, because the quarantine of people deemed likely to decrease social welfare has a completely different provenance from punishment.[2] Both the putative necessity and the specious justification of quarantine originate, in part, in a mistaken conception of value and normativity.

I. A SHORT HISTORY OF THE DEVOLUTION FROM PUNISHMENT TO QUARANTINE

Fifty years ago, the principal preoccupation of punishment theorists was the formulation of a defense against the scapegoating objection to the so-called deterrence theory of punishment.[3] The scapegoating objection points out that if punishment is justified by deterrence, or by any other beneficial consequences, then a net gain in good consequences should be pursued regardless of traditional notions of

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1. *Cf.* HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY, AND OTHER ESSAYS 22-45 (2002).

2. *See* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 Harv. L. Rev. 1429, 1429-32 (2001).

3. Deterrence is only one function of punishment and only one beneficial consequence of punishment, among others such as rehabilitation, incapacitation, catharsis, and the expression of community norms. The broader and more accurate term for a theory of punishment that takes these beneficial consequences to be punishment's justification is the consequentialist theory of punishment. *See* Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 Wm. & Mary L. Rev. 943, 944 n.7 (2000).

guilt and desert. If a quick conviction and hanging will avoid mob violence in a town upset by a heinous crime, then the authorities should quickly convict and hang someone. Anyone will do, provided that the person hanged can plausibly be portrayed as the perpetrator. Neither finding the true perpetrator nor determining an appropriate sentence should matter if this "punishment" is justified by a net gain in social welfare.

John Rawls, H.L.A. Hart, and other philosophers arrived at an answer to this objection, seemingly simultaneously, in the 1950s.[4] Justifying the overall practice of legal punishment with a consequentialist argument does not imply that one could, would, or should justify punishment in individual cases with that same consequentialist argument. Consequentialism morally justifies the system of legal punishments, but justification in the individual case is never more than a *legal* justification within the terms of that legal system. Furthermore, at the level of the punishment system, consequentialist moral theory would not sanction the regular opportunistic punishment of scapegoats because the uncertainty and insecurity engendered by such a practice would outweigh any isolated gains in social welfare. Thus, the inference that consequentialism justifies the punishment of scapegoats is a category error: it states a purported moral justification where only a legal justification is possible.

This solution, focusing on the punishment system instead of the individual case of punishment, has its own weaknesses,[5] and better defenses of consequentialism exist.[6] For present purposes, however,

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4. *See* H.L.A. HART, *Prolegomenon to the Principles of Punishment, in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 5-11 (1968); Anthony M. Quinton, *On Punishment*, 14 ANALYSIS 133, 134, 140 (1954); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3-13 (1955).

5. One objection is that if the public consists of thoroughgoing consequentialists who do not mind scapegoating to enhance overall welfare, then a legal system that engaged in scapegoating would be morally justified. A second objection is that, like many consequentialist arguments, this one puts legal and political elites in the position of administering an "as if" legal and political system that depends for its efficacy on concealment of the truth from the masses. This is both implausible and objectionable in itself. *See* Bernard Williams, *A Critique of Utilitarianism, in* UTILITARIANISM, FOR AND AGAINST 77, 123-24, 138-39 (J.J.C. Smart & Bernard Williams eds., 1973).

6. More promising defenses of consequentialism avoid the scapegoating objection by denying that consequentialism ever serves as a decision procedure. It is, instead, an abstract, philosophical account of the good that is not sufficiently connected to retail decision-making to justify either punishment systems or individual cases of punishment. The legal system must therefore identify the good by other means. The role of consequentialism as a moral theory is merely to explain, after the fact, why society

the interesting aspect of this argument from a half-century ago is its assumption that any theory of punishment that authorizes scapegoating must be incorrect. After all, anyone willing to accept the danger of scapegoating for the sake of increased social welfare would be unmoved by the objection. Its force rests entirely on the notion that to punish the innocent is wrong, no matter how great the compensating gains in welfare might be. That is, the scapegoating objection appeals to non-consequential values such as desert and human dignity.

A similar appeal lies at the center of another mid-century argument. Lady Barbara Wootton famously argued that the notions of crime and punishment ought to be abjured generally in favor of a medical approach to anti-social conduct[7]. Sanford Kadish denounced this proposal as incompatible with human dignity[8]. In Herbert Morris's terms, the criminal has a right to be punished, because to do anything else would be to treat him as something less than an autonomous, responsible moral agent.[9] However, this therapeutic approach to crime is paternalistic: it infantalizes where we ought to insist on adult accountability. To treat an offender as a patient is to treat him as an object instead of a subject, and to fail to accord him the respect of assuming that his choices and decisions are his own. Of course, some have argued that the therapeutic approach, as a practical matter, would not reduce crime,[10] but it is more significant for present purposes that Kadish's and Morris's powerful arguments were essentially non-consequentialist in their contention that the treatment of criminal wrongdoing as pathology was uniquely degrading to human dignity in a way that punishment, no matter how harsh, could never be.

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recognizes the good where it does. The difficulty with this kind of consequentialism, from the perspective of criminal law theory, is that it cannot generate any useful accounts of the retail-level moral and legal practice of punishment. It offers only a re-interpretation of existing accounts of social practices, for example that the law punishes if and where it is deserved, when it is not clear that any such reinterpretation is required or even useful.

7. BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST 111-12 (1963).

8. Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 287 (1968), *reprinted in* SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 65, 75-77 (1987).

9. Herbert Morris, *Persons and Punishment*, 52 MONIST 473, 476 (1968).

10. *Cf.* DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 571-74 (1975) (summarizing the effects of rehabilitative treatments); Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974) (casting doubt on rehabilitative treatment programs).

Fifty years later, scapegoating and human degradation are now routinely accepted. For example, the most powerful argument against the death penalty has always been that it is a scapegoating punishment. Given that the processes of crime detection and criminal adjudication are imperfect, some number of innocent people inevitably will be convicted and punished. Where the death penalty is an available punishment, its availability is purchased at the cost of killing many people who do not deserve to die. Accordingly, we are in roughly the same position that we would be if we were blessed with an infallible criminal justice system and also conducted a national lottery that randomly selected innocent citizens to be executed along with the criminals. The sole difference between this hypothetical world and the real world is that the execution of lottery "winners" in the hypothetical world would not be necessary in order to carry out executions, whereas in the real world, the execution of innocent people is necessary (albeit regrettable) if the death penalty is to serve as an effective deterrent to crime. If this purported necessity is premised on a deterrence rationale, it is morally indistinguishable from scapegoating.[11] The assumption is that the criminal justice system can and should achieve an increase in social welfare by means of the execution of innocent people. Furthermore, the public accepts this purported necessity. Fifty years ago, we executed comparatively few people and had no idea how many of those were actually innocent.[12] Today, we possess sufficient evidence to calculate a relatively precise error rate,[13] but the death penalty remains an overwhelmingly popular feature of the criminal justice system.[14]

Our tolerance for degradation via quarantine extends from the

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11. One can also argue that the execution of the innocent is a necessity if those who truly do deserve death as a punishment are to get what they deserve. But this supposed necessity is contradictory and self-defeating insofar as it is premised on a just deserts rationale. The innocents who are executed so that criminals can get their just deserts are denied their just deserts, *i.e.* to live. Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1225-31 (1981).

12. *See* Furman v. Georgia, 408 U.S. 238, 291-93 (1971) (Brennan, J., concurring); *see id.* at 291 (summarizing evidence of "a steady decline in the infliction of this punishment in every decade since the 1930's").

13. *See* James S. Liebman et al., *Capital Attrition: Error Rates In Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1852-54 (2000).

14. Jeffrey M. Jones, *Support for the Death Penalty Remains High at 74%: Slight Majority Prefers Death Penalty To Life Imprisonment as Punishment for Murder*, GALLUP POLL NEWS SERVICE, May 19, 2003, at 1-2, *available at* http://www.deathpenaltyinfo.org/article.php?scid=23&did=592.

obvious, such as the appalling conditions in prisons[15] and juvenile detention facilities,[16] to the more subtle and insidious practice of pseudo-commitment for neither crime nor insanity. In sixteen states, a person who has completed his sentence for a sexual offense may be incarcerated indefinitely, on the ground that he is a "mentally abnormal" "sexually violent predator."[17] Nothing in these statutory schemes fits with society's longstanding definitions of guilt and responsibility. Those who are so detained are sufficiently rational to have been held responsible for a crime, rather than being acquitted on grounds of insanity. After they finish their sentences, they continue to be held under a procedure that resembles ordinary civil commitment. Yet this detention is not an ordinary civil commitment, because the necessary condition of civil commitment—mental irresponsibility—has not been shown. Indeed, it almost certainly could not be shown, because the criminal conviction and continued imprisonment for that conviction suppose that the offender is mentally responsible.[18] The Supreme Court has upheld pseudo-commitment schemes on the condition that the states require (generally) and make (in individual cases) a showing that the offender has "serious difficulty in controlling behavior."[19] But as Stephen Morse has persuasively argued for years, "control" is incoherent as a condition of responsibility.[20] Indeed, the incoherence of "lack of control" as an

15. *See, e.g.,* Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379 (2000) (reporting that 21% of prisoners report at least one episode of forced sexual contact).

16. *See, e.g.,* HUMAN RIGHTS WATCH, CHILDREN IN CONFINEMENT IN LOUISIANA 1-5 (1995); Fox Butterfield, *Profits at a Juvenile Prison Come with a Chilling Cost*, N.Y. TIMES, July 15, 1998, at A1 (reporting on conditions at the notorious Tallulah Correctional Center for Youth, a privately-run facility in Louisiana).

17. This is the Kansas terminology. Kan. Stat. Ann. § 59-29a07 (2002). The other states with similar laws are: Arizona (Ariz. Rev. Stat. Ann. § 36-3707 (West 2003)), California (Cal. Welf. & Inst. Code § 6604 (West 2003)), Florida (Fla. Stat. ch. 394.917 (2002)), Illinois (725 Ill. Comp. Stat. Ann. 207/35 (West 2002)), Iowa (Iowa Code § 229A.7 (2001)), Massachusetts (Mass. Gen. Laws ch. 123, § 8 (2002)), Minnesota (Minn. Stat. Ann. § 253B.185 (West 2003)), Missouri (Mo. Rev. Stat. § 632.495 (2002)), New Jersey (N.J. Stat. Ann. § 30:4-27.32 (West 2003)), North Dakota (N.D. Cent. Code § 25-03.3-13 (2002)), South Carolina (S.C. Code Ann. § 44-48-100 (2002)), Texas (Tex. Health & Safety Code Ann. § 841.081 (Vernon 2003)), Virginia (Va. Code Ann. § 37.1-70.9 (Michie 2003)), Washington (Wash. Rev. Code Ann. § 71.09.060 (West 2002)), and Wisconsin (Wis. Stat. § 980.05 (2002)).

18. *See* Foucha v. Louisiana, 504 U.S. 71, 83 (1992) (incarceration of insanity acquittee in absence of proof of current mental illness violates due process).

19. Kansas v. Crane, 534 U.S. 407, 413 (2002).

20. *See* Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1587-88 (1994); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1035 (2002).

excusing condition is what led some of these same states to curtail the insanity defense by eliminating the defendant's inability to comply with the law as an alternative ground for that defense.[21] Accordingly, a mere lack of control on the part of a sex offender cannot justify the preemptive denial of liberty to him if he is also a responsible moral agent. States that enforce these statutes are engaged in pure preventive detention, or quarantine.[22] Mandatory minimum and three strikes sentencing schemes, as well as other determinate sentences that bear no rational relationship to individual desert, are likewise quarantine measures—both more direct and less obvious in their operation than pseudo-commitment schemes.

These quarantine schemes are often incorrectly described as triumphs of retributivism in punishment.[23] In fact, they are triumphs of a particularly crude form of consequentialism.[24] The answer that Rawls, Hart, and others formulated to the scapegoating objection was a sophisticated rule-consequentialism. Fifty years later, the consequentialist justification for incarceration has devolved into a crude act consequentialism that authorizes the indefinite detention of anyone deemed likely to detract from social welfare in the future. The justification for California's three strikes scheme offered by Secretary of State Bill Jones provides a stark example: "By carefully targeting the small percentage of criminals most likely to commit the majority of California's crimes, Three Strikes has had a maximum impact on the crime rate by keeping the worst of repeat offenders

21. In the wake of the acquittal of John Hinckley, the United States and at least 10 states, including California and Texas, returned to the M'Naughten test—premised on an inability to know, understand, or appreciate one's own wrongdoing—and abandoned the Model Penal Code's alternative "substantial capacity to conform" ground. JOHN Q. LAFOND & MARY L. DURHAM, BACK TO THE ASYLUM 64 (1992).

22. This is, of course, a metaphorical use of the term "quarantine." Genuine quarantine is both morally defensible and constitutionally permissible. Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380 (1902).

23. *See* Paul G. Chevigny, *From Betrayal to Violence: Dante's Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787, 789 (2001); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1839 (1999); Joseph L. Hoffmann, Apprendi v. New Jersey*: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 266-67 (2001); Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1303 (2000).

24. *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 51-55 (1998) (describing the Sentencing Commission's rejection of a principled retributive or "just deserts" philosophy in favor of a harsh, consequentialist "crime control" approach); *cf.* Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 371 (1989) ("The Commission's conclusion can be summarized thus: since people disagree over the aims of sentencing, it is best to have no rationale at all.").

incarcerated."[25] The fact that those future crimes have not yet been committed and that a life sentence is often manifestly disproportionate to the specific crime committed troubles Mr. Jones not at all. "The simple goal of Three Strikes is public safety. It is far better, for example, to remove a child molester from the streets for the commission of a so-called lower level felony than to wait for the offender to abuse another victim."[26] Officials have offered similar self-congratulations on other quarantine measures that collectively have given the United States the highest incarceration rate in the world.[27]

II. THE CAUSES OF THE DEVOLUTION FROM PUNISHMENT TO QUARANTINE

This devolution from punishment to quarantine has several causes. First, on the practical side, crime rates spiked in the 1960s,[28] and politicians and the public turned to harsher punishment as a countermeasure.[29] But crime rates leveled off in the 1970s and 1980s and declined significantly in the 1990s.[30] The continuation of a relentless and increasingly unprincipled war on crime was the combined product of political mendacity,[31] chronic defects in public

25. Bill Jones, *Why the Three Strikes Law Is Working in California*, 11 STAN. L. & POL'Y REV. 23, 24 (1999).

26. *Id.* at 25.

27. *See, e.g.*, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON BRIEF, *available at* http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/world_brief.html (last modified Sept. 18, 2003) (reporting U.S. incarceration rate as the world's highest at 701 per 100,000 as of Nov. 11, 2003).

28. *See* FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES—1972, at 61 (1973) (showing a rise in violent crimes from 286,880 in 1961 to 590,160 in 1968, and a rise in the number of murders and nonnegligent manslaughters from 8660 in 1961 to 13,690 in 1968).

29. *See* Joachim J. Savelsberg, *Knowledge, Domination, and Criminal Punishment*, 99 AM. J. SOC. 911, 929 (1994) (reporting that the proportion of Americans believing that courts do not deal harshly enough with criminals increased from 48% in 1965, to 66% in 1972, to 85% in 1978).

30. "In 1998, the total crime index calculated by the Federal Bureau of Investigation (FBI) fell for the seventh straight year. Moreover, between 1993 and 1998, victimization rates declined for every major type of crime . . . ." Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J. L. & ECON. 259, 259 (2001) (citing CALLIE M. RENNISON, CRIMINAL VICTIMIZATION 1998: CHANGES 1997-1998 WITH TRENDS 1993-1998 (1999)).

31. For example, California adopted its notably harsh three strikes scheme in a legislative rush to judgment, because a similar measure was expected to be adopted pursuant to a pending popular initiative. *See* Victor S. Sze, *A Tale of Three Strikes: Slogan Triumphs Over Substance as Our Bumper Sticker Mentality Comes Home To Roost*, 28 LOY. L.A. L. REV. 1047, 1051-54 (1995).

rationality,[32] and mass hysteria.[33]

Second, a pervasive set of theoretical assumptions guided public policy and judicial decision making for decades without any challenge to its manifest incoherence. Just as the public continued to insist on ever-harsher measures to counteract phantom crime waves,[34] legal academics continued to work within a consequentialist framework that had long since proved its inadequacy in the field of punishment.[35]

Consequentialism assumes that actions cannot be justified by retrospective reasons, which makes it an uncommonly poor tool for the analysis of punishment. Punishment is conventionally defined as hardship imposed by a legal system for a violation of a legal rule or rules.[36] But genuine punishment has always been grounded in a robust conception of wrongdoing that features fault and the desert that fault implies. Consequentialist punishment theory, however, cannot make a direct appeal to desert as a ground for punishment because desert is a retrospective reason for action involving a retrospective evaluation of wrongdoing and fault. Consequentialist theories of punishment must

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32. For example, the "availability heuristic" reveals that people tend to overestimate the probability of recent and emotionally salient events. This effect causes people to misperceive individual crimes, especially as they are reported on local television news programs, as evidence that crime rates are higher than they actually are. *See* Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. (forthcoming 2004); *cf.* Carole Kneeland, *A Grueling Standard To Live By*, 1996 NIEMAN REP. 15 (noting that even though violent crime rates fell in the 1990s, coverage of violent crime on television news increased). *See generally* Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002) (describing and analyzing the "availability heuristic" and other chronic failures of rationality in policy-making).

33. *See* Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 831 (2000) (describing the trend of increasing severity of criminal punishments in Durkheimian terms as a defense of social solidarity).

34. *See* Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 WAKE FOREST L. REV. 727, 728 (1998) (critically analyzing recurrent reports of a juvenile crime wave).

35. As Markus Dubber has recently argued:

> Rebuilding American criminal law, however, isn't simply a matter of undoing the damage caused by the war on crime. The war on crime could not have succeeded as easily as it did, if it hadn't found fertile soil in the reigning orthodoxy of American criminal law: treatmentism. All the war on crime had to do was flip over the treatmentist coin from its benign rehabilitative side to its unsavory incapacitative side.

Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 838 (2001). The common coin of "treatmentism" and "incapacitativ[ism]" is consequentialism.

36. *See* Rawls, *supra* note 4, at 7-8, (citing THOMAS HOBBES, LEVIATHAN, at ch. xxviii (Richard Tuck ed., Cambridge Univ. Press 1991) (1651)).

appeal indirectly to the widespread *belief* that punishment is deserved for crime, and argue that if the law did not accommodate this belief, then negative consequences for social welfare—self-help, blood feud, and anarchy—would ensue. Thus, the catharsis of punishment, as distinct from the effect and function of retribution, is transformed into an ersatz retribution.[37] Fault and desert are acknowledged as limitations on punishment, but not as affirmative reasons to punish (such that the failure to punish would itself be wrongdoing on the part of society). Genuine retribution—the unadorned claim that a wrongdoer deserves punishment for his wrongdoing—is assumed by the consequentialist to be an untenable relic of a less enlightened era.[38]

In order to appreciate fully the inadequacy of the consequentialist theory of punishment, one must understand both the reasons for its persistent dominance as the accepted rationale for punishment, and the way in which its principal weaknesses point toward a preferable approach that draws on a fundamentally different philosophical ethics. Consider first the motivations for consequentialism's exclusion of retrospective reasons for action. In part, this exclusion reflects a familiar desire to minimize the ratio of normative to empirical claims in moral, political, and legal affairs. Future states of affairs can motivate and justify actions aimed at bringing them about with weak and minimal normative premises, whereas the normative apparatus required to motivate and justify action by reference to past events is

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37. *See, e.g.*, JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863) ("The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."); *cf.* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37-38 (1968) (explaining that Stephens's view is not a retributive theory, but a utilitarian one).

38. *See* PACKER, *supra* note 37, at 38-39 (stating that "the thought that it is right for punishment to be inflicted upon persons who commit crimes," without more, "has no useful place in a theory of justification for punishment, because what it expresses is nothing more than dogma, unverifiable and on its face implausible."). On his way to exposing the prevailing view of retributivism at mid-century as a gross distortion, K.G. Armstrong memorably summarized that view in these terms:

> Retributive punishment is only a polite name for revenge; it is vindictive, inhumane, barbarous, and immoral. Such an infliction of pain-for-pain's-sake harms the person who suffers the pain, the person who inflicts it, and the society which permits it; everybody loses, which brings out its essential pointlessness. . . . The only people who today defend the retributive theory are those who, whether they know it or not, get pleasure and a feeling of virtue from seeing others suffer, or those who have a hidden theological axe to grind.

K.G. Armstrong, *The Retributivist Hits Back*, 70 MIND 471, 471 (1961), *reprinted in* THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS 138, 138-39 (H.B. Acton ed., 1969).

more extensive and controversial. From the parsimonious assumption that rational people will optimize the satisfaction of their preferences, consequentialist theories reconstruct most of the prescriptions of other moral systems in terms of instrumental reasoning—thereby obviating the more elaborate, controversial claims about rationality, goodness, human nature, and rational ends that appear in Kantian and Aristotelian theories.[39] Preference optimization and the dictates of instrumental rationality are norms—just as all claims about what is and is not rational are norms—but they are parsimonious norms, and the facts of existing preferences seem hardly controversial at all. This device of a few, eminently plausible normative claims that leverage facts into further, more detailed normative claims is an invention of genius.

Even so, consequentialism fails to deliver on its promises, particularly in the case of punishment. This failure should cause one to look more deeply into consequentialism's rejection of retrospective reasons. Why should we aspire to minimize normative claims in favor of factual claims in morality, politics, and law? After all, these are inherently normative matters, and if complete success in eradicating the normative is unattainable, then we have reason to wonder what constitutes partial success, if not to question the objective itself. Two reasons to minimize normative claims stand out. The first reason is a familiar desire to confine the deliberations and conduct of our democratic republic to a common normative ground—an aspiration that is indispensable given our wide diversity of belief on public matters. The second reason is a suspicion of normativity itself that rests on a persistent philosophical mistake. Normative claims—even the minimal normative claims of consequentialism—reflect valuations, and value is premised in emotion.[40] This feature of norms provokes anxiety in some quarters because many people assume that valuation is an irrational process, precisely because valuation rests on

39. *See* J.J.C. Smart, *An Outline of a System of Utilitarian Ethics, in* UTILITARIANISM: FOR AND AGAINST 5-9 (J.J.C. Smart & Bernard Williams eds., 1973).

40. There is a broad, neo-Humean consensus in Anglo-American philosophy that motivations have a significant affective or emotional component, and that Kantian cognitivism—the notion that belief alone can motivate action—is untenable. *See* Garrett Cullity & Berys Gaut, *Introduction* to ETHICS AND PRACTICAL REASON 1-27 (Garrett Cullity & Berys Gaut eds., 1997) (describing a consensus over internalism regarding reasons for action and a desiderative account of internalism); *see also* MICHAEL SMITH, THE MORAL PROBLEM 92-129 (1994); BERNARD WILLIAMS, *Internal and External Reasons, in* MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980, at 101, 102-04 (1981); Philip Pettit & Michael Smith, *Practical Unreason*, 102 MIND 53, 53-77 (1993).

emotion.[41] In common parlance, law and morality should avoid "subjective value judgments" to the greatest extent possible, in favor of "objective fact." This desire to avoid the supposed irrationality of the value judgments inherent in any but the least robust norms drives, in part, the consequentialist's desire to minimize normativity.

The first motivating assumption behind consequentialism's minimization of normativity is defensible, even though we do not act on it as strictly as one might think. If we really did confine public life to an intellectual common ground, we would exclude from law and public policy all reasons that are not publicly available.[42] This premise would disallow claims of faith, confining public discourse to empirical statements that meet the tests of falsifiability and non-falsification,[43] and society would govern itself entirely by science and not at all by religion. Whatever the merits of this restriction might be (and I am myself strongly in favor of it), we do not in fact conform to it. Faith-based reasoning continues to play a large role in the public life of all societies, including the United States.

The second motivating assumption behind consequentialism is not defensible at all. The disparagement of valuation as irrational is simply a mistake. The argument is that, because value judgments are premised in emotion, and emotion is the opposite of reason, therefore value judgments must be irrational. Alternatively, the argument is that if value judgments are premised on emotions, and emotions are subjective, then value judgments are subjective—in a pejorative sense that implies arbitrariness. Neither of these arguments is valid, because emotions are neither subjective nor irrational in the way that these arguments suppose. The disparagement of value judgments rests

41. *Cf.* RICHARD BRANDT, A THEORY OF THE GOOD AND THE RIGHT (1979). Brandt proposed to reformulate the terms "good" and "right" by means of a conceptual framework based on "facts and logic alone," *id.* at 244; to confine the use of the term "rational" to "actions, desires, or moral systems which survive maximal criticism and corrections by facts and logic," *id.* at 10; and to govern desires by a process of "cognitive psychotherapy" that would involve "reflection on available information, without . . . use of evaluative language," or simply "value-free reflection," *id.* at 113. This is, of course, a program deeply steeped in the fact/ value dichotomy that had been thoroughly debunked by the 1970's. *Cf.* PUTNAM, *supra* note 1.

42. *See* JOHN RAWLS, POLITICAL LIBERALISM 224-25 (1993) (describing the kind of reasons that can justify political arrangements and policies as consisting of common sense beliefs and non-controversial science).

43. *See generally* KARL R. POPPER, OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH 1-31 (rev. ed. 1979) (explaining that the inductive reasoning that is characteristic of science supports universal statements via falsification or refutation rather than by verification or confirmation).

ultimately on a confusion between emotions and feelings.[44] Feelings—bare somatic states—are subjective and irrational. But emotions are not feelings. First, emotions, unlike feelings, are intentional; that is, they have objects. For example, love is an emotion, whereas being cold is a feeling. As a result, I can say "I love *her*," but to say "I am cold *her*," is not only implausible, it is incomprehensible. Second, emotions are propositional—we hang predicates on them—whereas feelings are not. To say "I am distraught *that* she loves another" makes sense to any English speaker. But I cannot intelligibly say "I am cold *that* . . ." anything. Third, emotions are fallible, whereas feelings are indubitable. I can be persuaded that, on reflection, it was not love that I felt for her; it was instead a mere infatuation. But it is nonsensical to claim that, on reflection, I never was cold and just did not realize at the time that I was warm.

On this understanding of the nature of emotion, reasoning can and does influence one's emotions. My best friend can indeed persuade me that I never was in love with that woman, and this belief can be true or false. Consequently, value judgments are open to rational inquiry and debate even though they have an affective component. This fact is enormously important to the analysis of punishment. Instead of paying exclusive attention to consequences such as crime rates, and dismissing dignity and desert as impractically airy notions, we can take attributions of dignity and desert to be true or false—which means that we can take them seriously in the realm of law and public policy. The rule of law requires rational, predictable, constant, and regular judgments. Because we are accustomed to thinking of value judgments as satisfying none of these criteria, we have tended to exclude or minimize them—as, for example, consequentialist legal theorists have persuaded us to exclude desert and dignity from the analysis of punishment. But this is a mistake. Value judgments may be more complex and controversial than empirical statements, but

44. *See* GERALD GAUS, VALUE AND JUSTIFICATION: THE FOUNDATIONS OF LIBERAL THEORY 49-56, 106-26 (1990) (regarding the intentionality of emotion and valuation); SMITH, *supra* note 40, at 104-11 (regarding the propositional content and fallibility of emotion and desire); *cf.* RONALD DE SOUSA, THE RATIONALITY OF EMOTION 173-90 (1987); Nico H. Frijda, *Emotions Require Cognitions, Even if Simple Ones, in* THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 197 (Paul Ekman & Richard J. Davidson eds., 1994); ROBERT M. GORDON, THE STRUCTURE OF EMOTIONS: INVESTIGATIONS IN COGNITIVE PSYCHOLOGY 21-44 (1987); ANDREW ORTONY ET AL., THE COGNITIVE STRUCTURE OF EMOTIONS 15-17 (1988); Robert C. Roberts, *What an Emotion Is: A Sketch*, 97 PHIL. REV. 183, 185-90 (1988).

they are not irrational or arbitrary. They can be, and often are, sufficiently constant and regular to play a role in law.

We are worse off for refusing to make public value judgments openly and forthrightly. The movement toward quarantine in the field of criminal justice illustrates this point. In his short history of the drafting of the Federal Sentencing Guidelines, for example, Justice Breyer notes that the Commission quickly rejected desert-based sentencing because it was thought to be too "subjective."[45] The Commission instead devised a quasi-economic "revealed preferences" approach that relied on existing sentencing rates to determine the Guidelines' presumptive sentences.[46] Value judgments, however, are not so easily avoided, and normativity constantly intrudes. The highly politicized staff of the Commission covertly but systematically overstated the existing sentencing rates.[47] In its misconceived and necessarily futile attempt to minimize normativity, the Commission also severely curtailed the relevance of the offender's individual background and circumstances under the Guidelines.[48] By ignoring these traditional components of proportionality in sentencing, the Commission created uniformity at the expense of equality: offenders who are differently situated with respect to morally relevant personal considerations receive similar, and therefore unequal, sentences under the Guidelines.[49]

These glaring errors in the conception and drafting of the Guidelines rest ultimately on an uncritical pursuit of a specious

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45. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 16 (1988) (citing the "inherent subjectivity" of judgments about just deserts as the reason the Guidelines do not pursue a principled retributivism).

46. *Id.*

47. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

48. In 28 U.S.C. § 994(e) (2000), Congress required the Sentencing Commission to draft its guidelines and policy statements to discourage judges' considering the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties in sentencing. *Cf.* UNITED STATES SENTENCING GUIDELINES MANUAL §5H (1993) (barring such considerations from consideration in deciding whether to depart from the guidelines). *See also* Koon v. United States, 518 U.S. 81, 93 (1996) (noting that economic hardship, drug or alcohol dependence, and lack of guidance in youth are proscribed as sentencing considerations under the Guidelines); United States v. Watts, 519 U.S. 148, 160-63 (Stevens, J., dissenting) (explaining that the Guidelines circumscribe earlier provisions of the U.S. Code that authorize judges to consider all information concerning the background and character of the defendant).

49. The effect on minor children of offenders is one especially relevant feature that is not adequately taken into account in Guidelines sentencing. *See* BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN (2000).

"objectivity" in law that is characteristic of consequentialist legal theory. The well-publicized aim of sentencing reform in the early 1980s was to eliminate sentencing disparity and to promote uniformity. Avoiding disparity, however, is a nonsensical objective. If two offenders who have been convicted of an identical crime are not similarly situated, identical treatment will be unequal treatment. The real aim of the reformers was *equality* in sentencing. Consequently, the Guidelines take many features of the actual offense into account.[50] The difficulty is that the Guidelines take into account only those features that can be expressed quantitatively.[51] This choice, together with the rejection of personal circumstances as a legitimate sentencing consideration, eliminated any chance that the Guidelines would produce genuine equality in sentencing. Finally, even if the Guidelines had attained perfect equality in sentencing, they still would have been misconceived. To draw and quarter two shoplifters is to treat them equally. These equal punishments, however, are manifestly unjust because they are manifestly disproportionate.

The proper objective in just sentencing is neither uniformity nor

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50. One third of all Chapter Two Guidelines require a choice between alternative base offense levels for a single offense, a choice that is to be made by reference to "relevant conduct." *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (1987). After a base level is determined, relevant conduct is used again to raise the level in light of specific offense characteristics such as the number of firearms involved or the amount of money lost. *See id.* at § 2D1.1(b)(1) (firearms); *id.* at § 2B1.1 (amount of loss from theft); *id.* at § 2F1.1 (amount of loss from fraud). After specific offense characteristics are determined, relevant conduct is used again to make adjustments under Chapter Three of the Guidelines for the offender's specific role in the offense, *id.* at § 3B1.1, and any post-commission obstruction of justice. *Id.* at § 3C1.1. Relevant conduct, in turn, consists variously (and often cumulatively) of the following factors: all acts and omissions by the offender or accomplices in the preparation for, commission of, or concealment of the crime, *id.* at § 1B1.3(a)(1)(A), jointly undertaken criminal activity by others which was reasonably foreseeable to the offender, *id.* at § 1B1.3(a)(1)(B), aggregate harm caused by the offender or accomplices in the same course of conduct or common scheme or plan, *id.* at § 1B1.3(a)(2), and all harm caused or contemplated by these acts or omissions. *Id.* at § 1B1.3(a)(3).

51. *See id.* at § 3D1.2(d). David Yellen explains how the Guidelines' calculus of harms approach has led to discrepancies in sentencing of the kind that the Guidelines were supposed to eliminate. One source of discrepancies in Guidelines sentencing is the difference between section 3D1.2(d) offenses, to which real-offense sentencing principles apply, and those that are not subject to section 3D1.2(d), for which the offense of conviction determines the sentence. *See* David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines,* 78 MINN. L. REV. 403, 434-38 (1993) (describing this difference and the resulting discrepancies). The only difference between these categories is that the harm done in the former category of offenses is readily quantifiable. "The Commission decided that for certain types of crimes, amounts would largely determine the sentence. Then, because they could easily count amounts for nonconviction offenses, they did. This mechanical approach, apparently unguided by principle, seems destined to accomplish very little of value." *Id.* at 445.

equality, but rather proportionality. The difficulty is that a proportionate sentence is an "all-things-considered" value judgment. Disparity and inequality were never more than imperfect proxies for disproportionality, and the motivation behind the use of these proxies was the specious "objectivity" of consequentialist legal theory. The criminal justice system is better off without them. The enormous harm inflicted by the Sentencing Guidelines over the past two decades is directly attributable to the mistaken view that value judgments are arbitrary, and to the delusion that an inherently normative enterprise such as criminal sentencing can somehow avoid normativity.

III. THE RECOVERY OF DIGNITY AND DESERT

If the first motivation toward minimizing value judgments remains valid—that is, coping with wide diversity of belief on fundamental moral and legal issues in a democratic republic—then making value judgments and adopting norms openly and forthrightly in the law remains a difficult task. We will need the help and guidance that a comprehensive moral or ethical theory can provide. In the theory of punishment, this means we should abjure consequentialism and consider virtue ethics as an alternative.[52]

Virtue ethics in the Aristotelian tradition has nothing to do with the suppression of desire in order to adhere to moral prescriptions. Properly understood, aretaic[53] ethics is premised on the idea that desires and motivations, like the emotions and value judgments on which they are based, are subject to rational governance. Aretaic legal theory recognizes that norms govern people not only at the level of instrumental reasoning, but also at the level of desire, motivation, and character. Unlike the deontological theory of punishment, the aretaic theory does not deny that punishment's consequences, such as deterrence and incapacitation, are both valuable and justifying. But the aretaic theory of punishment does reconceive those functions.

Consider deterrence. When we encounter a substantial amount of lightly guarded cash at the corner store, most of us do not remind ourselves that we could be punished for theft if we were to take it. On the contrary, it simply never occurs to us to steal, because our desires and standing motivations have been formed in a way that excludes

52. *See* Huigens, *supra* note 3, at 1019-36.

53. *Arete* is the Greek word for virtue. OXFORD DICTIONARY OF MODERN GREEK 346 (1987).

theft. This governance at the level of desire and motivation is not a matter of subliminal conditioning; it is a matter of rational reflection on our characters and identities. We become who we are at home, in school, and in places of worship. What goes on in these places is not brainwashing, but explanation and argumentation; not indoctrination, but reasoning. We are similarly formed by the criminal law. The public expression and instantiation of criminal law norms in the practice of punishment does more than encourage instrumental reasoning about avoiding pain. The law affects us at the level of desire and motivation. But it is a fundamental misunderstanding to take this to mean that the law affects us subconsciously. Our characters, desires, and motivations are formed by the rational debate, deliberation, decision, and reflection involved in the choice and execution of criminal law norms. The criminal law causes us to refrain from wrongdoing by the rational governance of our ends, and not by the crude means-ends reasoning that is usually denoted by the word "deterrence."

Aretaic legal theory can shed this kind of light on how the criminal law works and ought to work in a variety of areas. It is a powerful theory that solves longstanding difficulties over the nature of criminal culpability,[54] the constitutional definition of an offense,[55] the conflict between autonomy and rehabilitation,[56] the effect of mistakes about justification,[57] and the relationship between punishment's multiple ends.[58] Most important, aretaic legal theory does not reject retrospective reasons for action, including attributions of desert and dignity. The aretaic theory of punishment not only explains the criminal law, but explains it in a way that never would have devolved

54. The word "culpability" is ambiguous between fault in wrongdoing and the eligibility (in the sense of fair candidacy) of a defendant for punishment. Eligibility is the concern in doctrines of excuse, such as insanity. Fault is an aspect of wrongdoing that is best (but not necessarily) described in terms of intentional states. *See* Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1230-54 (2000) (developing this distinction).

55. *See* Kyron Huigens, *Solving the* Apprendi *Puzzle,* 90 GEO. L.J. 387, 434-49 (2002) (analyzing the constitutional validity of determinate sentencing, mandatory minimum sentencing, and three-strikes sentencing in aretaic terms).

56. *See* Kyron Huigens, *Street Crime, Corporate Crime, and Theories of Punishment: A Response to Brown*, 37 WAKE FOREST L. REV. 1, 16-23 (2002) (defending drug treatment courts as dispensing genuine punishment to autonomous moral agents).

57. *Id.* at 23-28 (construing the "battered woman's defense" as a faultless mistake about justifying circumstances).

58. *See* Kyron Huigens, A Specification to Coherence Theory of Punishment's Justification 1-5 (unpublished work in progress, on file with author), *available at* http://users.ox.ac.uk/~magd1534/JDG/huigens.pdf.

punishment into quarantine. When the consequences of the quarantine movement hit home, the aretaic theory of punishment will offer us the best chance to return the criminal justice system to the practice of genuine punishment.