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ON ARISTOTELIAN CRIMINAL LAW: A REPLY TO DUFF

KYRON HUIGENS*

INTRODUCTION

According to some of the best legal scholars working today, a theory of punishment is something to be avoided, if at all possible. For some, any and all theorizing about the criminal law is a misguided affair. In the mode of the Posnerian "pragmatist," Dan Kahan scoffs at the notion that any theory can provide the truth about criminal law.¹ He insists that our objective is clear—less crime instead of more—and that we should simply do what works to achieve that end. This advice would be easier to dismiss if Kahan's analyses of what works were less dazzling, and if some other scholars such as William Stuntz and Darryl Brown were not doing equally brilliant work with no more in the way of apparent theoretical scaffolding than Kahan employs.² Other scholars are not opposed to theorizing in principle, but wisely caution that it is not always appropriate. Long before Cass Sunstein announced the discovery of undertheorization as a virtue in constitutional law,³ Kent Greenawalt made the same point in connection with

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1. See Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2496 (1997); cf. Jeremy Waldron, *Ego-bloated Hovel*, 94 NW. U. L. REV. 597, 600–01 (2000) (describing Richard Posner's legal pragmatism; reviewing RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999)).

2. See, e.g., Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001); William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2002) (describing overcriminalization and the enhancement of prosecutors' power); cf. Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811 (2002) (a theory-based response to Stuntz); Kyron Huigens, *Street Crime, Corporate Crime, and Theories of Punishment: A Reponse to Brown*, 37 WAKE FOREST L. REV. 1 (2002) (a theory-based response to Brown).

3. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35 (1996).

the criminal law.⁴ In his classic article *The Perplexing Borders of Justification and Excuse*, Greenawalt argued that it is best not to ask legislators to engage in theorizing where criminal law defenses are concerned.⁵ In defining self-defense, for example, legislators might adopt a rule of non-retreat from one's home because it is either morally preferable or morally tolerable to defend oneself in that situation. But they might well fail to resolve the question at all if they were required to specify which it is, exactly: morally preferable and therefore justified or morally tolerable and therefore excused.⁶

In a recent article entitled *Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, Antony Duff makes a third argument along these lines.⁷ Like Greenawalt, Duff does not object to theorizing in principle, but he goes beyond Greenawalt's recommendation that some decision-makers should sometimes refrain from theorizing. Duff argues that theorists themselves should moderate their ambitions because, even though grand theories are intermittently enlightening, they are "doomed to ultimate frustration, . . . and can lead to dangerously procrustean attempts to fit every aspect of criminal liability to one model"⁸ I strongly suspect that Duff rejects Posnerian "pragmatism," but he agrees with Kahan that criminal law theorizing should be eclectic. Duff believes "that we should look not for a single model of criminal liability, but for a number of different models, patterns and structures that interweave (and may conflict) in various and complex ways."⁹

This description is a fair one of Duff's own work, which is characterized by a revolving menu of basic concerns that he brings to bear, as needed, on particular problems, but that do not amount to a comprehensive theory of punishment. What distinguishes Duff's eclecticism from Kahan's is that, whereas Kahan picks and chooses from a public policy and legal economics menu, Duff's staples and his style of blending them are philosophical. Among other things, he deals with problems of action and intentionality; he defends liberal, constitutional democracy

4. See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

5. *Id.* at 1903-07.

6. *Id.* at 1906. This simplifies Greenawalt's example. As he notes, some would argue that a tolerable act is justified, not merely excused.

7. Antony Duff, *Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147 (2003).

8. *Id.* at 147.

9. *Id.*

and its supporting moral values; and he has argued for the importance of employing thick evaluative terms in criminal law.

Thus, in a recent book chapter, Duff argues that the intentions with which a homicide might be committed cannot be separated out from the conduct and harm that constitute homicide—as Paul Robinson has proposed to do in his matched pair of draft criminal codes.¹⁰ To separate act and intention in this way is to misdescribe the wrong that the criminal law condemns. The law does not merely prohibit causing certain harms and engaging in certain acts, in a content-independent way.¹¹ The law identifies pre-legal wrongs and designates them for legal condemnation and punishment in a content-dependent way. If I do not murder anyone, it is because I do not want to murder and believe that murder is wrong; not merely because I fear punishment by a superior power if I do commit murder. Intentions are often essential features of these pre-legal wrongs.¹² The difference between these two versions of the criminal law, Robinson's and Duff's, is a normative one. We might choose to define and impose prohibitions without reference to moral wrongs, as Robinson seems to propose, but Duff argues that this way of proceeding is inappropriate in a constitutional democracy, which ought not to assume a top-down command structure. Instead, criminal law ought to be framed in thick evaluative terms that are widely and mutually intelligible within a normative community of equals.¹³

The fact that Duff is a philosopher with more than a technical interest in law leads me to suspect him of secret ambition. This is not to say that he has been disingenuous, but only to suggest that his rejection of grand theorizing is not a matter of logic or principle, but of caution born of experience. Duff seems to be dedicated to going where the arguments and evidence take him. Should they take him toward a comprehensive theory of punishment that met his normative concerns, I suspect he would willingly, if warily, go along.

10. R.A. Duff, *Rule-Violations and Wrongdoings*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 47, 71 (Stephen Shute & A.P. Simester eds., 2002); see also PAUL H. ROBINSON, THE STRUCTURE AND FUNCTION OF CRIMINAL LAW (1997).

11. That is, the motive for compliance—the threat of punishment—is independent of the content of the norm. If the prohibition is content-dependent, in contrast, the motive for compliance is the norm and one's belief in and desire for the end it advances. See Duff, *supra* note 10, at 51–53.

12. *Id.* at 51–52.

13. *Id.* at 53–56.

In the pages that follow, I will attempt to draw Duff in this direction. This may be a fool's errand, and one additional fact may make it seem all the more so. In *Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, Duff takes a work of mine as his paradigmatic example of grand theorizing. He calls my article "the most ambitious of recent Aristotelian accounts of criminal liability," in a context in which it is plain that "ambitious" is not a good thing.¹⁴ Neither, for that matter, is "Aristotelian." Aristotelian punishment theory attempts to describe the criminal law in terms of virtue. Virtue, for Aristotle, was not adherence to moral duties against one's inclinations, but a quality of exemplary practical judgment by which the agent does right because the right is what he wants to do—not in the sense that he wishes to comply with a rule, but in the sense that his judgment is so well attuned to the good in ordinary affairs that the right course of action and its objectives are desirable to him. I have argued that the justification of punishment turns on an assessment of whether the defendant exhibited a lack of Aristotelian virtue in the conduct that violated the criminal law, because the inculcation of this kind of virtue is a justifying end of the criminal law.¹⁵ Duff finds this theory not only grand and procrustean, but also wrong on the merits.

However, I am encouraged to think that I might win Duff over to an ambitious Aristotelian agenda by two considerations. First, I myself no longer have any real attachment to many of the arguments that Duff rejects. I have retained the basic position and aim of that early effort—my project remains a comprehensive theory of punishment along virtue ethics lines—but I have refined the theory and its supporting arguments in the intervening years (or so I believe). Second, in the subsequent development of this comprehensive theory of punishment, Duff's writings have played a significant, if secondary, role. The theory that Duff rejects has come to rely less on Aristotle and more on the modern literature of virtue ethics or, in a simpler phrase, aretaic theory.¹⁶ Duff is not an aretaic theorist, but my project is an aretaic theory of punishment, and no one working on punishment theory can ignore Duff's work. More to the point, I have never felt the need to ignore Duff's work or a desire to escape his influence. On the contrary, I share his concerns, am persuaded

14. Duff, *supra* note 7, at 179.

15. See Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1480 (1995).

16. *Arete* is the Greek word for virtue.

by most of his arguments, and have always believed that I could reconcile many of his concerns and his arguments with my own.

In the first Part that follows this Introduction, I will argue that Duff's fear of grand theorizing is unwarranted and that the concerns behind his eclecticism need not rule out the pursuit of a comprehensive theory of punishment. In Part II, I will describe an aretaic theory of punishment and respond to the specific objections that Duff has made against my first statement of such a theory. In satisfying Duff's concerns, I will move my position closer to his. My Conclusion will suggest that Duff could, if he wished, move in my direction. That is, with nothing to fear from grand theorizing and with his preliminary objections to an aretaic punishment theory answered, he might also see how his own longstanding concerns, the pieces of his eclectic approach, fit comfortably within a larger, aretaic, framework.

I. GRAND THEORY VERSUS ECLECTIC THEORY

A. *Grand Theory*

Duff's rejection of grand theorizing seems to contradict my claim that our views are congruent, but I have already said that I do not take that rejection at face value. In this Section, I want to expand on that thought by describing some basic features of criminal law theorizing. These are, I hope, sufficiently general and uncontroversial that they form a common ground from which I can begin to persuade Duff to move in my direction. I am concerned in particular with his charge that grand theorizing runs the risk of procrusteanism.

A theory of punishment, like any jurisprudential theory, has a descriptive part and a normative part. Legal positivism, for example, has as its centerpiece the separation thesis: the idea that law and morality are two different normative systems, so that to insist, as natural law theorists once did, that an immoral law is no law at all is just confused. (Among other things, it overlooks the distinction between descriptive and normative claims.) The separation thesis itself is descriptive. But many legal positivists also make normative arguments from the separation thesis. They place value on the formality and prospectivity of legal rules in contrast to ordinary morals, and advance a distinctive rule of law agenda according to which legal norms *ought* to be different from and independent of moral norms to a very great degree.¹⁷ The theory of punishment tends to work in the opposite direc-

17. See Jeremy Horder, *Criminal Law and Legal Positivism*, 8 *LEGAL THEORY* 221, 222–25 (2002) (describing legal positivists' view of the criminal law).

tion, in that normative claims tend to drive the descriptive account. Thus, the principal preoccupation of consequentialist theorists of punishment at mid-point in the last century was to avoid the charge that punishment on the consequentialist model authorized scapegoating. The normative claim that scapegoating would be morally intolerable was a given, and the task was to describe punishment in consequentialist terms in a way that avoided suggesting otherwise.¹⁸

The relationship between the descriptive and the normative in legal theorizing is dialectical. Untoward normative implications can be a ground for rejecting a particular description, and normative aspirations can be stymied by the unorthodox appearance of necessary reforms. I have already given an example of the former pattern in the effort of H.L.A. Hart and others to formulate the consequentialist theory of punishment in a way that could avoid authorizing scapegoating. As an example of the latter pattern, consider the effort by Glanville Williams and Jerome Hall to persuade the other drafters of the Model Penal Code to adopt a purely subjective or intentional-states approach to criminal fault—that is, to adopt the position that criminal fault consists of a discrete intentional state of mind on the occasion of action.¹⁹ This effort at fundamental reform failed because, among other implausibilities, the pure intentional-states approach to fault implies a rejection of criminal negligence, an acceptance of justification premised on mere good faith belief in justifying circumstances, a tolerance for acquittal on the ground of unreasonable mistakes, and the outright abolition of felony murder. None of these agenda items was adopted, because the unorthodox appearance of a code featuring them would have doomed the new model code in state legislatures, thus defeating the other normative, reformist aims of the Code drafters.²⁰ This dialectic between descriptive and normative is not only normal

18. See, e.g., H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 1, 5–11 (1968); J.D. Mabbott, *Punishment*, 48 *MIND* 152 (1939), reprinted in *THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS* 39, 49–50 (H.B. Acton ed., 1969); Anthony M. Quinton, *On Punishment*, 14 *ANALYSIS* 512 (1954), reprinted in *THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS* 55, 63 (H.B. Acton ed., 1969); John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955), reprinted in *THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS* 105, 111 (H.B. Acton ed., 1969).

19. See GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 32–34, 123 (2d ed. 1961); Jerome Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 *COLUM. L. REV.* 632, 643 (1963).

20. See Herbert Wechsler, *Codification of the Criminal Law in the United States: The Model Penal Code*, 68 *COLUM. L. REV.* 1425, 1438–41 (1968) (describ-

but inescapable. Criminal law theorists will continue to support their theories by pointing to positive or palatable normative implications, and criminal law reformers will continue to support their reforms with arguments that new practices are consistent extensions of the pattern and deep logic of existing practices.

In this light, Duff's warning that grand theorizing runs an unusually great risk of procrusteanism seems questionable. When descriptive fidelity should give way to normative reformism (or vice versa) is a judgment call, and one can and should assess a theory for the adequacy of its implicit judgment calls along these lines. The charge of procrusteanism is a way of saying that one's opponent has let his normative aspirations overbalance his descriptive fidelity (or vice versa)—as happened in the case of Williams and Hall. But the hazard of procrusteanism in this sense is universal, and is not a function of a theory's aspiration to comprehensiveness. On the contrary, it is a hazard of willful, careless, or inept theorizing on any scale. For example, one feminist theorist whose interest in the criminal law apparently extends no farther than ensuring the acquittal of battered women who kill or assault their batterers has argued for the legal authorization of vigilantism in such cases.²¹ This, I think, is a procrusteanism that would sacrifice not just the feet but also the legs and torso of the criminal law. But it is a procrusteanism born of ambitions that are too narrow instead of too broad. Is it possible to guarantee that the opposite danger is non-existent; that ambitious, comprehensive theories of punishment run no risk of procrusteanism? Obviously not. If one suffers from a tendency to engage in grand theorizing, the most that one can do is to develop the quality of one's practical judgment and to bring that judgment to bear on one's theorizing, in order to balance the descriptive and the normative properly. If this were impossible, then neither Duff nor I nor any other conscientious legal scholar would engage in theorizing about the criminal law.

Let me give an example of a strongly normative theoretical argument, drawn from a comprehensive theory of punishment, that is not procrustean. I have argued in several places that the Federal Sentencing Guidelines ought to be declared unconstitutional because they feature judicial determinations of positive

ing the retention of negligence and a traditional intoxication defense over objections by Hall, Williams, and Learned Hand).

21. See Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. UNIV. J. GENDER & L. 141 (1995). Cf. Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. PITT. L. REV. 757, 802–06 (describing a defense of "tyranny murder" for battered women).

non-intentional fault considerations, in violation of the Sixth Amendment jury trial guarantee.²² Given that thousands of prisoners have been sentenced under the Guidelines over a period of nearly twenty years, whereas positive non-intentional fault is a novel theoretical category that features in a novel theory of punishment, this contention undoubtedly seems like the worst kind of procrusteanism. It is not. The feature of the Guidelines that I believe renders them unconstitutional is a practice—so-called “real offense” sentencing—that has been consciously rejected by every other jurisdiction that has adopted a determinate sentencing system.²³ It is the feature that, aside from the sheer excessiveness of Guidelines sentences, has drawn the most criticism from judges and scholars. It is the feature of the Guidelines that logically should doom them under the Supreme Court’s developing Sixth Amendment jurisprudence.²⁴ In short, something is seriously amiss with the Guidelines. And yet all attempts to explain precisely what is wrong seem to run aground. The Court’s Sixth Amendment jurisprudence is caught in a cycle of indecision and ambiguity that has run for fifty years.²⁵ As a result, no one really knows which way the ultimate decision on the Guidelines’ validity will go. The problem seems to have driven both Justice Breyer, the principal author of the Guidelines, and Justice Scalia, a Sixth Amendment stalwart, into patently untenable positions in that developing line of cases.²⁶ Theorists who have identified the

22. See Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 435–42 (2002) [hereinafter Huigens, *Apprendi Puzzle*]; Kyron Huigens, *Harris, Ring, and the Future of Relevant Conduct Sentencing*, 15 FED. SENT. REP. 88 (2003) [hereinafter Huigens, *Harris*].

23. Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENT. REP. 355, 356 (1992).

24. Huigens, *Apprendi Puzzle*, *supra* note 22, at 435–42.

25. *Id.* at 393–413.

26. In *United States v. Harris*, 536 U.S. 545 (2002), the Court upheld a mandatory minimum sentence against a Sixth Amendment challenge based on *Apprendi*, even while five Justices said that *McMillan v. Pennsylvania*, 477 U.S. 79 (1984), the case that authorizes mandatory minimum sentencing, could not be reconciled with *Apprendi*. Justice Breyer’s vote produced this outcome. *Harris*, 536 U.S. at 568–69 (Breyer, J., concurring). More strange than the outcome was the reason Breyer offered for voting to affirm *Harris*’s sentence while conceding that *McMillan* is, to his mind, logically inconsistent with *Apprendi*. Breyer said of *Apprendi*: “I cannot yet accept its rule.” *Id.* at 569.

Justice Scalia has described the Sixth Amendment jury right as “the spinal column of American democracy,” *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting), and was in the *Apprendi* majority. *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (stating that the Constitution requires the broad rule “that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury”). Scalia was also in the majority in *Apprendi*’s precursor case, *Jones v. United States*, 526 U.S. 227

objectionable feature of real offense sentencing have not been able to explain why that feature invalidates the practice under the Sixth Amendment.²⁷ Given this state of affairs, new tools from an ambitious theoretical project seem to be called for. To use them to explain a conclusion that many conscientious, practical-minded lawyers, judges, and scholars have already reached, but only by intuition, is not procrustean. In spite of its strong normativity—its seemingly drastic recommendation and its coming down hard on one side of a controversy instead of ecumenically reconciling opposing views—my argument makes the theoretical bed fit the practical body, not the other way around.

Finally, while I concede Duff's charge that I have engaged in grand theorizing and while I will continue, incorrigibly, to do so, I will also insist that I do this in response to others' procrusteanism. The intentional-states account of fault that Williams and Hall insisted upon in the course of the Model Penal Code's drafting remains the leading account of criminal fault. In spite of the Code's many concessions to existing practices—with regard to felony murder and intoxication as a defense to recklessness, for example—the Code is fundamentally committed to an intentional-states account of fault.²⁸ The same is true of the vast majority of criminal law theorists working today. But a consequence of making this assumption is that a huge number of ordinary criminal law doctrines must be treated as paradoxical, unprincipled, or radically unsettled, because they simply do not fit the intentional-states paradigm. One can find writers taking such views of criminal negligence,²⁹ unreasonable mistake in rape,³⁰ transferred intent,³¹ felony murder,³² depraved heart or

(1999). But Scalia voted with the plurality in *Harris*, without explanation. *Harris*, 536 U.S. at 548.

27. See Huigens, *Harris*, *supra* note 22, at 98 (extending the arguments of Michael Tonry, John C. Coffee, and Kevin Reitz on the subject of "legally recognized facts" and real offense sentencing). See also Michael Tonry & John C. Coffee, *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms*, in *THE SENTENCING COMMISSION AND ITS GUIDELINES* 142, 155 (Andrew von Hirsch et al. eds., 1987); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 *STAN. L. REV.* 523, 535 (1993).

28. MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 4 (1985); Wechsler, *supra* note 20, at 1439.

29. See Hall, *supra* note 19, at 635.

30. See Rosanna Cavallero, *Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 *J. CRIM. L. & CRIMINOLOGY* 815, 816 (1996) (analyzing "a growing judicial discomfort with the implications of an expansive defense of mistake to a charge of rape"); Victoria J. Dettmar, Comment, *Culpable Mistakes in Rape: Eliminating the Defense of Unreasonable Mistake of Fact as to Victim Consent*, 89 *DICK. L. REV.* 473, 483–89 (1985) (summarizing cases that impose a reasonableness requirement on mistake in cases of rape); Lani Anne Remick, Com-

malice murder,³³ strict liability,³⁴ intoxication as a defense to recklessness,³⁵ mistake regarding justifying circumstances,³⁶ conditional intent,³⁷ accomplice liability premised on negligence,³⁸

ment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1108 ("At least one court has even gone so far as to suggest that there is no mens rea for rape.").

31. See Anthony M. Dillof, *Transferred Intent: An Inquiry into the Nature of Criminal Culpability*, 1 BUFF. CRIM. L. REV. 501, 502-03 (1998) (arguing "against the moral soundness of the doctrine" because it "is inconsistent with the general principle that actors should not be punished based on the unintended results of their actions"); William Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 650 (1967) (describing the doctrine as an "arrant, bare-faced fiction of the kind dear to the heart of the medieval pleader").

32. See James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1431 n.9 (1994) (collecting critical commentary).

33. See Bernard E. Gegan, *More Cases of Depraved Mind Murder: The Problem of Mens Rea*, 64 ST. JOHN'S L. REV. 429, 432-37 (1990) (describing the unsuccessful efforts of some courts to reduce the doctrine to recklessness).

34. See Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 267 (1987) ("If a principle is at work [in strict liability crimes], it is the principle of 'tough luck.'"); Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 337 (1989) ("[T]he notion that the criminal law is unique because of its moral underpinnings and its infliction of blame-bearing punishment has been diluted significantly" by the rise of strict liability).

35. See Herbert Packer, *The Model Penal Code and Beyond*, 68 COLUM. L. REV. 594, 599-601 (1968) (criticizing the Code's perpetuation of the traditional rule as illogical under the Code's intentional-states construction of culpability). See also Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 251 (1998) (describing the complete elimination of the defense of voluntary intoxication as part of a recent trend toward the incapacitation of dangerous persons in disregard of fault or desert); cf. *Montana v. Egelhoff*, 518 U.S. 37, 40 (1996) (approving this abolition against a due process challenge).

36. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 40 (1988) (arguing for a reasonableness limitation on belief in justifying circumstances); Singer, *supra* note 34, at 514 ("If it is difficult to support the requirement that an actor's mistake be reasonable in order to exonerate in normal circumstances, it is virtually impossible to understand the requirement in a self-defense or other exigent situation.").

37. See *United States v. Holloway*, 526 U.S. 1, 13 (1999) (Scalia, J., dissenting) (arguing that conditional intent is a contradiction in terms).

38. See Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2169 (1988) (arguing that "accomplice liability should only attach where the accused accomplice possesses the full mens rea requirement of the substantive offense"); Andrew H. Friedman, Note, *Tison v. Arizona: The Death Penalty and the Non-Triggerman: The Scales of Justice Are Broken*, 75 CORNELL L. REV. 123, 145-50 (1989) (arguing that the Supreme Court has authorized accomplice liability without fault in a capital case); cf. *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient" to constitute fault for capital murder).

and willful ignorance.³⁹ Having concluded that one of these doctrines is unsustainable, the theorist urges its abolition,⁴⁰ recommends a resigned acceptance of reality,⁴¹ or advances an *ad hoc* solution.⁴² I confess that I find this situation unsatisfactory. It seems to me that these are procrustean responses born of a grand theory, and that their accumulation and persistence is a reason not only to discard that theory but to develop a better one that is, of necessity, equally comprehensive.

B. *Eclectic Theory*

In one respect, Duff cannot mean what he says about eclectic theorizing. He writes that “we should look not for a single model of criminal liability, but for a number of different models, patterns and structures that interweave (and may conflict) in various and complex ways.”⁴³ It is the parenthetical that concerns me, because I do not believe that Duff means literally that we should adhere to ideas about punishment that are irreconcilable in principle. Nothing else in his writings suggest so radical a step as abandoning the principle of non-contradiction. He must mean something more modest, such as the following. In the course of our thinking through the vast field of punishment, our theoretical statements may appear at times to contradict one another. However, we should not give reconciling these apparent conflicts first priority, but should instead keep our attention and efforts focused on the practices we are trying to explain. If we do this well, the apparent conflicts eventually will be resolved. We should not be afraid to hang back agnostically at some points until the way clears. Duff’s eclecticism, on this interpretation, is merely an acknowledgment that there are many such points of agnosticism.

This is a perfectly reasonable position generally, but one that I do not want to adhere to in the very place that Duff invokes it—that is, in connection with the application of virtue ethics to punishment. It seems to me that an aretaic theory of punishment is eminently possible, almost completely unexplored, enormously promising, and urgently needed. In Part II, I will explore

39. See Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 *FORDHAM L. REV.* 263, 297–326 (2002) (finding knowledge, willful blindness, and indifference inadequate as the mens rea of rape).

40. See, e.g., Hall, *supra* note 19.

41. See, e.g., Charlow, *supra* note 39, at 326–27.

42. See, e.g., MODEL PENAL CODE § 210.2 cmt. 6, at 29–42 (1980) (describing the Code’s revision and retention of the felony murder rule, which in its original form is “indefensible in principle”).

43. Duff, *supra* note 7, at 147.

the terms and merits of the theory. In this Section of Part I, I will explain why I think that there ought to be such a thing as an aretaic theory of punishment, how an ambitious program to articulate that theory can be reconciled with a healthy eclecticism, and why I think Duff's brand of eclecticism might be unnecessarily cautious and ultimately misleading.

A quick review of the leading criminal law casebooks reveals that the theory of punishment breaks down into two camps consisting of utilitarian justifications for punishment and retributive justifications for punishment, respectively.⁴⁴ This is all wrong. We ought to make some simple, basic distinctions between a theory of punishment, the justification of punishment, and the ends of punishment. A theory of punishment is a general, systematic explanation of our practices. The justification of punishment is one of the standing issues pertaining to our practices that a theory of punishment might explain—among others, such as the nature of criminal fault, the grounds of excuse, and so on. The end of punishment is the reason or reasons why we punish, and might also be called punishment's objective or function. (The end of punishment is actually just another issue to be explained by a theory of punishment, but it is one that has assumed a special, if unwarranted, importance. I separate it out here just so we can see the problem of its unwarranted importance.) The problem with the standard casebook formulation of the theory of punishment is that it refers indiscriminately to both utilitarianism (a theory) and retribution (an end) as justifications of punishment, whereas neither of them is any such thing. Utilitarianism might offer a justification of punishment among its other explanations of punishment's features. And retribution is an end of punishment that can be given a utilitarian explanation—according to which it will have no role in punishment's justification.

This is just one corner of a field that, as Duff suggests, is vast and complicated. There are many conceivable ends of punishment: retribution, incapacitation, general deterrence, specific deterrence, rehabilitation, public catharsis, and the internalization of norms, to name the most prominent. Likewise, there are many issues that a theory of punishment should be able to

44. See, e.g., JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 33–46 (2d ed. 1999) (discussing “utilitarian justifications” and “retributive justifications”); SANFORD KADISH & STEPHEN SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 101 (7th ed. 2001) (“Broadly speaking, the justifications for punishment fall into two large groups, retributive and utilitarian.”); PAUL H. ROBINSON, *FUNDAMENTALS OF CRIMINAL LAW* 31 (2d ed. 1995) (discussing “retributive justification” and “utilitarian justification”).

explain, beyond the question of punishment's justification: the nature of wrongdoing, the nature of fault, the ground of the excuses, the nature of justification defenses, the meaning of proportionality in sentencing, and so on. And, finally, there are at least three major traditions in philosophical ethics on which we might want to draw in order to articulate the ends of punishment and to provide explanations of things such as punishment's justification. These are consequentialism (of which utilitarianism is only one variety), deontological morality, and virtue ethics.

The field of punishment theory might be represented graphically this way:

Ends of Punishment	Theories of Punishment	Issues Requiring Explanation
Retribution	Consequentialist	Justification of Punishment
Incapacitation	Deontological	Ends of Punishment
Specific Deterrence	Aretaic	Wrongdoing
General Deterrence		Fault
Rehabilitation		Justification Defenses
Public Catharsis		Excuse Defenses
Internalization of Norms		Proportionality in Sentencing

Looking at punishment theory from this perspective, two important points can be made. First, punishment's justification by a primary end is not what defines theories of punishment. In other words, there is no necessary correlation horizontally between the items in the columns on this chart. Casebook authors confuse theory, end, and justification in the way that they do because they assume that a theory of punishment must take some one end of punishment as the primary justification of punishment, and that which end is chosen for this purpose defines each theory. Hence the so-called retributive theory of punishment, which says that punishment is justified by retribution; the so-called deterrence theory of punishment, in which punishment is justified by deterrence; and so on. But a more careful mapping reminds us that the field is more complex. To expand on the example that I have already noted, we can make connections between retribution as an end, consequentialism as a theory, and justification as an issue in need of explanation: consequentialism will deny that retribution has any justifying force—except perhaps derivatively through the consequence of public catharsis, which then becomes the consequentialist's reformulation of the end of retribution. Connections of this kind are concealed by conventional wisdom, which offers a choice between retribution as our theory and justification of punishment or deterrence as

our theory and justification of punishment.⁴⁵ To map things more carefully makes the simple but clarifying point that whether or not retribution or deterrence is taken to justify punishment depends on the moral theory that is brought to bear on that function.

Second, this mapping reminds us that there is more work to be done by a theory of punishment than to answer the question about punishment's justification. Consequentialism needs to describe the structure of wrongdoing and explain proportionality in sentencing, as well as to account for punishment's justification. Likewise, everyone knows that Kant justifies punishment by appeal to retribution. But this overlooks the fact that deontological moral theory necessarily has something to say about deterrence and incapacitation in relation to justification—that is, that they do not justify—and that it offers a distinctive take on fault and the excuses as well. This is not to say that theorists are not actually doing this work. For example, Andrew von Hirsch has explained deterrence and incapacitation within a deontological framework as a supplementary prudential reason to comply with the law.⁴⁶ And of course the voluntarism of Kantian deontological morality has been invoked in support of the intentional states construction of fault.⁴⁷ My point is only that our customary mapping of the theory of punishment tends to obscure the complexity and richness of the field and to make our exploration of it haphazard.

In no respect is this more true than in connection with virtue ethics. Once one makes the appropriate distinctions between theory, end, and justification, and once one maps the field as I have done above, then the possibility of an aretaic theory of punishment becomes obvious. Virtue ethics, like any other moral theory, can put a gloss on the ends of punishment and can offer explanations of our practices. This would seem to be an interesting exercise even if nothing of concrete, practical value were to come of it. In fact, the first effort in this direction was made over thirty years ago.⁴⁸ But this portion of the field has

45. Cf. Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 N.W. UNIV. L. REV. 843, 869–87 (2002) (arguing against a complete taxonomy of straw man "retributive" theories).

46. ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 12–14 (1993).

47. Cf. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 7 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1785) ("It is impossible to think of anything at all in the world . . . that could be considered good without limitation except a good will . . . A good will is not good because of what it effects or accomplishes . . . it is good in itself.").

48. See Edmund L. Pincoffs, *Legal Responsibility and Moral Character*, 19 WAYNE L. REV. 905, 918 (1973) (arguing that punishment represents a demand

never developed beyond the stage of a curiosity, and the casebook writers have never made so much as an oblique reference to it.

In this situation, it seems to me that the eclectic approach that Duff recommends, whatever its merits generally, is out of place. We have failed to make some basic distinctions and we have been very eclectic already—and it is hard to tell which is the cause of which. I have made no more than a modest start on thinking through the implications that contemporary virtue ethics has for punishment, and some of Duff's criticisms of that effort are well taken. But I do not think that Duff has made a convincing case against continuing down this path toward a comprehensive aretaic theory of punishment.

As I have already argued, I do not believe that such a program is at an unusual or intolerably high risk of procrusteanism. I also think it can be reconciled with an eclectic approach, albeit of a different kind than Duff describes. To begin with, aretaic ethics is hardly a monolithic school of thought. On the contrary, it exhibits the variety and dissension of any young and healthy intellectual enterprise. Rosalind Hursthouse's virtue ethics⁴⁹ is not Alasdair MacIntyre's virtue ethics⁵⁰ is not Henry Richardson's virtue ethics.⁵¹ Furthermore, not every feature of virtue ethics need be thought relevant to punishment, and some concepts that are relevant to punishment might be seen as only contingently or tangentially related to virtue ethics proper. For example, I make little use of the discrete, traditional virtues and vices such as courage and sloth; and certain conceptions of value and motivation that are useful in criticising consequentialist theories of punishment are characteristic of, but may not be necessary or essential to virtue ethics. Perhaps most important, the boundaries between virtue ethics and both consequentialism and deontology, respectively, are neither clear nor antecedently fixed. Justin Oakley describes a variety of aretaic theories according to the degree of their departure from consequentialism—making it

that one develop and exhibit certain character traits); see also Peter Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POL'Y 59 (1990), reprinted in CRIME, CULPABILITY, AND REMEDY 59, 61 (Ellen Frankel Paul et al. eds., 1990) (arguing that so-called rational choice theory is inadequate to describe the criminal law's concern with character); Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 252–53 (1995) (relying on Aristotle's conception of judgment to give an account of duress in terms of states of character).

49. See ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999).

50. See ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1997).

51. See HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS (1994).

clear along the way that establishing a perfectly watertight boundary between consequentialism and virtue ethics may be impossible.⁵² Barbara Herman and Nancy Sherman have both, in different ways, re-read Kant as a virtue ethicist.⁵³ Herman, indeed, argues that the very idea of deontological morality is a misreading of Kant.⁵⁴ I suspect that Herman's work holds enormous potential for the theory of punishment, and whether one were to call the product of such an effort a Kantian theory of punishment or an aretaic theory of punishment would be a matter of indifference. If this attitude, along with a general willingness to let our practices lead one's theorizing, counts as eclecticism, then I certainly subscribe to eclecticism of that kind.

Finally, Duff's own theorizing is systematic to a degree, but I suspect that the limitations of that system are not unrelated to his eclecticism. Duff has drawn a distinction between "choice" and "character" theories of punishment, and has advocated an "act" theory of punishment in conscious opposition to these two.⁵⁵ The governing idea of this three part scheme is the reason behind punishment; that is, the answer we give to the question, what is punishment inflicted *for*?⁵⁶ Some theories focus on the criminal's capacity for choice and the place of choice in our moral and political lives, and say that we punish because of the choices the offender makes in committing crimes. Other theories contend that we punish criminals because their acts reveal their characters, because some characters harbor dangerous propensities, and because we intend punishment to reform such characters. Duff rejects both of these views in favor of the bracingly simple notion that we punish criminal acts, and then he elaborates the notion of a criminal act—explaining, for example, the way in which intentions are immanent in actions.

My first objection to this scheme is that it is not my own. As I have said, I prefer to categorize theories of punishment by reference to the major traditions in philosophical ethics. If the justification of punishment is the principal issue in the theory of punishment, and if the justification at issue is the moral justification of punishment, then it seems to me that it makes sense to

52. See Justin Oakley, *Varieties of Virtue Ethics*, 9 *RATIO JURIS* 128, 129 (1996).

53. See BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* (1993); NANCY SHERMAN, *MAKING A NECESSITY OF VIRTUE: ARISTOTLE AND KANT ON VIRTUE* (1997).

54. HERMAN, *supra* note 53, at 209–40.

55. See R.A. Duff, *Choice, Character, and Criminal Liability*, 12 *LAW AND PHIL.* 345, 371 (1993).

56. See Duff, *supra* note 7, at 155–58.

divide the field according to the leading theories of moral justification. I find it unnecessarily confusing to run crosswise to this scheme—which is, from the point of view of moral philosophy, the conventional scheme. For example, Duff categorizes H.L.A. Hart as a choice theorist.⁵⁷ Now, Hart's work can be described or categorized in a number of ways: he was a legal positivist, a political liberal (in the classic sense), and a consequentialist. When Duff calls Hart a "choice" theorist, he has ample textual support, coming mostly from the liberal strain in Hart's thought. Hart famously described law as a "choosing system," meaning that law's basic function is to coordinate society, and that in doing so law could and should give maximum scope and effect to individuals' choices about their lives. But Duff also notes the importance of Kant to "choice" theories of punishment, and it is here that the confusion sets in.⁵⁸ Kant is indeed important to "choice" theories because Kantian voluntarism dovetails with a view of culpability and excuses that goes back to Blackstone.⁵⁹ The problem is that no one who reads Hart can fail to notice that he is agnostic at best about the role of fault and desert in the criminal law,⁶⁰ that he regards the function of punishment to be the promotion of social welfare,⁶¹ and that he is, in short, a dyed-in-the-wool consequentialist.⁶² Duff's placing Hart in Kant's school is implausible at best, probably confusing to some readers, and unwittingly obscurantist.⁶³

57. Duff, *supra* note 55, at 346.

58. *Id.* ("Some find a modern Kantianism in Hart's principle that a person is justly punished only if he had the capacity, and a fair opportunity, to obey the law.").

59. Blackstone wrote:

All the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable.

4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 20–21 (1769).

60. See H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28, 35–40 (1968).

61. See H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 60, at 158, 176–77 (defending strict liability on consequentialist grounds).

62. But see H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 60, at 1, 18–21 (taking Blackstone's view of the excuses and rejecting Bentham's utilitarian alternative).

63. By this last point I mean that Duff's scheme plays into an historical oddity. Hart seems at times to have regarded himself as a "retributivist" in the theory of punishment. See, e.g., H.L.A. HART, *Postscript: Responsibility and Retribu-*

However, my principal objection to Duff's choice/character/act scheme is that it falls victim to the bad habit of supposing that some one function of punishment justifies punishment and that to identify this justifying function constitutes a theory of punishment. It is misleading from the start to make the inquiry turn on our answer to the question, what do we punish *for*? Taken as the identifying feature of theories of punishment, that question conflates the issues of end and justification, and ignores the other standing issues that a punishment theory ought to address. More disturbingly, it distorts one's view of theories that do not approach the field of punishment in such a narrow way.

This distortion occurs in Duff's account of my aretaic theory of punishment. Duff correctly notes that I have argued that: "It is not just harm, but the lack of judgment that results in harm that the criminal law condemns."⁶⁴ He responds to this by writing:

Now Huigens suggests that "lack of judgment" is a central aspect of the intentional object of criminal liability—it is part of what the offender is condemned for. It might, however, be better to portray lack of judgment as a condition of liability—at least if this account is to be, as Huigens suggests, "descriptive of the criminal law as it stands," and even, I think, if it is to be at all plausible as a prescriptive account. The murderer, the rapist, the thief, might display a lack of practical judgment in committing their crimes; but they are and should properly be convicted and punished for those crimes, for what they did to their victims, not for their lack of practical judgment.⁶⁵

tion, in PUNISHMENT AND RESPONSIBILITY, *supra* note 60, at 233 ("A *fortiori*, the middle way, which I myself have attempted to tread, between a purely forward-looking scheme of social hygiene and theories which treat retribution as a general justifying aim, has itself been regarded as a form of retributive theory."). At the time Hart was writing, this made some sense. Legal positivism and consequentialism had dominated academic thinking about punishment for the preceding fifty years, at least, and the deontological retributivism of George Fletcher was still some years away. Hart, in the meantime, had begun to formulate ways to describe desert for punishment in consequentialist terms and had gone somewhat beyond the limits of consequentialism in his accounts of excuse and negligence. In treating those topics sympathetically, he was more of a "retributivist" than most of his contemporaries. In hindsight, however, the limits of Hart's work in this direction are clear. See Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 971–87 (2000). To classify Hart along with Kant as a choice theorist, as Duff does, obscures this chapter in the history of ideas about punishment.

64. Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1424–25 (1995), cited in Duff, *supra* note 7, at 179.

65. Duff, *supra* note 7, at 180.

As I will concede at greater length below, there are a number of errors in the article which Duff is criticizing here. But this is not one of them. I have not argued that we punish because of mistakes in judgment to the exclusion of punishing for the harm or wrongdoing done. And it is surprising that Duff should say that I have so argued when he has just quoted me as saying: "It is not *just* harm, but the lack of judgment that results in harm that the criminal law condemns." This means that, in some sense, we punish *both* because of the harm and because of the lack of judgment—as Duff seems to understand when he says I have suggested that the lack of judgment is "a central *aspect*" of the end of punishment and "*part of* what the offender is condemned for."

While I may have failed in this early article to spell out clearly what I thought the relationship between harm, wrongdoing, judgment, and fault to be, it was at least clear that I did not mean to use harm and criminal wrongdoing only as evidence of poor judgment or bad character. I argued that because the rules of the criminal law were the accretion of past judgments, the good judgment implicit in them was inferred and employed by the jury in the course of its deliberations. There was no suggestion that the rules of the criminal law were irrelevant, or that the harms and wrongs to which both the rules and good judgment pertain were not the subject matter of the criminal law or part of the justifying purpose of punishment.⁶⁶ If Duff has misread me here, it is in part because I was not clear, but also in part because he has superimposed his own scheme over mine. He categorizes me as a "character" theorist, and then assumes that this means I believe that good character in the sense of good judgment is what we impose punishment *for*. But the main thing driving that

66. Specifically, I wrote:

The criminal law is a set of accrued communal judgments about recurring situations and frequently confronted choices. By and large the product of common-law development, the criminal law is strongly analogous to the phronimos's acquired guides to action. The law resembles and to a degree reflects the accepted virtues that concerned Aristotle, at least in the sense of having been generated out of the particulars of experience.

In short, the law of the jury's instructions, as well as the jury's particular decision, is grounded in phronesis. In the hard case, the jury acts as I have described it above: each member comparing the accused's choices with what she believes her own would be in the situation of the accused. Even in the easy case, however—the confessed premeditated homicide—phronesis is implicit in the very rules that speed the case to its foregone conclusion.

Huigens, *supra* note 15, at 1466.

conclusion, it seems to me, is the fact that this is the question around which Duff's eclectic theory of punishment is organized.

II. REPLY TO DUFF

Just as the notion that we punish criminal acts—not choices and not characters—is central to Duff's view of the criminal law, the centerpiece of my reply to Duff is the contention that an aretaic theory of punishment takes the same view. We punish acts that constitute criminal wrongdoing, and we do so because criminal wrongdoing is intimately related to our pre-legal conceptions of wrongdoing. In spite of virtue's obvious relevance to character, to say that virtue is an end of punishment—even to say that it is the principal justifying end of punishment⁶⁷—is not to say that character is what we punish for, to the exclusion of criminal wrongdoing. One must consider questions beyond punishment's principal end, especially the structure of wrongdoing and the nature of criminal fault, if one is to see the relevance of virtue to punishment. Duff takes a step in the right direction when he separates the question of punishment's objectives from the question of the conditions we place on criminal liability. He forgets, however, that these two issues are related. More crucially, he fails to realize that the way in which a theory explains this relationship is an excellent gauge of its adequacy. Consequentialist theories of punishment treat the conditions we impose on punishment as exogenous side constraints that have no necessary bearing on the justification of punishment. The aretaic theory of punishment treats some of the conditions we impose on punishment as endogenous to punishment's justification. The superiority of the aretaic theory goes beyond its greater coherence, however, and extends to areas of special concern to Duff. The aretaic theory fits comfortably into the liberal tradition of limited government and well serves the political ideal of deliberative normative community.

Let me proceed in this Part in two steps. First, I will lay out an aretaic conception of criminal responsibility, criminal wrongdoing, criminal fault, the ends of punishment, and punishment's justification. My aim is not only to describe the distinctive features of an aretaic theory of punishment, but also to emphasize the familiar appearance of our practices under that account.

67. I have argued this recently. See Kyron Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. REV. 97 (2002). However, I have come to think it is unnecessary to do so for reasons that are explained below. Nevertheless, the point in the text stands. I do not contend that criminal wrongdoing serves merely as evidence of character.

This will answer not only the charge of procrusteanism, but also the charge that the theory is illiberal. Duff makes the latter charge in his recent article, and the second Section of this Part responds to this and his other objections. Some of my responses will be obvious by that point, but others will not be. Some of my responses will be concessions, and I will try to explain why I do not think these concessions are fatal to the version of the aretaic theory of punishment that precedes them.

A. *The Theory in Brief*

I have argued above that theories of punishment are not, or should not be, defined by some one end of punishment that is designated as primary. The defining features of a theory of punishment are instead the characteristic concerns, assumptions, arguments, and methods of the philosophical ethics on which the theory draws for its account of punishment's ends, justification, and other standing issues. Consequentialist theories of punishment center around the attainment of an optimal state of social welfare, and a consequentialist theory will make its own characteristic assumptions—about self-interested individuals and consistent preference orderings, for example. Deontological theories of punishment focus on the duties of and pertaining to autonomous individuals. Jean Hampton's account, for example, describes punishment in terms of our duty to restore victims of crime to equal dignity⁶⁸—a concern shared by George Fletcher.⁶⁹ The characteristic features of an aretaic theory of punishment include, at a minimum, a concern for human flourishing and an account of practical reasoning that includes deliberations on ends. In the following paragraphs, I will outline a theory of punishment that has these features.

The nature of practical reasoning and the criteria of sound practical reasoning are little understood, and their relevance to law remains largely unexplored. The principal point that has been neglected is this: practical reasoning encompasses more than mere instrumental reasoning toward one's ends: it also includes deliberations on ends. Before I figure out how to support my family, I deliberate about whether or not to have a family. This neglect of rational deliberation on ends is easy to

68. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 U.C.L.A. L. REV. 1659, 1660–61 (1992).

69. GEORGE FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIM'S RIGHTS IN CRIMINAL TRIALS 201–06 (1996). The title is misleading. Fletcher's concerns go well beyond standard victim's rights advocacy, and extend to the purposes of punishment.

explain. There is a strong tradition in western philosophy that denies that rational deliberation on ends is possible, because of the connection between our ends and our emotions. We have the ends we do because we value them, and valuation involves the emotions. As we commonly say, a decision such as the decision to have a family is a value judgment, and value judgments are widely assumed to be beyond the realm of rational debate and deliberation: ultimately, they just feel right to us.⁷⁰ However, the connection between ends and emotions does not rule out rational deliberation on ends. Neither emotion nor valuation is reducible to mere feeling, in the sense of an a-rational, non-cognitive somatic state.⁷¹ Emotions are intentional (I love *her*), propositional (I am angry and distraught *that* she loves another), and fallible (on reflection, I never did truly love her; it was a mere infatuation). Mere feelings are neither intentional (I am cold *her*?), nor propositional (I am cold *that* . . . ?), nor fallible (On reflection, I never was cold?). The intentional, propositional, fallible character of emotions gives reason purchase on them, and enables us to engage in genuine deliberation on ends.

Similarly, deliberation on ends entails the rational construction of the set of standing motivations that constitutes one's character. Motivations are reasons for action, and they have a strong affective component. This has been taken to mean that both motivations and character are beyond our rational control. But the affective component of motivation is a function of the emotions and valuations that lie behind our reasons for action, and motivation is no more reducible to a-rational, non-cognitive feeling than emotion or valuation is.⁷² Accordingly, character is, or can be, something that one rationally constructs, maintains, and modifies.

This expansive account of practical reasoning contrasts sharply with that which is characteristic of consequentialist ethics. Consequentialism tends to confine its conception of practical reasoning to instrumental reasoning toward stipulated ends—

70. See, e.g., ALFRED JULES AYER, *LANGUAGE, TRUTH AND LOGIC* 102–20 (2d ed. 1946) (arguing for the view that value judgments are merely expressions of noncognitive attitudes).

71. See generally ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 52–79 (1994); GERALD GAUS, *VALUE AND JUSTIFICATION: THE FOUNDATIONS OF LIBERAL THEORY* 31–34, 106–26, 136 (1990); ANDREW ORTONY ET AL., *THE COGNITIVE STRUCTURE OF EMOTIONS* 34–47 (1988); JUSTIN OAKLEY, *MORALITY AND THE EMOTIONS* 7–16 (1992); Andrew Ortony, *Value and Emotion*, in *MEMORIES, THOUGHTS, AND EMOTIONS: ESSAYS IN HONOR OF GEORGE MANDLER* 337, 349–51 (William Knessen et al. eds., 1991).

72. RONALD DE SOUSA, *THE RATIONALITY OF EMOTION* 218–20 (1987); MICHAEL SMITH, *THE MORAL PROBLEM* 104–111 (1994).

sometimes on the ground that one's ends are impervious to reason, though more often as a studied agnosticism toward the question of rational deliberation on ends. On the other hand, a more expansive account of practical reasoning dovetails neatly with the tenets of Aristotelian virtue ethics—notably with Aristotle's contention that the agent is responsible for her character and her motivations.⁷³ If our ends, valuations, and emotions were a-rational, non-cognitive somatic states—subliminal givens—then responsibility for character and motivation would indeed be impossible. But if we recognize the rational dimension of the emotions and valuation and the possibility of rational deliberation on ends, then responsibility for one's motivations and character is no more problematic than responsibility for beliefs and actions (which is not to say, of course, that such responsibility is unproblematic). Responsibility for one's character and for the quality of one's practical reasoning—including one's deliberations on ends—is the core of virtue ethics.⁷⁴

73. ARISTOTLE, *NICOMACHEAN ETHICS* bk. 3, sec. 3.4, at 66 (Terence Irwin trans., Hackett Pub. Co. 1985).

74. Perhaps an example of deliberations on ends and the attribution of responsibility for such deliberations would be helpful at this point. Suppose that Francis is a successful lawyer who works long hours and who often brings work home at night. More and more often lately, Francis finds himself getting angry at his children for interrupting him. Reflecting on these incidents, Francis's first reaction is to appreciate his own father's experience. He now understands the pressure of responsibility as well as the pride and excitement that come with success in one's profession. This, he now sees, can lead a man to be impatient with children, who cannot appreciate any of this. Francis is struck by the irony of his now being in the same position as his father. But then he is struck instead by the memory of the pain he felt as a boy at being shut out and neglected by his busy father. He recalls his own pledge—made not only when he was a boy but also when he married, and again when his children were born—not to be like that. Furthermore, Francis recalls—with some embarrassment now—conversations he had as a law student, in which he invoked his experience with his workaholic father to bolster arguments that traditional gender roles ought to change. Francis therefore pledges to spend less time on work and more time with his children. But no more than a week passes before Francis finds himself once again immersed in work and yelling at his children to please be quiet and leave him alone. Reflecting again, he is first inclined simply to disregard his pledges to be a better father. He obviously did not understand as a boy, or even as a young man, that it simply is impossible to reconcile high achievement with family life. Then again, Francis can recall expressly rejecting that argument as a self-serving rationalization when he heard a colleague make it a few years ago. In fact, Francis told himself at the time that, even if there were such a choice to be made, he would choose his family—in no small part because he would not want to think himself the same sort of man this colleague was. And the recollection of his children's hurt, bewildered, angry faces brings home to Francis the force of his own earlier argument. So Francis pledges anew that he will be a better father. But when

In a virtue ethics theory of punishment, responsibility for one's character and for the quality of one's practical reasoning—including one's deliberations on ends—is portrayed as essential to just punishment. People do not commit crimes because they fail to fit means to ends. They commit crimes because their ends are wrong. The failures of reasoning that lead people to commit crimes are not instrumental errors confined to the immediate circumstances of the offense. Crimes are manifestations of callousness, persistent immaturity, narcissism, greed, lack of empathy, impulsiveness, uncontrolled anger, and so on—failures in the rational construction of an agent's motivations, including the standing motivations that make up a character. We hold people responsible for failures of character in ordinary morality, and when failures of this kind result in a violation of a criminal prohibition, we hold people responsible by punishing them. But this is not to say, simplistically, that good character or sound practical reasoning is what we punish for—at least not in any sense that would reduce the criminal act to mere evidence of these qualities. Any theory of punishment has to explain the point of punishment—to explain why the deliberate infliction of pain in punishment is not mere cruelty. Under an aretaic theory, virtue is an end of just punishment and this is to say, in some sense, that we punish people for the sake of virtue. But the relationship between the ends of punishment and the other features of just

the cycle repeats itself after another week or two, Francis recalls how his own father made such promises from time to time, and inevitably broke them, just as Francis is doing now. Francis realizes that he is now angry with himself, not only for behaving like his father did, but for violating what, on repeated reflection, he still takes to be his deeply held beliefs about the relative value of the roles of lawyer and father—to him and to society. As a result of this realization, Francis from that time forward consciously cuts back on his legal work, welcomes interruptions from his children, and prolongs these distractions—giving his children his full attention in order to allow his love for them and the pleasure of their company to dispel his annoyance in the short term and to reorder the distribution of his time and energies away from work and toward his family in the long term.

This is an example of rational deliberation on ends. While not exactly a daily occurrence—by its nature it probably could not be—this kind of deliberation is not only possible, but commonplace in an ordinary life. Furthermore, it does not seem that an ascription of responsibility is any more impossible than the deliberation itself. To deny that one can be responsible for one's character or for the quality of one's deliberation on ends would entail denying that the behavior that Francis exhibits in this scenario can be described as praiseworthy. But it seems implausible to say that Francis's conduct is not even potentially praiseworthy. (Perhaps someone who places a higher value on lawyering than fatherhood would not praise it, but this would not be to deny praise on the ground that the conduct is not an appropriate candidate for responsibility at all.).

punishment is no simpler or more obvious in the aretaic theory than in any other.

B. *Yes, We Do Want an Aristotelian Criminal Law*

In his *Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, Duff argues that we seldom punish people for vice. We punish them instead for criminal acts, and these acts are not defined by reference to vices.

It is . . . implausible that the criminal wrongfulness of criminal actions is generally constituted, even partly, by the attitudes or motives they display. The agent's intention might often, if not always, be partly constitutive of the wrong for which he is convicted; but the vicious attitudes, motives, or character traits that might be displayed in the action do not contribute to its criminal wrongfulness.⁷⁵

In the few crimes that are expressly defined in terms of identifiable vices, such as depraved heart murder or theft, we do not punish people for depravity or dishonesty as such. Vice as a component of the crime is etiolated, Duff says, for two reasons: because the diachronic nature of vice—its being a persistent character trait instead of an isolated event—is unaccounted for in the definition of the crime; and because the crime can be committed out of *akrasia*—weakness of will leading to a failure to do what one knows is right—just as well as it can be committed out of vice.⁷⁶

Duff is right about the place of vice in the criminal law: it is minor at best, as he says. But he is wrong in supposing that Aristotelian theories of punishment need to claim otherwise. Likewise, Duff is right that the notion of vice is etiolated in the criminal law. But he is wrong in supposing that an aretaic theory of punishment necessarily contends that it is not. In his argument, Duff runs afoul of one of the principal barriers to the application of virtue ethics to law, which is the notion that virtue ethics is confined to the explication of the conventional virtues and vices. Were this true, aretaic legal theory would be almost a contradiction in terms. After all, we do not frame legal norms in terms of character traits; we frame legal norms in the form of rules and standards. But while it is true that Aristotle and his successors have much to say about character traits as norms, it is not true that they have nothing to say about rules and standards. Rules are accounted for in virtue ethics in several ways, and it is

75. Duff, *supra* note 7, at 171–72.

76. *Id.* at 172–73.

these features that give virtue ethics its purchase in legal theory.⁷⁷ In aretaic legal theory, the role of discrete virtues and vices is correspondingly attenuated. This is why the aretaic theory of punishment that I have presented above emphasizes deliberations on ends, and why my earlier accounts of the same theory stressed the end of human flourishing. These concerns are featured in virtue ethics, but they are not absent from law, and the point of an aretaic legal theory is to bring out these concerns in the law as a way of addressing longstanding theoretical and doctrinal difficulties that consequentialist and deontological legal theory have failed to resolve. In this light, it is hardly an argument against the aretaic theory of punishment to note that the vices play no discernible role in the criminal law.

Similarly, Duff's argument that "[i]t is . . . implausible that the criminal wrongfulness of criminal actions is generally constituted, even partly, by the attitudes or motives they display,"⁷⁸ falls just wide of the mark. Criminal wrongdoing sometimes is constituted by attitudes or motives, as Duff acknowledges, but more to the point criminal wrongdoing is constituted by the practical reasoning, including deliberations on ends, that lies behind attitudes and motives. Likewise, this kind of practical reasoning lies behind the actions and intentions that are unquestionably constitutive of criminal wrongdoing. What Duff misses is the substratum of practical reasoning that these features of the criminal law have in common, and the extent to which the law governs us as we govern ourselves: by addressing, not only how we get what we want, but also how we come to want what we want. It is not implausible at all to say that the criminal wrongfulness of criminal actions is constituted at least in part by failures of practical reasoning, including failures in one's deliberations on ends.

77. For example:

But it is hard for someone to be trained correctly for virtue from his youth if he has been brought up under correct laws, since the many, especially the young, do not find it pleasant to live in a temperate and resistant way. Hence laws must prescribe their upbringing and practices; for they will not find these things painful when they get used to them. Presumably, however, it is not enough to get the correct upbringing and attention when they are young; rather, they must continue the same practices and be habituated to them when they become men. Hence we need laws concerned with these things also, and in general with all of life.

ARISTOTLE, *supra* note 73, at bk. 10, sec. 14.21, at 293. Aristotle continued, "For the legislator makes the citizens good by habituating them, and this is the wish of every legislator . . ." *Id.* at bk. 2, sec. 2.1(3), at 34.

78. Duff, *supra* note 7, at 171.

Duff's conception of virtue ethics occludes his view of the aretaic theory of punishment, but so does his conception of the criminal law, particularly his conception of criminal fault. In the passage quoted above, Duff readily assimilates intentions into criminal wrongdoing, but refuses to do the same with practical reasoning in general or with its other products, such as attitudes and motivations. The reason for this difference is that for Duff, as for most criminal law scholars, intentions are not just any product of practical reasoning. For these scholars, intended action is paradigmatic of responsible action and so of actions for which we hold people criminally liable.⁷⁹ The more an action departs from this paradigm, the more difficult we are supposed to find it to impose just punishment for that action.⁸⁰ Not only intended actions (those done with a purpose, in Model Penal Code terms), but also intentional actions (those done knowingly and recklessly) are proper bases for criminal liability, but beyond this intentional-states boundary line punishment becomes harder to justify.

The aretaic theory of punishment must seem implausible to anyone wedded to these assumptions, because intentions have no such paradigmatic status in that theory. On the contrary, it is negligence that is paradigmatic, in that fault generally is taken to be an inference drawn by the jury, in the course of deciding wrongdoing, that the defendant has failed in his practical reasoning, including in his deliberations on ends. Our framing fault in terms of intentional states is a concession to the rule of law that we make in the course of specifying our competing ends concerning wrongdoing. The aretaic theory recognizes the significance of intentions for criminal wrongdoing—that is why they are relevant to our rules about fault to begin with—but it denies that that significance extends beyond what intentions tell us about the quality of the practical reasoning that led to their formation. And on that point, a defendant's attitudes and his character as reflected in his conduct are as relevant as his intentions.

One cannot argue for a gestalt shift, but some such argument seems to be called for at this point. Duff acknowledges the

79. See R.A. DUFF, *INTENTION, AGENCY, AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 102 (1990) ("But if free or responsible agency is essentially a matter of rational agency; and if intentional agency is, paradigmatically, a rational agency; then intentional agency provides the paradigm of responsible agency.").

80. See, e.g., *id.* at 202–03 (explaining non-liability for reckless attempts as presenting too great a departure from the intentional paradigm of responsible agency).

existence of non-intentional criminal fault, such as negligence.⁸¹ He recognizes that non-intentional criminal fault is limited neither to negligence nor to minor offenses: depravity, in the sense of indifference to the value of human life, can premise murder;⁸² and an unreasonable mistake does not necessarily, or even plausibly, acquit one of rape on the ground that there is no *mens rea* regarding non-consent in such a case.⁸³ And Duff recognizes that provoking circumstances can reduce an intentional murder to manslaughter, though those circumstances do not negate the murderer's intent to kill. So are these fault doctrines all departures from a paradigm of intentional action? Or is it rather the case that the limitation of criminal liability to cases of intentional action is an aspiration born of rule of law concerns that are exogenous to criminal fault? One obstacle to exchanging the former view for the latter has been the difficulty of seeing what criminal fault does consist of, if not of intentions. But the aretaic theory addresses this need with an alternate definition of fault from which the familiar fault doctrines of the criminal law can be derived—without calling most of them into question.⁸⁴

Because the aretaic account of wrongdoing and fault is premised on a failure of practical reasoning instead of vice as a character trait, the theory also is untouched by Duff's point that crimes are attributable to *akrasia* as often as they are to vice.⁸⁵ Fault is partly constitutive of wrongdoing and fault consists of a failure of practical reasoning. *Akrasia* is a failure of practical reasoning in the relevant sense: it consists in part of a failure to deliberate well on ends. Duff seems to understand *akrasia* differently, as consisting of a failure "to complete the appropriate practical syllogism that would lead [an agent] (in light of his own conception of the good) not to offend, or [a failure] to act in accordance with his own practical reasoning."⁸⁶ In other words, the *akratic* agent's ends are in order; it is his reasoning from those ends, or something in the execution of the action that goes awry.

However, there is more to the problem of *akrasia* than this. The actions of the *akratic* agent seem paradoxical. If the agent does not act in accordance with an end he has, then his contrary actions contradict his commitment to that end. To judge from

81. *Id.* at 102.

82. *Id.* at 179.

83. *Id.* at 171.

84. See, e.g., Huigens, *supra* note 67 (analyzing implied malice murder and provocation in aretaic terms).

85. Duff, *supra* note 7, at 181.

86. *Id.*

his action, he must not have that end any longer, if he ever did. And yet the rejected end hangs around, somehow, to condemn or call into question the action that the agent did take. Perhaps the *akratic* agent is just paying lip service to an end he does not really hold, but more often than not his commitment to the end in question seems quite genuine. The *akratic* agent seems simultaneously to have, and not to have, the end his action contradicts.⁸⁷ One way to resolve this paradox is to recognize that the failure of the *akratic* agent is not merely a failure to act in accordance with set ends (as Duff's formulation suggests), but a failure to reconcile competing ends in deliberation as well as in action. Such a failure to make one's ends cohere counts as a failure in the agent's deliberations on ends—for example, a failure to specify his ends properly.⁸⁸

If criminal fault is partly constitutive of criminal wrongdoing, and if criminal fault consists of a failure of practical reasoning, including one's deliberations on ends, then not only vice—adopting and pursuing bad ends—but also *akrasia*—the failure to reconcile one's conflicting ends—counts as fault and is partly constitutive of criminal wrongdoing. As Duff says, we punish for *akrasia* as well as for vice. But in either case we punish for a failure of practical reasoning.

On a related matter, I must concede Duff's point. In the original statement of my version of an Aristotelian theory of punishment, I argued that a defendant whose actions exhibit *phronesis* would be acquitted of wrongdoing, and that the jury would exercise *phronesis* in deliberating.⁸⁹ *Phronesis* is a faculty of exemplary practical reasoning that is exhibited by the truly virtuous. It is the full integration of desire and the good that enables the virtuous person to see and pursue the right course of action in any situation.⁹⁰ Duff points out that *phronesis* is not required for innocence; that simple law-abidingness will do, even if, as is usually the case, that law-abidingness is not a product of exemplary practical judgment. This is clearly correct. Duff is also right when he argues that a jury need not exhibit *phronesis* in its

87. Put another way, logically, "If a then not b" and "b" implies "not a." So practically, "If I love my wife I will not cheat on her," and "I cheated on my wife," implies "I do not love my wife." My wife will certainly see matters this way. But the fact that I am distraught at her saying so and wracked with guilt over my infidelity suggests that the end of loving my wife still hangs around for me.

88. This is Richardson's explanation, and it has the virtue of explaining how seemingly rejected ends hang around to condemn contrary actions. See RICHARDSON, *supra* note 51, at 77–82.

89. See Huigens, *supra* note 15, at 1458–67.

90. See *id.* at 1454–56.

deliberations. Obviously most juries fall short of *exemplary* practical reasoning in their deliberations, but this does not in any way call the legal or moral validity of their verdicts into question.

In response I can only say that I abandoned these arguments some time ago, and that Duff's point is not a strike against the theory as I have stated it above, or even against another earlier statement of the theory. The interesting thing about *phronesis* as a quality of practical reasoning is its sensitivity to practical context. I relied on the idea in an attempt to articulate the ways in which the criminal law is concerned with context-sensitive value judgments. But one can describe this concern without appealing to *phronesis* at all. As I have described in more recent articles relying on and developing the aretaic theory, juries make context-sensitive judgments about wrongdoing when they deliberate about fault if their deliberations are framed in positive law by a concept such as "implied malice" or "extreme indifference to human life," or if they deliberate about interstitial fault. Likewise, our use of thick evaluative terms to describe criminal wrongdoing reflects the context-dependent value judgments that are made in the legislative and constitutional phases of the criminal law.⁹¹

On another, more basic point, I think that Duff has not offered an argument at all. Duff claims that to say a criminal has failed in his practical reasoning is no more than a truism.⁹² Obviously something has gone wrong in the defendant's reasoning if he has run afoul of the law, but "this is so far to show only that 'lack of judgment' can be inferred from criminal liability, not that it constitutes a substantial condition of liability."⁹³ This argument does not, of course, engage the arguments about the nature of fault that I have made above. But it also fails, I think, to engage the argument of the earlier article that Duff is criticizing. Bracketing my mistaken and misleading reliance on *phronesis*, I have argued from the outset that sound practical reasoning is an end of punishment because human beings in society are interdependent, and rightly demand sound practical reasoning of one another.⁹⁴ This much of my argument was at least clear enough to criticize, and it purports to explain why a failure of practical reasoning is more than a coincidental feature of criminal wrongdoing. But Duff rejects it without explanation.

91. See, e.g., Huigens, Apprendi *Puzzle*, *supra* note 22.

92. DUFF, *supra* note 79, at 18.

93. *Id.*

94. Huigens, *supra* note 15, at 1458–62.

One possible reason for his rejecting my argument from interdependence is that Duff is unpersuaded by its Aristotelian origins. Aristotle described human beings as social animals. The *ergon*, or distinctive end, of human beings was said to be rationality in action; and our flourishing, the full attainment of that *ergon*, had to be understood in light of our social nature. The best life, *eudaimonia*, could not be a solitary life.⁹⁵ It is impossible to accept Aristotle's account of human nature and the good as a whole and at face value, because it rests on assumptions about logic and the physical world that we no longer share.⁹⁶ Perhaps this is why Duff rejects my argument that our interdependence makes sound practical reasoning an end of punishment. However, despite one's doubts about Aristotle's account of human nature (or about contemporary scientific arguments for an identifiable human nature) one would be hard pressed to deny the simple fact of human interdependence. It is not impossible to live a self-sufficient life in a remote corner of the world, but such cases are extraordinarily rare and may evidence illness.⁹⁷ Ordinarily, we rely on one another. Paradoxically, this characteristic of ordinary human life has become more pronounced in industrial and post-industrial society, even as technological advances expand the scope and efficacy of individual self-determination. I think Duff must recognize this as a descriptive matter. The real problem with appealing to interdependence as a basis for a theory of punishment is that it threatens to make the criminal law illiberal. Duff rejects my argument from interdependence, I suspect, on normative grounds.

One response to this concern over the illiberal implications of the aretaic theory of punishment would be to claim that a theory of punishment simply describes its subject matter and has no

95. ARISTOTLE, *supra* note 73, at bk. 9, sec. 11.6, at 257–61.

96. As Bernard Williams put it in one of his last essays:

If there is such a thing as an essential nature of human beings, there is only one way in which it can rule anything out—by making it impossible. If it has failed to rule it out in that way, it cannot try to catch up by sending normative signals. Such an idea would make sense only if there were more teleology in the universe than is represented by evolutionary adaptation, and one thing we know that Aristotle did not know is that there is not.

Bernard Williams, *Relativism, History, and the Existence of Values*, in JOSEPH RAZ, *THE PRACTICE OF VALUE* 106, 116 (R. Jay Wallace ed., 2003); *but see* George Sher, *Knowing About Virtue*, in NOMOS XXXIV, VIRTUE 91, 99 (John W. Chapman & William A. Galston eds., 1992) (“But even if no specific way of life is best for everyone, our background beliefs may still identify various dimensions along which people’s lives can be more or less successful.”).

97. Cf. JON KRAKAUER, *INTO THE WILD* (1996) (recounting the fatal attempt of a young man to live self-sufficiently in the Alaskan wilderness).

impact on practice. But I do not believe this is true. On the contrary, I believe that the consequentialist theory of punishment and the reductive account of value and practical reasoning on which it rests have had serious adverse consequences for the criminal law in practice.⁹⁸ Conversely, I believe and hope that a theory of punishment that reflects a richer conception of practical reasoning and valuation can serve to restore or forestall further dismantling of the traditional architecture of the criminal law. If Duff is concerned that this objective entails an illiberal political system, then this is my fault. In the article that he criticizes, I tied the theory of punishment to a larger political theory, classical republicanism,⁹⁹ that can fairly be described as illiberal.¹⁰⁰ My defense is, again, that I dropped this argument some time ago, and that a republican political theory is not a necessary feature of the aretaic theory of punishment.

Even aside from republican political theory, however, I suspect Duff is concerned about a theory that emphasizes and, in effect, defends the way in which law governs people at the level of ends—that is to say, at the level of their desires and motivations. But the aretaic theory of punishment is not illiberal on this ground. To say that the law governs us at the level of our ends, desires, or motivations is not to say that the law governs us by means of subliminal manipulation. The jump to this conclusion requires the support of a false premise, which is that our ends, desires, and motivations are established only in non-cognitive and a-rational ways, so that subliminal conditioning is the only way that we could be governed at that level. It appears that something like this is Duff's view, for he doubts that we have sufficient rational control over our ends to be held responsible for them.¹⁰¹ But as I have argued above, the fact that our ends, desires, and motivations have an affective component does not make them mere subliminal givens. Emotion itself is not non-cognitive or a-rational; on the contrary it is intentional, propositional, and fallible, and these features give reason purchase on the emotions. For this reason, the affective dimension of our ends, desires, and motivations does not preclude our being responsible for them.¹⁰² We can and do deliberate on ends, and

98. See Kyron Huigens, *Dignity and Desert in Punishment Theory*, 27 HARV. J.L. & PUB. POL'Y 33 (2003).

99. See Huigens, *supra* note 15, at 1457.

100. See generally Richard H. Fallon, *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989).

101. Duff, *supra* note 7, at 159–60.

102. One can also argue that our ends, desires, and motivations are determined by our past, our circumstances, and our situation in life, so that responsi-

if the law affects those deliberations, in part by holding us responsible for their outcome, then its governance of our desires and motivations is a rational governance.

Properly understood, governance at the level of ends, desires, and motivations actually supports the liberal value of autonomy. The notion that the law governs us only instrumentally is implausible. As Hart pointed out long ago, the law is not a set of commands backed by threats, it is a matter of felt obligation. We do not constantly advert to the threat of punishment; instead, we internalize the law and act within a social fabric constituted by law.¹⁰³ This is what Hart meant when he called the law a choosing system.¹⁰⁴ The aretaic theory rejects Hart's consequentialism, but dovetails nicely with this aspect of his liberalism. If interdependence is an inevitable feature of human society, then sound practical reasoning by individuals is a necessity—all the more so if we set the expansion of individual self-determination in society as one of our objectives. A society of free individuals is practically impossible unless those free individuals choose the right course of action (speaking broadly) in most situations. The law could not ensure that they do this unless it had the capacity to govern not only practical reasoning toward given ends, but also the choice of ends itself. Aretaic legal theory describes this kind of governance.

CONCLUSION

As I noted in the Introduction, Duff has recently argued against Paul Robinson's proposed reformation of the criminal law, under which we would rigorously separate conduct rules from principles of adjudication.¹⁰⁵ According to Duff, crimes are not just prohibited invasions of interests; they are pre-legal wrongs that have been designated as grounds for punishment. This distinction is important for both descriptive and normative reasons. As a descriptive matter, the thickly normative, pre-legal origin of crimes precludes the artificial separation of conduct rules from principles of adjudication, as Robinson would have it. This is particularly true of the intentions that partly constitute crimes.¹⁰⁶ Murder and manslaughter are distinct wrongs, and

bility is questionable. But this is just to acknowledge that our ends, motivations, and desires are on a par with our beliefs and actions. The question of determinism is equally difficult for emotion as it is for belief and action—which is really my point.

103. See H.L.A. HART, *THE CONCEPT OF LAW* 88, 140 (2d ed. 1994).

104. See HART, *supra* note 60, at 44.

105. Duff, *supra* note 10, at 71.

106. *Id.* at 51–52.

not merely two infringements of an interest in life that we distinguish only *ex post*, in adjudication. Were I to commit both a murder and a manslaughter, I would be conscious of doing two very different wrongs because of the enormous difference between intending to kill a person on one hand and, on the other, consciously risking another person's death.

Duff argues that there is also a normative reason to retain the thickly normative phrasing of crimes as wrongs. Robinson's proposal treats criminal law norms as commands to refrain from doing certain acts on pain of punishment, so that compliance with those norms is content-independent. That is, people would comply with the norm, not because of its content and their agreement with it, but because of a fear of punishment that had nothing to do with the content of the norm. Given how thin Robinson's reductive conduct rules are, it could not be otherwise. Duff argues, to the contrary, that because crimes reflect thick, pre-legal norms, our compliance with the law is content-dependent. I do not refrain from killing other people only because I fear that a superior power will punish me if I do. I refrain from killing because I believe it to be wrong—just as my fellow citizens believe it to be wrong. If the criminal law works in the thickly normative and content-dependent way that Duff describes, then I comply with the law as a citizen of a deliberative, democratic community. If I comply with a prohibition on killing only because I fear punishment, then I am merely subject to a superior authority in which I have no voice.¹⁰⁷

Both Duff's descriptive point and his normative point fit neatly within the aretaic theory of punishment. In the perennial dispute over whether punishment is imposed for the infliction of harm or for wrongdoing, the aretaic theory is firmly in the "wrongdoing" camp. I have described the legislation of the criminal law's prohibitions as the generalization of specific practical judgments, and the adjudication of particular cases as involving a complementary re-specification of the criminal prohibition, from which a context-sensitive inference about the practical reasoning of the defendant is drawn.¹⁰⁸ It should be clear that on this account the criminal law operates on the basis of thick norms: detailed, context-specific prohibitions that have an organic relationship to human history and the human situation, and that are cognate with moral norms. Robinson's radically simplified catalogue of harms to be avoided, accompanied by a separate cata-

107. *Id.* at 53–56.

108. See Huigens, *supra* note 63, at 1028–29.

logue of limitations on the adjudication of harms allegedly inflicted, cannot be an adequate account of criminal law.

In the end, I suspect that most of the items in Duff's eclectic theory of punishment are responses to two pervasive tendencies in twentieth-century legal theory: the reductiveness of consequentialism and the rule-fetishism of one kind of legal positivism.¹⁰⁹ The aretaic theory of punishment responds to both of those concerns in a systematic fashion. If a systematic, comprehensive theory of punishment threatens to be procrustean, this is so only when it is in the wrong hands. If Duff were to adopt the aretaic theory of punishment as a framework for his theorizing, there would be no such danger. On the contrary, I believe that the strain of humane good sense that is so prominent in his work would be well served. I would be honored to count him as an ally instead of an opponent.

109. See Horder, *supra* note 17, at 228 (attributing the weaknesses in Robinson's theory as identified by Duff to a narrow legal positivism).