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Political Theory and Criminal Law

GEORGE P. FLETCHER

Criminal punishment has traditionally been the most elementary and obvious expression of the state's sovereign power. As evidenced by the ready appeal to punishment in the international community as well as in the European Union, the institution of punishment also provides an important medium for expressing the majesty of new super-entities as well as of traditional states.

One would expect, therefore, that the theory of punishment and of criminal law would be high on the agendas of those interested in the philosophical foundations of the state. Yet in contemporary writing on political theory, particularly in English, neither criminal law nor criminal procedure receives much attention.¹ The converse is also true: those writing on criminal theory rarely see the connection between their internal disputes—say, about victims' rights and impossible attempts—and the broader issues, not only of political but of moral philosophy. In this essay I assess the way in which certain basic positions about the nature of state and society work themselves out in criminal law. In the absence of a developed literature on political and criminal theory, most of these arguments will be novel attempts to lay the groundwork for further discussion.

I begin by projecting implications for criminal law from specific theories, known by the conventional labels of *libertarian*, *liberal*, *communitarian*, and *perfectionist* approaches to using criminal sanctions. Then I turn to the problem of legitimacy in both domestic and international criminal law.

The distinction between political and moral theory is critical to the argument. Some writers today use the term "moral" so broadly that their usage obfuscates the important distinction between the state's acting legiti-

mately and individuals acting morally.² The political addresses the power and prerogatives of state officials—that is, of human beings cast into a particular role of enforcing criminal prohibitions. The moral focuses primarily on the lives of individuals, both in their personal flourishing and in their relationships with other individuals.

An example of the kind of the argument I seek to avoid is the conventional claim about desert. The argument goes like this. Some people—really bad people like Adolph Eichmann or Slobodan Milosevic—deserve to be punished. Because they deserve a certain consequence, it follows that the state is justified in delivering it. This is a non sequitur. An extreme version of the non sequitur is found in the retributive theory of Michael Moore who argued that because individuals feel guilty, they should be punished according to their guilt.³ Missing are the critical premises first that it is the business of the state rather than of God (or the victim or the victim's family) to punish the offender, and second that the offender's feelings of guilt are a reliable indicator of that which should be punished and of the appropriate degree of punishment.⁴

The popular language of "just deserts" reveals the depth of our confusion. Just because the offender might deserve punishment, it does not follow—without an appropriate theory of state power—that the state should assess the degree of deserved punishment and use its power to impose it on the offender. The quick assumption that the state is entitled to punish offenders who "deserve" it is one of the unfortunate banalities of criminal law in our time.

The logical gap between the offender's desert and someone's or some entity's authority is well understood in Jewish law and in other religious legal systems. Genesis 9:6 tells us that "whoever sheds the blood of man, by man shall his blood be shed." This is comparable to claims about desert. The killer may deserve to die but it does not follow that the state is entitled to kill him. We should think about this conceptual divide as the dis-

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inction between moral and political theory. The moral specifies what people deserve. The political defines the power of the state to realize their moral desert.

Kant's distinction between moral and legal theory helps to clarify the issues. The moral theory, written in 1785, provides an account of moral action as an expression of an autonomous will. The legal theory, published 12 years later, begins with an account of the Right, or the law, as a matter of principle.⁵ The centerpiece of the Right is not moral action, but the external freedom to act on the basis of preferences (*Willkür*). This freedom includes the right to act immorally. "Any action is right if it can co-exist with everyone's freedom in accordance with a universal law."⁶ The immoral, therefore, cannot provide a guide to that which should be punished in order to preserve the Right.

Indeed the relationship between the Right and the moral is the opposite of the unfortunate thesis that infers state power from moral arguments. The idea of moral action in Kantian theory recapitulates John Locke's theory of toleration.⁷ The attempt to coerce human beings into moral action is self-contradictory, for the threatened sanction enters into the motivations of the actor and therefore restricts the possibility of autonomous behavior based solely on a reasoned judgment of what duty requires. We should take note, then, of three critical propositions:

- (1) Morality requires autonomy;
- (2) Right requires coercion; and
- (3) Coercion compromises autonomy.

If these propositions are true, then it follows that, conceptually, the state cannot punish in order to induce moral behavior. This is what it means to say that the state cannot legislate morality. This is one reason Isaiah Berlin rejected the enforcement of positive liberty (based on moral theory) for the sake of protecting negative liberty (based on the theory of Right).⁸ The ordering of these ideas is of critical importance. They run parallel to the lexical structuring of wrongdoing and culpability in constructing a theory of crime. As the concept of wrongdoing is primary, so is the concept of the political. Wrongdoing is expressed in the violation of norms enacted by the state. As culpability or guilt is secondary, so is the relevance of moral thought in the criminal law. As wrongdoing invites consideration of guilt or culpability for the wrongdoing, so political theory authorizes the moral assessment of culpability.

In short, the political precedes the moral. It is only when a political theory makes reference to a moral

question that the latter can become relevant in the criminal law. This thesis is grounded in the simple fact that the criminal law addresses the state's authority to intervene in people's lives. That authority must first be justified as a matter of political theory before one turns to the criteria, including perceptions of morality, that might enter into the use of the state's power.⁹

In an early essay Joel Feinberg distinguished usefully between conduct that is *just*, and that which is *justified*.¹⁰ Sometimes people suffer justly, as is the case when wicked people suffer accidents of nature, and of course some suffer unjustly, as related in the Book of Job. But suffering justly does not imply punishment that is justified. Justification requires an appeal to established norms. In cases of the state and international courts seeking to justify punishment, the appeal must be to norms that relate not to individuals but to states and entities like states. That is, the justification must appeal to the political.

The political theories considered in this essay differ from procedural questions about the legitimacy of state behavior. Libertarianism, liberalism, communitarianism, and perfectionism are substantive theories about the proper mission of the state in using coercive power, particularly in the field of criminal law. For these purposes, I hazard the thesis that it does not necessarily matter how the state officials have acquired their power—by democratic election, by appointment, or by inheritance. Indeed, we should gird ourselves against the tempting belief that a democratic government can do whatever it wants to in the field of criminal law.¹¹ Democratic or dictatorial governments require a political theory to justify their using the coercive sanction known as criminal punishment.

The state cannot punish in order to induce moral behavior.

As the cultivation of human rights provides a shield against the power of the majority, the arguments bearing on the political justification of punishment might provide a shield against democratic governments thinking that they are entitled to punish anyone the majority wants to see punished. These arguments might be constitutional in nature, but they need not be. They might be simply

premises in the political cultures that legitimate the use of state power. We focus, therefore, not on how the state acquires authority, but on its justification for punishing under particular circumstances.

The four theories that we shall discuss are ideal types. They are constructs, coherent positions in the debate about the political meaning of punishment, abstracted from the works of any particular writer. It does not matter to me whether anyone has ever been a consistent libertarian, liberal, communitarian, or perfectionist. More

important is the set of views that constitute a particular position.

In the notes I mention particular writers who have been associated, more or less, with these various schools of thought. My purpose here is not to provide an exegesis of their work but merely to demonstrate that some version of the ideal type has found concrete expression in commonly read works in the field of political and moral philosophy.

I Libertarianism

We begin with the libertarian, minimalist conception of the state. In this tradition, the assumption is that liberty (sometimes called freedom or autonomy)¹² is the highest good, and therefore every assertion of state power that encroaches on this basic value requires a convincing justification. "Liberty" includes the rights to act, speak, believe, and think as one chooses.¹³

Laws prohibiting aggression both limit and enhance liberty. On the one hand, they inhibit the freedom to act as one pleases, and therefore they restrict liberty. On the other hand, these restrictions also enhance liberty by assuring that each person enjoys the freedom to act without threat to person or property.

Thus libertarians can take one of two radically opposed approaches to systematic legislation in the field of criminal law. If they think of liberty and its attendant rights as natural rights, they are likely to see legislation as a dangerous intrusion of the state;¹⁴ legislation should serve, at most, to confer definition and precision upon pre-existing rights.¹⁵ If, however, they think of rights as taking shape only by virtue of the state's power of definition and protection, they are likely to welcome the state's participation in the protection of liberty. The latter view of liberty is sometimes attributed to German and other middle-European conceptions of liberty.¹⁶

However one thinks of liberty, it is tempting to think of the security of potential victims as comparable to the right of a defendant to be free of unjustified punishment. They can both be thought of as species of "liberty" and therefore placed in an offsetting balance. The attempt to maximize liberty, therefore, can lead to a curtailment of rights of the criminally accused. This is the move that led John Rawls to make the unfortunate claim that the security of potential victims could justify strict liability against offenders.¹⁷ In my view, this is an overly simple argument

that fails to take seriously the differences between personal security—a legitimate interest in its own right—and the basic right of the defendant to be treated fairly regardless of the social pressures of the moment. Libertarians might sensibly favor laws that protect persons from criminal harms but it does not follow that in particular cases, the balance of advantage between the state (and the victim) on the one side and the accused, on the other, should be adjusted in the name of maximizing liberty.

One school of libertarian criminal theory—called "abolitionist"—argues that there is no need at all for the criminal law. Restitution for damage done should take the place of condemnation and punishment; for those who do not have the means, some form of coerced labor would generate the funds necessary for restitution.¹⁸ In *Anarchy, State and Utopia*, Robert Nozick reasoned that private remedies, for example, damages in tort, should be the primary vehicle for redressing injury and deterring future harm. Criminal punishment is justified only as a last resort when acts of violence threaten the peace and well-being of the entire community.¹⁹ The argument is that homicide and rape threaten everyone; therefore, tort recovery is insufficient.²⁰ The claim that criminal punishment should be the last resort is well-known in the European literature under the heading of punishment as "*ultima ratio*."²¹

Many Continental jurisdictions run afoul of the libertarian ethic of minimalist punishment by invoking criminal sanctions when tort remedies might suffice. The negligent maintenance of an atomic energy facility at Chernobyl was sufficient to convince the former Soviet government to bring criminal charges.²² But negligence by engineers resulting in the meltdown of a nuclear reactor would not per se constitute a punishable crime in the United States. Negligently false statements on

applications for government subsidies are punishable under the proposed European *Corpus Juris*²³ but this would not win much favor in the United States. In the field of international legal violations, the Europeans have also shown more enthusiasm for using criminal sanctions under the principle of universal jurisdiction,²⁴ whereas the Americans have developed the Alien Tort Claims Act (ATCA) as a sophisticated tool for establishing and sanctioning human rights violations.²⁵ In this and many other cases, Americans seem to take the principle of *ultima ratio* (criminal penalties only as a last resort) more seriously than do Europeans.

The libertarian approach leads to a strong emphasis on the harm principle, as advocated by John Stuart Mill.²⁶ Only when actions cause public harm to others should the state intervene and punish. Consequently, difficulties arise when allegedly criminal conduct occurs in the context of private relationships, for in these cases the public element of the harm disappears. The relationship localizes the harm and insulates the public. Those who do not enter these relationships have nothing to fear. Consider the problem of embezzlement: A entrusts goods to B, who then appropriates them to his own use. If the owner did not trust the suspect, the latter would never be in a position to commit the crime. When a bank teller takes money from the till, the bank's personnel department is at least partly to blame for not having checked the teller's background more carefully. In fact, embezzlement did not come under the sanctions of the criminal law until the end of the eighteenth century. A mere breach of trust was not thought to be a crime—it was not perceived as threatening the public interest. This was true not only in England, but in France, Germany, and other Continental jurisdictions.²⁷

The same reasoning applies to the punishment of fraud in the proposed *Corpus Juris* for the European Union.²⁸ No person can defraud the Union unless the Union is willing to do business with that person. The relationship is voluntary and therefore the Union always contributes to the circumstances of its ill-advised payments to dishonest recipients.

The general principle for libertarians is that some forms of harm occur in autonomous relationships that should be insulated against the power of the state. The problem is determining when a subculture is and ought to be autonomous. Cheating on university examinations provides a good test case. Though cheating causes harm to others and could conceivably be treated as a crime, it is perceived today as an internal university problem—not as conduct that threatens the public as a whole. There

are other more questionable cases, such as the spanking of children. The abuse need not be as egregious as that raised in *A. v. U.K.*, declared a violation of the anti-torture provision of the European Convention on Human Rights (ECHR),²⁹ but, however light the spanking, some courts would object to the idea that parents still have this kind of authority over their children's bodies. The same objection might be made about male circumcision. And for some observers who react against state intrusion into the family and sub-cultural mores, the argument would go the other way: lighter forms of female circumcision should be tolerated as a gesture of respect toward multicultural differences.

The Germans have created a perceptive expression—*Verrechtlichung*—to cover the state's intrusion into relationships that would otherwise be regarded as private. We could coin an equivalent expression in English. The direct translation of *Verrechtlichung* would be "legalization," but this has the opposite meaning. "Juridification" might be the correct but awkward rendering. To be clear, we should refer to the dangers of "absorption into the legal culture." Libertarians generally oppose this process of absorption, but their reasons are often strategic rather than principled. The strategic argument is that it is desirable to generate as many sub-state, self-regulating institutions as possible—if only to keep the power of the state at bay.

The general principle for libertarians is that some forms of harm occur in autonomous relationships that should be insulated against the power of the state.

It is interesting to note that libertarians tend to concur with multiculturalists on these issues. Both are opposed to the intrusion of the state into autonomous relationships. For libertarians, the family has particular traction, as it does for many traditional subcultures.

Feminists are generally opposed to invoking the family as buffer against state power. Their argument is that traditional family life tends to denigrate the status of women and therefore women need the intervention of the state to counteract the mores of the family.

The problem of respecting autonomous groups conflicts with another libertarian premise, which is the

high regard expressed for the requirement of consent as a condition for the loss of liberty. According to this line of thought, consensual sexual relationships between adults are not the business of the state. The same might be said of consensual business relationships. Libertarians are as opposed to punishing usury as they are to punishing incest. One would also expect that they would share the historical reservations about embezzlement as a crime (since the bank consents to hiring the employee who then embezzles the bank's funds), but remain opposed to giving parents a privilege to use physical violence to discipline their children (since the child does not consent to the relationship).³⁰

Of course, the notion of consent becomes tenuous in these cases. The bank consents to the hiring of the employee, but not to the misappropriation of the money. Desirée Washington consented to visiting boxer Mike Tyson in his hotel suite at 2:00 A.M., but she did not thereby consent to sexual relations.³¹ The only true form of consent is one in which the affected party fully embraces the problematic event, either as an end or a means.

Consent also presupposes a capacity to choose one's fate. Those incapable of consenting are in need of special protection. Children and the mentally ill are the classic categories of those in need of supervision, either from the family or the state. When it comes to a choice between these two agents of control, libertarians generally prefer the family as less threatening than the state.

Consent loses its force as a legitimating factor when the act of consenting blends into the background of normal, everyday occurrences. If hiring employees and providing them with goods and money is a routine occurrence, the act of employment does not display any particular willingness to run a risk of defalcation. The same could be said of late-night private meetings between men and women: the more commonplace the event, the less force it has in communicating consent.

Self-defense stands by consent as one of the two important modes of defending against charges of aggression. For libertarians, actual consent is a precondition for relations with others, and if anyone intrudes without consent, he or she should be subject to

the kind of rebuff that an aggressor state would suffer if it invaded a neighbor's territory.

Libertarians tend to treat individuals as analogous to sovereign states.³² Each person is free to enter into relations with others and yet also to remain an island unto himself, with the institution of self-defense serving to guarantee the sanctity of his borders. This means that the institution of self-defense should be coextensive with the range of personal rights. Individuals should be able, therefore, to use deadly force to defend even minimal rights, such as petty property interests.

In the philosophy of punishment, libertarianism leads to a rigorous emphasis on individual autonomy and responsibility. The punishing agent should recognize the autonomy and dignity of the offender. Punishment serves as testimony to that autonomy. These ideas dovetail well with retributive thinking. Thus libertarians have sought to apply their most prestigious concepts—"consent" and "rights"—to the justification of punishment. Kant and others have tried to fashion a rationale of punishment based on consent.³³ The idea eludes us because offenders obviously do not consent to their punishment in any ordinary sense of the term. Herbert Morris carried forward the provocative Hegelian idea of "a right to be punished," by which he meant that offenders have a right to be treated as autonomous agents deserving punishment rather than as sick and irrational people in need of treatment.³⁴ These are actually mainstream libertarian values expressed, intriguingly, in a seemingly metaphoric extension of the core terms of libertarian thinking.

These basic values—liberty, consent, rights, and self-defense—express a coherent vision of criminal justice. The only problem with the libertarian vision is that it leaves out of consideration a whole set of values that resonate with modern sensibilities. Libertarians have no place in their system for the collective interests of the community, for the necessity of caring for others, or for the balancing of competing interests. As we turn now to liberalism and to communitarianism, we encounter more complex bodies of thought. Liberty becomes one value in competition with others. Whether these alternatives are superior to the libertarian vision remains to be seen.

II Liberalism

I use the word "liberal" with trepidation. The term means many different things to many different people. American academic liberalism has at best a tangential relationship

to the pejorative "L" word in American politics, which seems to imply undue governmental intervention in society. American liberals, either academic or political,

have little to do with European economic liberals who believe firmly in the free market. Despite the total ambiguity of the label, academic liberals in the United States engage in sometimes vicious infighting in order to protect their turf and determine who really constitutes a full-fledged liberal.³⁵

One version of academic liberalism holds that society is too conflicted in its premises to posit assumptions about the absolute good, be it liberty or competing values.³⁶ This is the idea I shall use as my point of departure in constructing an ideal type of liberalism that carries implications for criminal theory. This approach to political theory is grounded in a diversity of personal values. Everyone should be entitled to pursue his or her own vision of "the good"—in religion, speech, sexual orientation, education, and family life.

The implicit premise in this approach to the good is a radical distinction between the Right and the good, a distinction that in fact brings to bear the Kantian distinction between legal theory and moral theory. The law defines the Right. Morality addresses the good. Liberals can reach a consensus about the right, the legal framework of social cooperation, but not about the good—the values that every person pursues independently.³⁷ As the argument goes, we may and should disagree about the good, but to enable society to function we should concur on the protection of the right—that is, on the basic structure of voluntary social relationships.

As a result of their value skepticism, liberals take two critical positions that resonate across the field of criminal justice. First, they are committed to legislation as the proper means of defining the criminal law. The maxim *nullum crimen, nulla poena sine lege* [no crime, no punishment, without prior legislative definition] is liberal in spirit; it is designed to protect individuals against criminal sanctions unless they have adequate legislative warning that their conduct will violate the law. In a world of value diversity, our innate sense of good and evil is not enough to warn us that certain actions might bring criminal sanctions down upon our heads. Individuals of differing moral persuasion can have this "fair warning" only if the law-making authority tells them in advance that their conduct will run afoul of the law.

Significantly, the eighteenth-century U.S. Constitution does not explicitly recognize the principle *nullum crimen sine lege*, but the *ex post facto* clause speaks to the same value by prohibiting retroactive criminal legislation, and many Supreme Court cases have recognized the requirement of "fair warning" as a constitutive element of "due process" under the Fourteenth Amendment,³⁸ but it is

still not clear whether the Constitution prohibits punishment of judicially developed crimes—called common-law crimes.³⁹ Many twentieth-century constitutions, drafted as liberal documents, explicitly recognize that the legislature and only the legislature has the power to define criminal offenses.⁴⁰

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Despite the strong trend toward legislative hegemony in domestic criminal law, international criminal law represents an exceptional adherence to the principle of doing justice regardless of prior legislative authorization. Since the Nuremberg trials, the international community has tolerated *ex post facto* punishment in the name of doing justice. In Article 7(2) the ECHR acknowledges the need for the "trial and punishment" of offenders who engage in conduct that, "at the time when it was committed was criminal according to the general principles of law recognized by civilized nations." This provision qualifies Article 7(1), which requires that the conduct "constitute a criminal offense under national or international law at the time when it was committed." Even the latter, more stringent rule of the ECHR falls short of the demands of *nullum crimen sine lege* because it does not require that the alleged offense have violated a legislative prohibition.⁴¹

The second strong liberal position consists in skepticism about retribution as a rationale for criminal punishment. If the state cannot posit fundamental values for the society as whole, then, by like token, the state cannot arrogate to itself judgments about ultimate justice for criminals. It is not the job of the liberal state to do God's work on earth. Retribution—the pursuit of "ultimate justice"—is not, therefore, a proper aim of a liberal criminal law. Liberals must, by definition, have more modest goals. They mostly limit their inquiry to the secular benefits of punishing criminal offenders.

It is not surprising, then, that liberalism came to be closely associated with the advocacy of deterrence as the proper goal of criminal punishment. This connection comes through clearly in the work of Jeremy Bentham and it is found, in a slightly modified form, in H.L.A. Hart's writings on punishment.⁴²

Because they eschew other value commitments, liberals often end up adopting utilitarianism by default. According to the cost-benefit analysis urged by utilitarians, punishing a specific offender is justified only if the future benefit to society outweighs the harm suffered by the punished offender. Each decision reached in the criminal justice system must maximize the utility of the society as a whole.

These are worthy goals of liberal theory but, unfortunately, the simultaneous advocacy of legislation and of deterrence based on utility maximization results in contradiction. Legislation is, by its nature, indifferent to the benefits of applying the legislated rule in each individual case. Yet utilitarianism insists that if it is not beneficial to apply the law in particular cases, we should not do so. Some people argue in favor of a form of rule utilitarianism as a solution to this problem—namely, that the action should be judged according to the costs and benefits of following a rule of which the action is part. The problem with rule utilitarianism, as Richard Wasserstrom pointed out long ago,⁴³ is that deviation from the rule is always justified when maximum utility requires it.

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As utilitarians have difficulties justifying the adherence to rules, they encounter problems with equality under the law as an independent imperative of the legal culture. Whether discriminatory treatment is justified always depends on the costs and benefits of punishing in a particular case. There is no way, under the principle of utility, to have it both ways, to insist both on equal

application of the law and on maximizing the welfare of society.

So far as they endorse a pluralistic system of values, liberals have difficulty resolving these value conflicts. Upholding the law is one value, favoring the good of society is another. When the two conflict, there is no principled way of furthering one value rather than another.

This paradox in liberal theory has two consequences for criminal justice. One is the gradual recognition of police and prosecutorial discretion as a factor ameliorating the categorical impact of legislated rules. When it is better not to apply the rule, police and prosecutors can supposedly be trusted to act in the social interest. Those who object to the rise of prosecutorial discretion insist that giving this power to individual decision makers, who act with no legal supervision, violates the basic premises of the rule of law.

The second consequence is the recognition, in the twentieth century, of necessity as a justification for breaking legislated rules. According to the development of "extra-statutory justification" by the German Supreme Court in 1927,⁴⁴ and Model Penal Code § 3.02 in the 1950s, individuals are justified in violating the prohibitions of the criminal law whenever the net balance of benefits over cost points in that direction. In its interest-balancing structure, the principle of necessity as a justification represents an approximate application of the utilitarian standard as a basis for modifying legislated rules.⁴⁵ By applying the defense of necessity, individuals and courts can reconcile the conflicting premises of liberal utilitarianism—the simultaneous commitment to legislation and to the standard of utility maximization.

The defense of necessity is a point on which libertarians and liberals should strongly disagree. The liberal emphasis on balancing conflicting interests arguably ignores the impact of the justified violation on the rights and interests of an innocent victim. For example, the defense of necessity would justify blowing up a house to prevent the spread of a fire; but libertarians would object on two grounds—first, sacrificing the innocent home owner for the sake of the greater good, and second, generating a sphere of judicial discretion that subjects everyone's rights to the discretion of the judiciary. Libertarians take property and other rights defined by legislation as sacrosanct. It would be impermissible to require an innocent individual to suffer harm just because it seemed, on balance, to be in the social interest to do so. It would also be problematic to subject all rights to the contingency that a judge might rule that the right was overridden by the greater utility of society.⁴⁶

The relationship between liberalism and utilitarianism, however, has never been stable. The pluralistic and skeptical stance of liberals should make them dubious about the possibility of defining the welfare of the group. The more individualistic strand of liberalism stresses the power of each person to define his or her own life, and the positing of this power is closely connected to skepticism about the good. If there are no clearly defined objective values to guide us, then we must put our faith in individuals as the responsible architects of their own lives. Yet there seems to be a frequent slide in liberal thinking toward cost-benefit analysis and the interpersonal comparison of utilities as a guide to policy making. This tendency presupposes that a collective decision-maker can and must determine the community's welfare regardless of the preferences of the affected individuals. This contradiction is notable in the school of law and economics, which purports to value individual autonomy in the marketplace and yet links their notion of efficiency to a centralized determination of community welfare.⁴⁷

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Liberalism suffers, therefore, from two contradictions: the first arises from a simultaneous commitment to governance under law and, as well, to the ever-shifting calculus of community welfare, and second from the conflict between two incompatible sovereigns—the consumer in the marketplace and state officials as the judges of community welfare.

Despite (or perhaps because of) these contradictions, liberalism is the dominant philosophy of criminal law today. Its berth is so wide that it accommodates such antagonistic thinkers as Ronald Dworkin and Richard Posner. And because at bottom liberalism is a pluralistic body of thought, it generates a mode of thinking that can be best described as “muddling through.” A good example is the Model Penal Code's approach to the purposes of punishment. In the pseudo-scientific language of the 1950s, the Model Penal Code refers to punishment as “treatment” and then proceeds to list eight different purposes of applying criminal sanctions.⁴⁸ No priorities are established.⁴⁹ The only way to apply all eight

variables is to juggle them in one's mind and see which lands first in the process of decision.

The European tradition of liberal thought differs markedly from the American version. In the German discussion, in particular, the building of a post-fascist legal system has demanded the elucidation of a “liberal” criminal law, as an antidote to the tendencies of its perceived opposite, the fascist legal culture. According to the perceptions of postwar scholars, the critical feature of fascist criminal law was the shift in focus away from the criminal act (*Tatstrafrecht*) and toward either the subjective attitude of the offender (*Gesinnungsstrafrecht*) or the personal character of the offender (*Täterstrafrecht*).⁵⁰ This emphasis on personal attitudes fit readily into a system that wanted to treat all offenses as crimes of disloyalty and betrayal toward the state, and these disloyal attitudes were thought to be punishable, regardless of actual harm, as a breach of the duty to be loyal to the state.⁵¹ The emphasis on actor types led to a different, potentially racist criminal law.⁵² Criminals were not those who committed particular acts—they were those who were of a certain type likely to commit criminal acts in the future. We see traces of this way of thinking in our language: we refer to thieves, rapists, murderers, and other types as though crime were a kind of profession to which certain people are born, or into which they happen to fall.⁵³ The German criminal code still retains a vestige of this popular way of thinking: it refers to those guilty of murder as murderers.⁵⁴ The usual practice of criminal codes is to define not the actor's status but the act and the criteria for being guilty.

Post-fascist liberal criminal law stresses two important features of liability. First, the focus of punishment should be the act alone, and not the actor's moral character or criminal record. It is fundamentally unjust to convict a defendant for a specific crime charged just because it is known that he has committed many crimes in the past.⁵⁵ If the presumption of innocence means anything in contemporary criminal law, it means that we must judge the alleged criminal act in abstraction from experience with the suspect and his history of criminal conduct. And further, criminal behavior should be grounded not in a breach of duty, but rather in the violation of a specific, legally protected interest (*ein Rechtsgut*). Germans had—or should have had—a particular sensitivity to grounding crimes in a breach of duty. This smacks of an association with Kant's moral theory and its emphasis on imperatives of duty. To make this into a basis for criminal offenses confuses the realm of morality with the realm of law in a liberal state.⁵⁶

Some of the specific consequences of German liberalism are the rejection of character and criminal types as a basis for analyzing liability, skepticism about punishing impossible attempts because they do not violate a legal interest,⁵⁷ and an ideological commitment to the requirement of human action as the touchstone of liability. This last view has made German scholars resistant to corporate criminal liability, because, in their considered view, corporations do not act in the way that humans do.⁵⁸

While liberalism is the reigning moral philosophy in the United States, its advocates have an unclear idea of who their opponents are. In Germany, liberal approaches to criminal law stand for an anti-fascist political commitment to uphold certain traditional assumptions of the criminal law, such as requirement of human action, personal guilt, and the harm principle as limitations on intrusive governmental regulation of perceived disloyalty and statistical conclusions about dangerousness.

III Communitarianism

In the late 1980s and 1990s, the primary debate in American political theory was between those who called themselves liberals and those who gathered under the banner of communitarianism.⁵⁹ This conflict had many fronts, among them the oft-repeated charge that liberals regard individuals as abstracted from their history and culture. The communitarians insisted that all selves are “situated” in a particular culture and that this fact has bearing on the possibility of realizing a hypothetical social contract of the sort that Rawls envisioned.⁶⁰ In very broad strokes, one might say that liberals believe that individuals choose their society and communitarians hold that the society defines the individual—or at least, that membership in the community is involuntarily bestowed at the time of birth or early childhood. In my 1993 book *Loyalty*, I tended to side with the communitarians, at least at the level of personal duties to those around us.⁶¹ These duties are not chosen; they are discovered as part of our recognition of personal identity.

familiar with the victims and their suffering and thus more keenly feel the need to bring the offenders to justice.⁶² As Jaime Malamud Goti has argued, the local national court is able to reach the right compromise between these conflicting sentiments—understanding of the defendant and sympathy for the victims. In light of the farce that developed in the 2006 trial of Saddam Hussein in Iraq, this position might require a nuanced revision.

Not surprisingly, the American Constitution stands squarely on the side of local communitarian justice. As provided in the Sixth Amendment, “the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” But tension remains in this formulation between a commitment to impartiality and to local justice. In the last several decades, the desire for impartiality has gained the upper hand and generated many decisions shifting the trial away from the local community, arguably partial because it is “too close” both to the crime and the media reports about the victims’ suffering.⁶³

(1) *International courts and local courts.* The conflict between liberalism and communitarianism has salience for international criminal law. The major issue in recent years is whether alleged high-profile offenders such as Pinochet, Milosevic, Sharon, Arafat, or Hussein should be tried in an international court or at home, in a local national court, with their own people as prosecutors and judges. The tendency of liberal international lawyers is to believe that international courts are superior because they are more likely to be unbiased. The communitarian argument on the other side is that local judges and jurors, if there are jurors, are more likely to appreciate the nuances of the defendant’s guilt. They know the circumstances under which the crime was committed, and thus they can sympathize with the offender, but they are also closely

At the international level, the liberal quest for an impartial decision maker has given rise to ad hoc tribunals for the former Yugoslavia, Rwanda, and the permanent International Criminal Court (ICC). Here the argument for impartiality has a slightly different grounding. The fear is not of excessive identification with victims, but of a whitewash of the prosecution by local judges sympathetic to and also sometimes pressured by defendants and their supporters. This fear is evidenced in the principle of complementarity, as recognized in the Rome Statute (1998) Article 17. (This statute established the International Criminal Court, effective as of July 1, 2002.) The ICC will defer to the local national court so far as the local prosecutors and courts are “able and willing” to bring the prosecution.

Though this provision seeks to reconcile the conflicting roles of national and international courts, the proper relationship between them remains in dispute.⁶⁴ The two extremes are illustrated by the chaotic Saddam Hussein trial, on the one hand, and the overly-painstaking Milosevic trial, on the other.⁶⁵ There is no adequate theory to mediate between the dangers of too much distance and of too much proximity. The liberal ideal is impartiality, but distance does not always generate impartiality. It is hard to believe, for example, that the Belgians were impartial in their zeal to prosecute Ariel Sharon for alleged war crimes in Beirut in 1982.⁶⁶ Nor does proximity guarantee impartiality, largely because local officials are under political pressure to turn their back on war crimes committed by local heroes of the nation. My own view is that the honest recognition of interest is a better guarantee of a fair trial than an ungrounded faith in one's own impartiality.⁶⁷

(2) *Insiders and outsiders.* A strong consciousness of belonging to a community intensifies the perception of insiders and outsiders. Loyalty is owed to insiders, not outsiders. A criminal can lose his status as an insider and be expelled from the community or treated as an enemy of the society. Thus we return to the most primitive way of handling criminals—expulsion, excommunication, and banishment. In the idiom of Carl Schmitt, we generate a distinction between *Freund* and *Feind*—friends and enemies—in criminal law.⁶⁸ The distinction generates two distinct forms of criminal law, one a “criminal law for friends or citizens” and the other a “criminal law for enemies.”⁶⁹ “Criminal law for citizens” employs punishment to reintegrate the offender into the society. It might accomplish this end by enabling the offender to “pay” the proverbial debt to society or it might seek the goal of reintegration by providing rehabilitative treatment. Either way the criminal is permitted to repair the damaged relationship with the victim and the society and resume a normal life.

A “criminal law for enemies” seeks to get rid of or at least to neutralize the offender. In an interdependent world, we can no longer ship the unwanted to Australia and other open spaces. But modern societies have developed other techniques for purging themselves of their “enemies.” The ambiguity of capital punishment is that some people regard it as an institution of justice or at least as a sound measure that fosters deterrence; others simply want to execute murderers as a way of insuring that society is rid once and for all of their malevolent presence. The use of life imprisonment for third time

offenders—“Three strikes and you’re out”—can also function like a measure of permanent banishment.⁷⁰ It would be difficult to argue that life imprisonment for three theft offenses was the appropriate debt to be paid, as retributive punishment, for the crime.⁷¹ The best way to describe these attitudes toward the death penalty and the casual imposition of life imprisonment against repeat offenders is not that they represent efforts to do justice, but rather that they are acts of war against “the enemy within.”⁷²

A strong consciousness of belonging to a community intensifies the perception of insiders and outsiders. Loyalty is owed to insiders, not outsiders.

A good example of the criminal law as an institution of warfare is the way in which convicted felons are systematically deprived of their voting rights.⁷³ The disenfranchisement of felons, even after they leave prison, leaves them in a permanent state of second-class citizenship. They are excluded from jury service. They are disenfranchised and subject to a host of private sanctions.⁷⁴ For a variety of reasons, most notably the skewed enforcement of the drug laws, the practice of disenfranchisement has fallen harder on African-Americans than on other groups in our society.⁷⁵ In the national election of 2000, a million and a half African-American men—about fourteen percent of the total—were barred from participating in the democratic process.⁷⁶ In the pivotal state of Florida alone, half a million felons were unable to vote. Their presence at the polls would probably have tipped the balance in favor of Al Gore and changed the course of history. The creation of this underclass of non-voting citizens can hardly be justified according to the standard rationales of punishment. The disenfranchised are precluded from “paying their debt” and rejoining society. An argument of deterrence lacks the most elementary empirical support. The only rationale ever given for this practice is that disenfranchising felons protects “the purity of the ballot box.”⁷⁷ The implication is that felons are forever tainted by their crime and forever lose their status as democratic citizens. Convicted felons constitute the enemy and the greater their suppression, the better—or at least this seems to be the implicit attitude

of those who continue to accept felon disenfranchisement as a "normal" consequence of a felony conviction.

European countries have displayed a different pattern in their efforts to develop one body of criminal law for citizens and another against enemies. The past pattern of official violence against Jews and other minorities hardly needs repetition here. The modern enemies are called terrorists, and many European societies have developed special procedural and substantive policies for coping with the problem of the terrorist enemy. These techniques vary, from suspending jury trials in Diplock proceedings in Northern Ireland⁷⁸ to creating an aggravated form of conspiracy in German law known popularly as "terrorist organizations"⁷⁹ to explicitly punishing membership in "grupos terroristas" in Spanish law.⁸⁰ From the point of view of legality, these new offenses punishing terrorist organizations are no more deviant than the long-standing Anglo-American offense of criminal conspiracy.⁸¹ Yet the special offense of terrorist conspiracy has also led to the relaxation of cherished Continental principles of criminal procedure. Germans have always resisted the American

and common law practice of granting immunity to witnesses in return for testimony helpful to the prosecution,⁸² but in response to the perceived terrorist threat, Germany has experimented in recent years with granting partial immunity to "crown witnesses" who would testify in prosecutions against terrorist organizations.⁸³

These practices might once have shocked the consciences of American lawyers, but in the aftermath of September 11, 2001, Americans seem to have outdone the "old world" in their pursuit of special means for combating the ever-feared terrorists. The government began an immediate roundup of suspected terrorists and held them incommunicado, justifying their actions in part by reference to the measures recognized in the USA PATRIOT Act of 2001.⁸⁴ Congress adopted new statutory crimes such as the offense of providing assistance to a terrorist organization.⁸⁵ The means used were both substantive and procedural, with the procedural techniques bearing even a greater significance in defining the "enemy."⁸⁶

IV Perfectionism

Despite the glories of habeas corpus and affirming the humanity of all suspects, we have to admit that the criminal law is not a very satisfying institution. Individuals commit crimes and, if we are fortunate, the right people get punished. It is never very clear what we ultimately hope to accomplish by this vast process of trying and sentencing. Some people feel that justice is done, others that we are protecting society, but the tangible benefits of locking up convicted offenders should be open to question, at least in comparison with the other core governmental functions such as generating jobs and public works and providing education and health care. The enormous expenditure of criminal justice readily comes into focus as an established budget looking for a political rationale.

Governments are constantly tempted to adapt the institutions of the criminal law to some purpose other than the straightforward sanctioning of wrongful deeds; the particular prosecution is then embedded in a larger program, an overarching governmental project. The project might be the task of ridding a revolutionary society of pre-revolutionary influences and educating a "new person" to lead a new generation of citizens.⁸⁷ Or, as in the case of American hate crimes legislation, the objective

might be to rid the population of negative thoughts about ethnic minorities.⁸⁸ If the goals of the perfectionist are ever realized, the government should, in principle, declare the end of criminal law, the argument being that everyone has achieved a perfected state of being and that therefore the criminal law should be disbanded. The very existence of the criminal law, then, is a sign to the perfectionist that the state must prosecute and punish more resolutely.

One of the characteristics of communitarian thinking, as we noted in the previous section, is the sharp division between friends and foes, citizens and enemies. The community must close ranks and defeat its foes. This may require sharp and controversial measures, as in the United States after September 11, 2001, but the community must also take care of its own and educate them into the proper way of life. Warfare against outsiders, therefore, goes hand in hand with perfectionist attitudes toward insiders.

In Kantian terms, the shift from a libertarian or liberal way of thinking to a perfectionist agenda is signaled by promoting the good over the right.⁸⁹ The Right states the basic conditions for maintaining freedom among individuals to choose their way of life.⁹⁰ The good is the proper object of choice in exercising freedom.⁹¹ The

primacy of the good over the Right is often supported by a confusion of Kant's moral and legal theory. As Kant conceived of his system, the legal theory defined the bounds of the state; the moral theory was addressed to individuals acting with inner freedom, absent state coercion. But it is always possible to take the moral as the guide to the legislative activities of the state, and thus states would enforce moral strictures on the taboo against suicide, on keeping promises, on perfecting one's talents, and on coming to the aid of others.⁹² All of these laws would violate the libertarian premises of Kant's legal theory because they would restrict freedom in the name of the good.

The apology for transposing the Kantian structure is that the state should be concerned about cultivating a shared sense of the good life. It pursues this objective in prescribing a curriculum for public schools, creating public rituals, and rewarding proper role models. It could pursue the same ideal of the good by using the criminal law to sanction deviations from its standards.

This argument is bolstered by claims that the individual is truly free only when acting morally. This is the idea of positive freedom, which finds warrant in Kant's idea that autonomy consists in the union of negative and positive freedom. The negative side is freedom from restraint, and the positive side is acting in conformity with reason and the moral law. Isaiah Berlin railed against the claim that the state should enforce positive freedom (or liberty, as he called it).⁹³ This, in his mind, was the essence of totalitarianism, a plague that haunted European intellectuals in the post-World War II period.

Another approach to perfectionism relies on Aristotle's instead of Kant's theory of ethics. For Aristotle, the end of the ethical life should be personal fulfillment, or *eudaimonia*. Lawyers often read Aristotle's *Nicomachean Ethics* as though he were writing about the law. A good example is the work of Kyron Huigens, who has sought to develop an entire theory of criminal law based on Aristotle's ethics.⁹⁴ The missing premise in Huigens's argument is why, if we take Aristotle as the proper guide to moral philosophy, it follows that the state is entitled to punish people on the basis of the alleged breakdown of virtue in their criminal conduct. Further, his approach might support some rather oppressive uses of the criminal law. For example, he would punish failures to rescue, whether or not there is a duty to act, simply because the omission or failure to rescue reveals a bad character.⁹⁵ To Huigens's credit, he is fully aware of these risks but dismisses them on the ground that his virtue and

character-based theories are too indeterminate to become oppressive.⁹⁶ As with all perfectionist theories, however, the dangers of abuse are inherent in the ambition.

"Character" is a code word for perfectionist theories.⁹⁷ As soon as the state takes charge of individual character, it can support its agenda of perfecting the character of its citizens. The temptation to introduce "character" into the theory of excuses is beguiling. The argument that once convinced me is that excuses check the logical inference from the actor's conduct to the actor's character.⁹⁸ If we cannot infer negative character traits, it is argued, we cannot blame. I now see this as a tempting but incorrect view.⁹⁹ There is a need in the literature for a much more serious and exhaustive account of the problem.

"Character" is a code word for perfectionist theories. As soon as the state takes charge of individual character, it can support its agenda of perfecting the character of its citizens.

The perfectionist approach to criminal justice focuses hard on the person and his or her need for improvement. Support for this concentration on the person—found in the view that punishment is imposed not for wrongful conduct but is rather addressed to the personal moral culpability of the offender—provides support for the perfectionist preoccupation with the person.¹⁰⁰ An application of this perfectionist tendency is found in the current debate about shaming penalties, an insidious method that American courts have recently invoked to sanction offenders in certain fields, notably sex crimes, drunk driving, and white collar offenses.¹⁰¹ These penalties require offenders to parade in front of the court house with self-incriminating signs, to publish apologies in the newspapers, and similar acts that are designed to "shame" them in the public eye. The shaming penalty is a perfect illustration of my thesis that, to answer the question whether shaming penalties are morally justified, we need first to specify the political theory that would lead us to inquire about the morality of these means of punishment. The perfectionist theory is a good candidate for a political theory that would prompt the state to treat offenders in this way.

Perfectionism rejects the common thread of libertarian, liberal, and communitarian approaches to punishment, which all resign themselves to the imperfection of arrest and prosecution and to the dubious nature of the entire process. We are never sure whether we accomplish anything by criminal prosecution. The play must go on—even though there is no promise of a climax. Or, to shift the metaphor with Jaime Malamud Goti as he described the prosecution of the dictatorial generals in Argentina, it is all part of a “Game Without End.”¹⁰² This may sound cynical and tragic to some. The wisdom of anti-perfectionism becomes apparent only by contrast with the established dangers of trying too hard to perfect society though the institutions of prosecution and punishment.

The differences among the four theories for justifying punishment can be summed up in the way they regard

persons subject to criminal prohibitions and punishment. Libertarians treat the subject as an autonomous person abstracted from societies. Liberals are likely to see the potential defendant as a citizen in a broad sense—as someone participating in the political community. Communitarians see him or her as a citizen in a narrower sense, as brother or sister, as friend, and potentially, as enemy. The perfectionist sees the same subject of the law as a novice undergoing an educational process. Depending on the eye of the beholding theory, the suspected offender is a person, citizen, friend/enemy, or new-person-in-the-making. All of these diverse theoretical perspectives remain hidden beneath the surface of the supposedly autonomous criminal law. Our task is to make sure that the deeper theoretical content of every rule and every decision is properly laid bare.

V The Political and the Moral

Our point of departure was the claim that political theory authorizes the relevance of moral judgments about the particular offender. The argument further was that the political stands to issues of wrongdoing as moral judgment stands to the analysis of guilt or culpability. It is time now to make good on these claims.

The ideal response would set out a series of equations explaining why each of the four political theories required a moral judgment about the actor’s deserving punishment.¹⁰³ The world is, unfortunately, not so neat. The first two theories—libertarianism and liberalism—stress the central value of individual liberty. The question for both schools is how the state can justify singling out some persons and making them suffer in the name of securing the liberty of all. The most devastating charge that could be levied under either theory would be that the state arbitrarily selected those to be punished. A just system of criminal law requires, therefore, that the punishing force of the state be rationally directed toward some and not toward others. We shall call this the problem of moral selection.

There are different ways of justifying moral selection. Sometimes the argument is based on the utility of punishing and confining; in other cases, the claim is that, regardless of the interests of the group, the individuals to be punished single themselves out. Either they choose, in some loose sense, to be punished or their

culpability functions as a kind of moral forfeiture of their right to complain about their punishment. However the argument goes, the starting place is the principle of protecting liberty and insuring that the state’s breaches of individual liberty are individually justified.

A communitarian approach to crime control implies that the culpable perpetrator does not stand entirely alone but that the entire community is engaged in the process of moral selection of those to be punished. The criminal remains one of us and the point of punishment is to reinstate the offender as a member of the community. Unfortunately, the concept of communitarianism is sufficiently loose that a political theory under this rubric might issue in a general claim about punishing as a means of validating the criminal prohibition or confining dangerous people as a means of social protection. The lines of inclusion can also have an exclusionary effect, thus leading to a form of “criminal law against enemies.” The lines between political theory and moral selection are not as clearly defined as one might wish.

The emphasis in perfectionist theories is on educating the population to cultivate virtue and to live well, a mode of life that implicitly requires abstention from criminal behavior. Education is a basic good, and therefore the state should arguably use a lower threshold of liability to punishment than presently in force. The notion of a lower threshold would imply lowering the level of negligence

required for liability or a more stringent theory of excuses in assessing culpability. It appears that the more one stresses the role of the state in educating the public, the lower the demands of moral selection.

The connections between political and moral theory invite further elaboration. The general thesis seems correct. Moral arguments are not free-standing. Punishing criminals is an exercise of state power and therefore the justification for punishing a particular individual must be located in a general theory of the state and its purposes. Though this much might be clear, the lines between political and moral theory are not as clear as one would like. Moral argument pervades the criminal law, as will become clear in the ensuing discussion of legitimacy and the scope of penalization. Additional problems arise from our reliance on ideal types that are never clearly instantiated in legal argument.

In real life, neither systems of criminal law nor the best philosophers commit entirely to one of the four ideal types of political theory that define this essay. Virtually every system of criminal law combines elements from at least the first three lines of thought. Libertarian thought explains the importance of consent and self-defense;

liberals can account for the principle *nulla crimen sine lege* as well as the justification of necessity, and communitarians can explain the element of social solidarity that leads us to fluctuate between thinking of criminals either as one of us or as the enemy. Perfectionism is a less common but nonetheless important aspect of progressive politics. Good examples are post-revolutionary communist societies and the United States both in the aftermath of the Civil War and in the throes of the civil rights movement.

All these approaches seek to justify aspects of the penal sanction. Yet all of them fail to consider the preliminary question of whether the state or international court imposing sanctions is itself legitimate. Even if one accepts a particular philosophy of using power—one of the four considered so far—we reserved the question at the outset of whether a dictatorship, without the support of its people, could claim legitimacy in punishing either those who threaten the state or those who harm other citizens. Turning now to the problem of legitimacy we remind ourselves, unfortunately, how blurred the lines between political and moral theory may be.

VI Legitimacy

So far as I know, the term "legitimacy" has not received adequate philosophical analysis. It means something like "acceptable" in line with the basic procedural and substantive values of the society. What we say about legitimacy must, alas, remain in the realm of the speculative. The concept has different implications in domestic and international law.

(1) *Domestic law.* It is tempting to rest legitimacy on a theory of social contract, a hypothetical contract that all citizens would agree to in order to achieve a just and stable society. Since Rawls reawakened the field of distributive justice in 1971, this technique has become commonplace among social and moral philosophers. Contract theories work with regard to distribution *ex ante*—that is, with regard to initial allocation of resources. Yet in the field of corrective and retributive justice, we cannot ignore the asymmetry of established facts: Some people are victims and others are wrongdoers. This is easily illustrated by trying to apply Rawls's theory of the original position to the question of whether those defending against rape should be able to use deadly

force. If you ask yourself "Which rule would I choose in the original position if I did not know whether I would be a victim or a rapist in real life?", the results will be unsatisfactory. You might reason, "Well, as a rapist, I would not want to be killed." Alternatively, you might say, "As a potential victim, I would want to kill to protect myself." There is no way to formulate a rule that would satisfy both sides. In Rawls's system, the maximin principle assures that the least advantaged can accept the outcome of deliberations in the original position. But the maximin principle will not work in the concrete cases of imperfect justice that we encounter in criminal cases.¹⁰⁴

Justice in criminal law is invariably *ex post*. The facts are always asymmetrical. Someone is an aggressor and someone else is a victim. This is the reason that *ex ante* systems of thought—either economic analysis or Rawlsian distributive justice—cannot answer detailed questions about the criminal law. Of course, the older forms of contract theory—Hobbes, Locke, and Kant—might explain why some state is better than no state, or some system of criminal punishment is better than none, but a hypothetical social contract cannot account for the

details of the criminal law, why some crimes are punished more than others, which claims of justification and excuse should be available, or any of the abundant details defining crime and its punishment.

No one chooses to be punished. As Kant has pointed out, no one wills to be punished but wills at most a "punishable offense."¹⁰⁵ Criminals might choose the system under which they are punished, or the rational criminal might choose to be punished for his crime, and if there were a neutral, non-tautological way of determining the content of rational thought, this might be a suitable approach to punishment. In the final analysis, however, these arguments of ideal or abstract consent are invariably unsatisfying. We know that actual criminals resist punishment and have a right to do so.

Elsewhere Kant suggests that we would lose respect for offenders who are unwilling to accept the death penalty for treason.¹⁰⁶ This seems to be a version of the argument of moral forfeiture discussed above. Even if this claim is adjusted for our changing sentiments toward the death penalty, it is unconvincing. Perhaps there is some merit to the *ex ante* question, "If you commit murder sometime in the future, what do you think your punishment ought to be?" The answer would not necessarily have to be "Death," but if a respondent thought that he would deserve at most a minimal "slap on the wrist," we would wonder about his moral sensibility. Yet no answer that he might give *ex ante* could account for the circumstances in which the killing actually occurs. He might *ex post* have good grounds for claiming justification, excuse, or mitigation, but there would be no way to know this in advance of the actual killing.

If contract and consent theories are not likely to lead us to a productive result, we might consider general democratic theory as the foundation of legitimacy in the field of criminal law. While democratic governments can claim greater legitimacy than those that do not have the support of their people, a democratically elected government cannot do anything it wants to do in the field of criminal justice. It does not have *carte blanche* to punish homosexuality and victimless sexual offenses, abortion, or blasphemy. With respect to the death penalty, democracy is hardly a convincing source of legitimacy—just because the majority of people want to execute murderers, it does not follow that the state is entitled to do so.¹⁰⁷

A good test case is the punishment of brother-sister incest. What entitles modern states to punish this victimless sexual offense? For the purpose of discussion,

let us stipulate that none of the conventional apologies for the crime apply—no concern about genetic inbreeding, coercion, or disruption of family life. Why, then, is the harmless sexual act punished? The "harm" principle does not convince modern democratic governments to stay their punitive hand in this area. Nor would it do much good to argue, as Feinberg does, that causing offense is a sufficient basis for penalization.¹⁰⁸ We know that causing offense is contingent and socially variable, as evidenced by Feinberg's own outdated argument that homosexuals kissing on a bus in a straight neighborhood would deserve punishment for causing offense.¹⁰⁹ That the punishing government is democratically elected does not seem to ease the burden of justification. Most people in Western democracies would say that incest is immoral and that is a good enough reason for punishing it. But they might say the same thing about homosexuality or first-term abortion.

With respect to the death penalty, democracy is hardly a convincing source of legitimacy—just because the majority of people want to execute murderers, it does not follow that the state is entitled to do so.

A sociological datum might account for the legitimacy of punishing incest. In contrast to the cases of homosexuality and first-term abortion, there is no organized group demanding legalization of incest. Therefore the moral sentiments of the majority are allowed to prevail. The problem is whether it is permissible to draw a conclusion about legitimacy from the absence of organized political opposition. The best case for recognizing the normative claim would be a version of communitarian theory expressed in *multiculturalism*. The government should not be entitled to legislate in the field of victimless crimes if there is significant organized opposition.

To state the argument formally, it consists of the following steps:

- (1) The state is entitled to reinforce the moral taboos of the community by the use of criminal punishment, provided no significant sub-community objects to the sanction.

- (2) Incest violates a taboo of the community.
- (3) No significant group in the society feels discrimination as a result of the practice of stigmatizing and punishing incest.
- (4) Therefore, the state is entitled to enforce this moral taboo.

The virtue of the argument is that it provides an account for why the state is entitled to punish some sexual acts and not others. Incest may be subject to punishment but homosexuality is not.¹¹⁰

The general thesis is that states and international courts may not punish simply on claims of moral truth, for example, incest is evil and therefore requires punishment. Yet we should acknowledge that conventional limitations on the authority of the state to punish are also based on claims of moral truth—in particular claims about human dignity, autonomy, and the sanctity of personal and sexual freedom. On the basis of these widely-held moral values, we now witness strong international campaigns against the death penalty, expanding the punishment for rape but decriminalizing early-term abortion and homosexuality. But these shared values are hardly universal. Arab and African states dissent.¹¹¹ As the discussion of international penal policy becomes more comprehensive, we can expect intensified debate about these issues.

(2) *Legitimacy in international law.* Although there is much talk about the international “community” in the Rome Statute, the approach of the statute resonates more with claims of moral truth than arguments based on political theory. The crimes it defines are, for the most part, taken to be self-evidently wrong on the basis of universal values.¹¹² The principle of equal dignity—of all persons, all nations, men and women—is taken for granted. There are a few instances, however, where the Rome Statute, to its discredit, slips into partisan law making. This is particularly noticeable in provisions that are rooted in regional conflicts rather than in the texts and traditions of international humanitarian law.¹¹³ The long-range success of the ICC will depend on its seeking a position of neutrality and avoiding identification with any particular “community” in the world.

So far as there is a political theory expressed in the Rome Statute, it seems to be perfectionist rather than seriously communitarian. The role of the court is to make states realize their commitments to do justice on their own territory and for their own people. The principle of complementarity permits intervention only when these

states are unwilling or unable to prosecute. The ICC appears, therefore, to be in the role of educator holding states accountable to international standards. Yet there is another way to look at the legitimacy of the ICC, which we are likely to appreciate only by reflecting on the idea that the Rome Statute is addressed to individuals rather than states. In light of the ratification of the Rome Statute by state governments, how can the Statute prescribe liability for individuals? How is this possible? How can the action of a state bind anyone except a state?

The tradition of international law is based on the two principles that treat states negotiating treaties as though they were individuals engaged in making contracts. The first assumption is *pacta sunt servanda*—“treaties are binding.” The second is the principle of state succession. Successor states are bound by the commitments and debts of prior regimes. This is true even in the case of radical changes from dictatorships to democratic regimes, or from monarchies to communist governments. Significantly, neither of these principles requires any assumptions about the internal legitimacy of the particular regimes. For purposes of international law, it does not matter whether the state recognized *de facto* and *de jure* is governed internally by a monarchy, a dictatorship, or a democratic regime.

The distinction between international and internal legitimacy should trouble us in our efforts to account for individual criminal liability in the ICC. The rules of jurisdiction and admissibility are complicated. Nevertheless, we should note the most surprising feature of the Rome Statute—that it enables non-party states to accept jurisdiction of the court as to foreigners from states that also have not recognized it.¹¹⁴ For example, a newly-constituted government in Iraq would be able to lodge a complaint against American soldiers for war crimes or crimes against humanity. The new government could submit a declaration of acceptance “with respect to the crime in question.”¹¹⁵ According to an explicit exception in the Rome Statute provision on temporal jurisdiction, this declaration could have retroactive effect.¹¹⁶ The rationale for this provision must be that if the local state has the authority to prosecute for a violation of its own law, it can also authorize the ICC to prosecute for a violation of the Rome Statute.

The localism implicit in the Rome Statute frequently leads international lawyers astray.¹¹⁷ According to the Westphalian tradition, the relevant actors are states in their external personae. By contrast, criminal lawyers are inclined to turn inward and cultivate the local, communitarian significance of criminal prosecutions. In

the typical case, the offenders, the victims, the judge, and the jury constitute aspects of the same culture. The crime requires a response within the parameters of their sensibilities and moral principles. The local judge and jury, if there is one, can appreciate the nuances of the defendant's guilt and the circumstances that produced the crime. Of course there are some cases when too much proximity can breed bias, but it is still in the interests of the community to work through the trauma of a serious crime.

This communitarian aspect of the criminal process does not marry well with the liberal universal spirit of international law. Yet there is a way to bring them together, as evidenced by current trends in the ICC. The original conception of complementarity emphasized the likelihood that states would be unwilling to prosecute and that therefore the ICC would have to correct their malfeasance. This fear might well be a matter of the past, a concern produced by the complicity of communist and fascist regimes in mass state criminality. Today there is great anxiety about states that would like to prosecute but, because they are afraid of reprisals from rebel groups, are unable to do so. In this situation the prosecutor of the

ICC can step in to enable states, whether parties to the Rome Statute or not, to realize their aspirations and commitments to pursue justice in cases that occur on their territory. The proper conception of the International Court, then, is not as the neutral arbiter among states but as the friend of every country in need of support against those who have committed "serious crimes of concern to the international community as a whole." This approach is unmistakable in the policies articulated by the first Prosecutor of the Court, Luis Moreno Ocampo, and his choice of the Congo as the first country requiring intervention.¹¹⁸ Ideally, the ICC would enable conflicted countries to rise about their internal fights for the sake of justice in particular cases. The danger, however, is that the ICC will become embroiled in civil strife and deploy the powers of the criminal law to strengthen one party against the other.

The problems of legitimacy, both domestic and international, are not so easily resolved. The hope, however, is that by having isolated these factors bearing on the problem we now have a better framework for approaching the issues.

NOTES

[A version of this essay will appear in Volume I of a trilogy, *The Grammar of Criminal Law: American, Comparative, and International*, to be published by Oxford University Press. © 2006 George P. Fletcher]

1 Notable exceptions are Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) and H.L.A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968). For a more recent attempt to lay a political foundation for the criminal law, see John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (New York: Oxford University Press, 1990) (a republican theory of criminal law would seek to maximize individual "dominion" or liberty). For a critique of their views, see R. A. Duff, "Penal Communications: Recent Work in the Philosophy of Punishment," *Crime and Justice*, ed. Michael Tonry (Chicago: Chicago University Press, 1996), vol. 20, 20-21. A republican approach to criminal law should perhaps be one of the themes of this essay, but the content of republican theory seems to me to be too ambiguous.

2 See in particular the work of Ronald Dworkin, e.g., Ronald Dworkin, "Hard Cases," *Harvard Law Review* 88 (1975): 1057.

3 Michael S. Moore, "The Moral Worth of Retribution," in *Responsibility, Character, and the Emotions: New Essays in Moral Psychology*, ed. Ferdinand Schoeman, (Cambridge, UK: Cambridge University Press, 1987).

4 Moore, "The Moral Worth of Retribution."

5 Kant is concerned with *Recht* (law as principle) rather than *Gesetz* (statutory law).

6 Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), 56. For more on the complex relationship between Kantian and Rawlsian thinking, see my "Law and Morality: A Kantian Perspective," *Columbia Law Review* 87 (1987): 533.

7 John Locke, *Second Letter Concerning Toleration* (London: Awnsham & Churchill, 1690), 7,11

8 Isaiah Berlin, *Four Essays on Liberty* (London: Oxford University Press, 1969), 18-19.

9 One would think that this would be a rather obvious proposition. Given the general indifference of the literature to these basic questions, however, one can never be sure, and I have heard thoughtful theorists—Michael Moore, in particular—argue that the moral should precede the political.

10 Joel Feinberg, "On Being 'Morally Speaking' a Murderer," in *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, NJ: Princeton University Press, 1970), 38-54 (an act may be both just and unjustified, as it may be both unjust and justified).

11 It seems to me that Joseph Raz's theory of authority

makes the same assumption that the authority of law is orthogonal to the legitimacy supplied by democratic elections. See Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 70-109.

12 Apparently it is also called "dominion." See Braithwaite and Pettit, *Not Just Deserts*, 60-68.

13 My preferred examples of libertarian thinking in criminal law are Friedrich A. von Hayek, *The Road to Serfdom* (London: Routledge, 1944) and Nozick, *Anarchy, State, and Utopia*.

14 Hayek, *The Road to Serfdom*, and Nozick, *Anarchy, State, and Utopia*.

15 John Locke, *Treatise of civil government and A letter concerning toleration*, ed. Charles L. Sherman (New York: Appleton-Century-Crofts, 1937), 14 (natural right of self-defense). See the discussion in my *Rethinking Criminal Law* (1978; New York: Oxford University Press, 2000), 860-61. See also Robert F. Schopp, *Justification Defenses and Just Convictions* (Cambridge, UK: Cambridge University Press, 1998), 75-83 (interpreting self-defense as the expression of "liberal" principles based on the autonomy and equality of all persons).

16 This claim is widely made, but difficult to confirm.

17 John Rawls, *A Theory of Justice*, rev. ed. (1971; Cambridge, MA: Belknap Press, 1999), 212-213. See also Braithwaite & Pettit, *Not Just Deserts*, for a similar view.

18 See Randy Barnett, "Restitution: A New Paradigm of Criminal Justice," in *Assessing the Criminal: Restitution, Retribution and the Legal Process*, ed. Randy Barnett and John Hagel (Cambridge MA: Ballinger Publishing Co., 1977), 349. See Louk Hulsman, "The Abolitionist Case: Alternative Crime Policies," *Israel Law Review* 25 (1991): 681.

19 Nozick, *Anarchy, State, and Utopia*, 60-61.

20 The relationship of tort to crime is replicated in the perceived escalation from normal crime to terrorism. I discuss this in *The Grammar of Criminal Law* (Oxford University Press, forthcoming), Vol. 2, § 12.2.

21 Claus Roxin, *Strafrecht Allgemeiner Teil* (Munich: C.H. Beck Verlag, 1997), vol. 1, 45-46. See also, in accord, Douglas N. Husak, "The Criminal Law as Last Resort," *Oxford Journal of Legal Studies* 24 (2004): 207.

22 Thom Shanker, "3 Jailed Ex-Chernobyl Executives to Go on Trial," *Chicago Tribune*, June 11, 1987, 5. The defendants were convicted and sentenced to 10 years in a labor camp. See News Summary, *New York Times*, July 30, 1987, A2.

23 *Corpus Juris* § 1(1).

24 E.g., Belgium's threat to indict and prosecute Ariel Sharon. See *The Grammar of Criminal Law*, vol. 2, § 9.1.

25 See 28 U.S.C. 1350. The case that initiated the modern application of ATCA as a human rights remedy is *Filartiga v. Peña-Irala*, 530 F.2d 876 (2d Cir. 1980). For the last decision by the United States Supreme Court on the Statute, see *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). This topic is explored in depth in *The Grammar of Criminal Law*, vol. 2, chap. 10.

26 J.S. Mill, *On Liberty*, ed. Currin V. Shields (Indianapolis: Bobbs-Merrill, 1956), 13.

27 Fletcher, *Rethinking Criminal Law*, 7-9.

28 See "*Corpus Juris*" portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne, ed. Mireille Delmas-Marty (Paris: Economica, 1997); G. Grasso and R. Sicurella, eds., *Il Corpus Juris 2000: Un modello di tutela penale dei beni giuridici comunitari* (Milano: Giuffrè, 2003).

29 *A. v. U.K.*, September 23, 1998 (Case No. 100/1997/884/1096).

30 See *A. v. U.K.* for an example of the current trend toward protecting the rights of children.

31 See George P. Fletcher, *With Justice for Some: Victim's Rights in Criminal Trials* (New York: Perseus, 1995), 114-131.

32 For a sophisticated version of this approach, see generally Nozick, *Anarchy, State, and Utopia*.

33 Kant, *The Metaphysics of Morals*, 143 ("No one suffers a punishment because he has willed it but because he has willed a punishable action"). Cf. Carlos Nino, "A Consensual Theory of Punishment," *Philosophy & Public Affairs* 12 (1983): 289-306. For clarification of the difference between willing the punishment and consenting to it, see Duff, "Penal Communications," 13.

34 See Herbert Morris, "Persons and Punishment," *Monist* 52 (1968): 545.

35 For good examples of needless turf-protecting, see Ronald Dworkin's book review, "What Liberalism Isn't," *The New York Review of Books*, Jan. 20, 1983 (reviewing Bruce Ackerman, *Social Justice in the Liberal State* [New Haven: Yale University Press, 1980]); Peter Berkowitz, Book Review, "Byron at Ground Zero," *The New Republic*, November 14, 2004, 31 (reviewing my *Romantics at War: Glory and Guilt in the Age of Terrorism* [Princeton, NJ: Princeton University Press, 2002]).

36 See Ackerman, *Social Justice in the Liberal State*. Other versions of liberalism are found in the work of John Rawls, Ronald Dworkin, Joseph Raz, and Jeremy Waldron.

37 This distinction is often attributed to Kant. See Rawls, *A Theory of Justice*, 24-30. I have never actually found the distinction in Kant's writing but it does follow from his general views on the relationship between legal theory (the Right) and moral theory (the highest good is the morally autonomous will). See my "Law and Morality: A Kantian Perspective," *Columbia Law Review* 87 (1987): 533.

38 I discuss the influence of the principle *nullum crimen, nulla poena sine lege*, in *The Grammar of Criminal Law*, § 2.2.

39 There have been no federal common law crimes since 1812. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

40 See note 39 above.

41 Another problem in international criminal justice is the willingness to follow the thought patterns of international criminal lawyers and treat custom as a source of law. See Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), § 2.4.3, and, in particular, p. 29 n. 14 on rape as a violation of customary international law. There seem to be many misunderstandings about this issue between international and criminal lawyers, who regard customary law as anathema to the rule of law.

42 See Hart, *Punishment and Responsibility*, 8-10 (noting that the general justifying aim might be utilitarian without following the same principle in deciding individual cases).

43 Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford, CA: Stanford University Press, 1961), 135.

44 See 61 RGSt [Entscheidungen des Strafgerichts in Strafsachen] 242 (1927). This principle is now incorporated in StGB [Strafgesetzbuch] § 34.

45 The qualification "approximate" is added because the costs and benefits of applying the rule are limited to the particular society. A rigorous utilitarian standard would consider the implications of applying the rule to the entire world. For some puzzles associated with utilitarian theory in the law, see my "Paradoxes in Legal Thought," *Columbia Law Review* 85 (1985): 601.

46 This libertarian critique of the defense of necessity first came to my attention in a conversation with Professor Wolfgang Naucke in Frankfurt. It seems clear that Kant would have objected to this way of subjecting individual rights to an override based on the welfare of others.

47 For a critique of these contradictions in the theory of efficiency, see George P. Fletcher, *Basic Concepts of Legal Thought* (New York: Oxford University Press, 1996), 162-168; George P. Fletcher and Steve Sheppard, *American Law in a Global Context: The Basics* (New York: Oxford University Press, 2005), Ch. 23.

48 Model Penal Code § 1.02(2).

49 For a leading article supporting this pluralistic way of thinking, see Henry M. Hart, "The Aims of the Criminal Law," *Law & Contemporary Problems* 23 (1958): 401.

50 For the leading survey of National Socialist thinking in criminal law, see Francisco Muñoz Conde, *Edmund Metzger y el Derecho Penal de su Tiempo*, 4th ed. (Valencia: Tirant Lo Blanch, 2003).

51 I provide an extended analysis of this form of liability in *The Grammar of Criminal Law*, § 1.3.1.

52 See *supra* note 50.

53 The nature of actor-based criminal law is treated at greater depth in *The Grammar of Criminal Law*, § 1.2.3.

54 StGB § 211(2) (*Mörder ist ...*) ["A murderer is. . . (someone who commits one of the following acts)"].

55 But note that German courts have the disturbing practice of beginning every criminal trial by questioning the accused whether he or she is *vorbestraft*, previously punished.

56 See my "Law and Morality: A Kantian Perspective."

57 The German scholars have in fact collapsed on this issue. See *Rethinking the Criminal Law*, 148. So far as I can tell, the German courts were never persuaded by a restrictive approach to liability for attempts.

58 See Kurt Seelmann, *Kollektive Antwort im Strafrecht* (Berlin: de Gruyter, 2002).

59 The leading books are Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge, UK: Cambridge University Press, 1982); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2nd ed. (Notre Dame, IN: Notre Dame University Press, 1984); Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989). See also Roberto Mangabeira Unger, *Knowledge and Politics* (New York: Free Press, 1975). My own foray into the field was expressed in George P. Fletcher, *Loyalty: An Essay in the Morality of Relationships* (New York: Oxford University Press, 1993) followed by George P. Fletcher, *Romantics at War*.

60 Sandel, *Liberalism and the Limits of Justice*, 62-63.

61 Fletcher, *Loyalty*, 33.

62 See Jaime Malamud Goti, "The Moral Dilemmas about Trying Pinochet in Spain," *University of Miami Inter-American Law Review* 32 (2001): 1. For an application of the same argument against possible intervention of the International Criminal Court in the Congo, see Adam Branch, "International Justice, Local Injustice: The International Criminal Court in Uganda," *Dissent* 51 (Summer 2004).

63 The most disturbing of these recent changes of venue was the trial of Timothy McVeigh, which was transferred from the federal court in Oklahoma City to the federal court in Denver. This long-distance transfer burdened the victims who wanted to attend the trial. I argued against this practice in Fletcher, *With Justice for Some*, 169-75.

64 If the Security Council refers a case to the ICC, it is not clear that Article 17 on complementarity even applies. I discuss this further in *The Grammar of Criminal Law*, vol. 3, ch. 16.

65 On the Milosevic trial, see Maya Steinitz, "The Milosevic Trial — Live!: An Iconical Analysis of International Law's Claim of Legitimate Authority," *Journal of International Criminal Justice* 3 (2005): 103. For a skeptical look at recent trials, see George P. Fletcher, "Milosvic and Hussein: Trial by Farce," <http://www.project-syndicate.org/print_commentary/fletcher8/English>, op-ed printed in dozens of newspapers around the world.

66 See *The Grammar of Criminal Law*, vol. 2, § 9.1.3; also George P. Fletcher, "Against Universal Jurisdiction," *Journal of International Criminal Justice* 1 (2003): 579.

67 I pursue this theme further when discussing the problem of double jeopardy and jurisdiction. *The Grammar of Criminal Law*, vol. 2, § 9.3.

68 Carl Schmitt, *The Concept of the Political*, trans. George Schwab (1932; New Brunswick, NJ: Rutgers University Press, 1976). I recognize that my usage of the *Freund* and *Feind* might differ slightly from Schmitt's. But this usage has become common in the German literature. The most important contemporary theorist of *Feindstrafrecht* is Günther Jakobs. See, e.g., his recent essay, "Das Selbstverständnis der Strafrechtswissenschaft vor den Herausforderungen der Gegenwart (Kommentar)," in Albin Eser, Winfried Hassemer, and Björn Burkhardt (eds.), *Die Deutsche Strafrechtswissenschaft vor Jahrtausende: Rückbesinnung und Ausblick* (Munich: C.H. Beck Verlag, 2000), 47, 51-52. Jakobs identifies the following

as characteristic of *Feindstrafrecht*: (1) advancing the threshold of liability as in the doctrine of conspiracy, (2) holding the defendant liable for the full punishment regardless of the how early the stage of execution, (3) transition from the criminal penalties to campaigns of prevention, particularly against organized crime, and (4) reduced procedural guarantees. My difficulty with Jakobs is that he describes the inevitability of a "criminal law against enemies" without condemning the development and urging its elimination, 52-53.

69 See Francisco Muñoz-Conde, *Derecho Penal para los Enemigos* (Buenos Aires: Hammurabi, 2004).

70 *Ewing v. California*, 538 US 11 (2003) (life imprisonment for a third non-violent felony is not excessive under the Eighth Amendment where one of the prior felonies is a violent offense).

71 See, e.g., Cal. Penal Code 667 (West 1999); Wash. Rev. Code Ann. 9.92.090 (West 1998); Wis. Stat. Ann. 939.62 (West Supp. 1998). For courts upholding the constitutionality of "three strikes and you're out" legislation, see, for example, *State v. Thorne*, 921 P.2d 514, 537 (Wash. 1996), and *State v. Lindsey*, 554 N.W.2d 215, 221 (Wis. Ct. App. 1996).

72 The use of the word "war" is not entirely apt because war is an "alternative legal order" carrying its own rules of reciprocity and decent treatment. See Fletcher, *Romantics at War*. These rules are based on the expectation that the war will end and one will have to live at peace with the erstwhile enemy. There is no similar expectation of living at peace with criminals, and therefore the kind of war at stake is a war of elimination on the model of the holy wars discussed in the Bible. See Susan Niditch, *War in the Hebrew Bible* (New York: Oxford University Press, 1993), 28 (illustrating the *herem* or ban, by which all among the defeated are "devoted to destruction").

73 See my "Disenfranchisement as Punishment: Reflections on the Racial Uses of *Infamia*," *U.C.L.A. Law Review* 46 (1999): 1895. For an excellent analysis of the tolerant approach toward the voting rights of felons in Germany, see Nora Demleitner, "Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative," *Minnesota Law Review* 81 (2000): 753.

74 According to a recent survey of state laws provided by The Sentencing Project and Human Rights Watch: In forty-eight states and the District of Columbia, felons are prohibited from voting while in prison. Thirty-six states prohibit offenders from voting while on parole and thirty-one bar voting while on felony probation. Felons are barred for life from voting in three states, and for certain categories of offenders in another nine, though in some cases they permit application for restoration under certain conditions. Only two states (Maine and Vermont) allow prison inmates to vote. The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (April 2006), available at <http://www.sentencingproject.org/pdfs/1046.pdf>; see also Michael A. Fletcher, "Voting Rights for Felons Win Support," *Washington Post*, February 22, 1999, A1.

75 In 1996, twenty-two percent of all adult jail inmates in the United States were incarcerated for drug law violations. See Caroline Wolf Harlow, *Profile of Jail Inmates 1996*, (U.S. Dept. of Justice, 1998) 4. Over forty-two percent of those incarcerated

for federal drug law violations and almost sixty percent of those in state prisons for drug offenses were African-Americans. See Douglas A. McVay (ed.), *Drug War Facts*, 4th ed. (Common Sense for Drug Policy, 2004), 322, available online at <http://www.drugwarfacts.org/factbook_4-1.pdf>.

76 Some 1.46 million African-American men are ineligible to vote out of an eligible population of 10.4 million, slightly more than fourteen percent. See Pierre Thomas, "Study Suggests Black Male Prison Rate Impinges on Political Process," *Washington Post*, January 30, 1997, A3.

77 For a critique of this argument, see Note, "The Disenfranchisement of Felons: Citizenship, Criminality, and 'The Purity of the Ballot Box,'" *Harvard Law Review* 102 (1989): 1300.

78 On Diplock proceedings, see Antonio Vercher, *Terrorism in Europe: An International Comparative Legal Analysis* (Oxford: Clarendon Press, 1992), 120-155.

79 StGB § 129a. The provision, introduced in 1976 and amended several times since, does not explicitly use the word "terrorist" in defining the punishable conspiracies. See § 129b. Analogous legislation in Italy is directed against the mafia.

80 Código Penal §§ 572, 574. The substance of these provisions is similar to the German statute, with the specific aim of defining a prohibited terrorist organization. See Código Penal § 571.

81 There are, however, significant differences between punishing membership and punishing conspiracy. I have discussed the intersection of conspiracy with the law of war at greater length in *The Grammar of Criminal Law*, vol. 2, ch. 10.

82 See the controversial challenge to this practice in *United States v. Singleton*, 144 F.3d 1343 (10th Circ. 1998) (a US Attorney's inducements to testify violate bribery statute) reversed en banc in *United States v. Singleton*, 165 F.3d 1297 (10th Circ. 1999) (inducements to testify are a proper function of the sovereign).

83 Various provisions in the codes of criminal law and procedure permit a reduction of penalties in cases of cooperation with the prosecution. See StPO § 153e; StGB § 261.

84 See Stephen J. Schulhofer, *Rethinking the Patriot Act: Keeping America Safe and Free* (New York: Century Foundation Press, 2005).

85 18 U.S.C. 2339A - 2339D (variations on the crime of providing material support to terrorists and their organizations).

86 In *The Grammar of Criminal Law*, vol. 2, I take a closer look at the responses of the United States to the new sense of "us" vs. "them" that took hold after September 11, 2001.

87 This was nominally the goal of Communist jurisprudence in the U.S.S.R. See Harold Berman, *Justice in the U.S.S.R.: An Interpretation of Soviet Law* (Cambridge, MA: Harvard University Press, 1963), 283-284.

88 On the structure of hate crimes, see Anthony M. Dilloff, "Punishing Bias: An Examination of the Theoretical Underpinnings of Bias Crime Statutes," *Northwestern*

- University Law Review* 91 (Spring 1997): 1015; Alon Harel and Gideon Parchomovsky, "On Hate and Equality," *Yale Law Journal* 109 (December, 1999): 507; Heidi M. Hurd and Michael S. Moore, "Punishing Hatred and Prejudice," *Stanford Law Review* 56 (April, 2004): 1081.
- 89 In light of our earlier analysis, it is equivalent to promoting morality over legality, or culpability over wrongdoing.
- 90 On Kant's definition of the Right, see *supra*, p. 13.
- 91 On the general relationship of the Right and the good, see *supra*, p. 17.
- 92 These are the four concrete examples that Kant gives of the way the categorical imperative applies in practice. See Immanuel Kant, *Grounding for the Metaphysics of Morals*, third edn., trans. James W. Ellington (1785; Indianapolis, IN: Hackett, 1991), chap. 2.
- 93 Berlin, *Two Concepts of Liberty*, 33.
- 94 Kyron Huigens, "Virtue and Inculpation," *Harvard Law Review* 108 (1995): 1423.
- 95 Huigens, "Virtue and Inculpation," 1479.
- 96 Huigens, "Virtue and Inculpation," 1467.
- 97 The term *Charakterschuld* [guilt based on character] has become a derogatory reference in the German literature. For a survey of the German discussion, see Roxin, *Strafrecht Allgemeiner Teil*, vol. 1, 863-65.
- 98 See Fletcher, *Rethinking Criminal Law*, 799-802.
- 99 My views were clarified by working with Ekow Yankah on his article addressing this theme. See Ekow Yankah, "Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment," *Cardozo Law Review* 25 (2004): 1019.
- 100 This distinction is explored in greater depth in *The Grammar of Criminal Law*, vol. 1, ch. 6: "Punishment."
- 101 See Toni M. Massaro, "Shame, Culture, and American Law," *Michigan Law Review* 89 (1991): 1880; Dan M. Kahan, "The Meaning of Alternative Sanctions," *University of Chicago Law Review* 63 (1996): 591; James Q. Whitman, "What Is Wrong with Inflicting Shame Sanctions?" *Yale Law Journal* 107 (1998): 1055.
- 102 See Jaime Malamud Goti, *Game Without End: State Terror and the Politics of Justice* (Norman, OK: University of Oklahoma Press, 1996).
- 103 For a previous exercise of this sort, see my analysis of the way paradigms of self-defense influence the contours of self-defense. *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (Chicago: University of Chicago Press, 1988), 18-38.
- 104 Rawls, *A Theory of Justice*, 8 (principles limited to perfect compliance).
- 105 Kant, *The Metaphysics of Morals*, 143. See also Duff, "Penal Communications," 13.
- 106 Kant, *The Metaphysics of Morals*, 142.
- 107 The major proponents of the death penalty, apart from the United States, are dictatorships in the Islamic world and in the Caribbean and Africa. See William A. Schabas, *An Introduction to the International Criminal Court*, 2nd ed. (Cambridge, UK: Cambridge University Press, 2004), 140 for comments on the resistance to eliminating the death penalty in the Rome Statute.
- 108 Joel Feinberg, *The Moral Limits of Criminal Law* (New York: Oxford University Press, 1985), vol. 2: *Offense to Others*, 1.
- 109 Feinberg, *Offense to Others*, 42.
- 110 *Lawrence v. Texas*, 539 U.S. 558 (2003). It is much too easy to argue, as does Justice Scalia, that no relevant distinctions exist among sexual offenses, 586, 599 (grouping as equivalent all statutes prohibiting "fornication, bigamy, adultery, adult incest, bestiality, and obscenity").
- 111 On politically incorrect attitudes toward the death penalty, see Jens David Ohlin, "Applying the Death Penalty to Crimes of Genocide," *American Journal of International Law* 99 (October, 2005): 747.
- 112 I discuss the concept of *malum in se* at greater length in *The Grammar of Criminal Law*, vol. 1, ch. 1, § 1.2.1.
- 113 See Rome Statute § 8(2)(b)(viii) (adding "indirect" transfer to the prohibition of the Geneva Convention).
- 114 Rome Statute, Article 12(3).
- 115 Rome Statute, Article 12(3).
- 116 Rome Statute, Article 11(2).
- 117 For an example of the biases of international lawyers, see Madeline Morris, "The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-Party States," *Law & Contemporary Problems* 64 (2001): 13, who assumes that the only state that can determine the susceptibility of individuals to jurisdiction is the state of the accused's nationality. She is led to this mistaken conception by reasoning that since the state is the proper party to be bound, the state can make its own citizens liable in its place.
- 118 In February 2004 Luis Morena Ocampo gave a lecture in Florence, Italy, in which he outlined the new interpretation of complementarity and explained why he was going to proceed in the Congo.