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**Virtue Ethics and Criminal Punishment**

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1. Introduction

Criminal punishment is designed to serve particular societal-level functions. These are often called the principles of punishment, and there are four that are referred to most often: retribution, deterrence, incapacitation, and rehabilitation. The principle of retribution states that violators of the law should get their “just deserts,” and thus punishment should serve to provide harmful consequences in response to a harmful act. The principle of deterrence attempts to influence an offender’s decision-making with the threat of punishment. The principle of incapacitation also aims to stop defendants from offending, but there is no attempt to influence decision-making; instead the offender’s environment is manipulated to make reoffending impossible (usually via incarceration). Finally, rehabilitation is the idea that offenders can be reformed such that they won’t reoffend.

These *functions* of punishment fall into broad categories of *justification* for punishment. A justification for punishment provides good reasons why society is warranted in denying offenders’ liberties based upon their performance of certain acts. Deterrence, incapacitation, and rehabilitation are often seen as utilitarian aims, and thus are primarily justified based on their consequences, while retribution is usually justified based upon deontological notions of moral judgment and desert. A third sort of justification for punishment is offered by virtue theorists, who view punishment as a means to encourage virtuous character development, and punish vicious characters. Rehabilitation is the function of punishment most easily justified from the perspective of virtue theory, although some have argued the theory can justify all four of the principles of punishment.

All of the major justificatory theories of punishment – deontological, utilitarian, and virtue theory, as well as the more recent theories that emphasize the communicative aspect of punishment (e.g., (Duff 1996)) – rest upon the cornerstone notion that citizens and offenders are rational agents. Citizens are culpable for their criminal acts precisely because, as rational agents, they can understand legal rules and punishment as reasons to act or refrain from acting: such abilities ground what HLA Hart termed “capacity responsibility” (Hart 1968). If persons, or classes of persons, do not have the capacity to understand the rule of law and/or make decisions regarding whether to follow legal rules, then the institution of law as structured fails as applied to that person or class (Hart 1968)(227).

Punishment aims in part to communicate with offenders (namely, to convince offenders that their act was wrong), and influence their future decision-making (Duff 1996). Thus the aims of retribution, deterrence, and rehabilitation each depend upon offenders’ rational capacities: retribution requires that an offender understand why he is being punished; deterrence attempts to convince an offender not to reoffend, and rehabilitation attempts to reform an offender so he will be less inclined to chose to commit crimes in the future. Conviction of a criminal offense does not to rescind one’s standing as a rational agent (Hart 1968, Duff 2002). As preeminent U.S. Federal Appellate Judge Richard Posner has noted, if the status of rational agency was revoked due to criminal behavior, we might come to view offenders as “members of a different species, indeed, as a type of vermin, devoid of human dignity and entitled to no respect” [[1]](#footnote-1) instead of as agents who retain the capacity to undergo moral change.

In this chapter I use virtue theory to critique certain contemporary punishment practices. From the perspective of virtue theory, respect for rational agency indicates a respect for choice-making as the process by which we form dispositions which in turn give rise to further choices and action (Pincoffs 1980). To be a moral agent requires one must be able to act such that his or her actions deserve praise or blame; virtue theory thus demands that moral agents engage in rational choice-making as a means to develop and exercise the character traits from which culpable action issues. With respect to criminal offenders, virtue theory indicates the state is obligated to recognize offenders’ right to form their own moral character via rational choice-making, even while under state supervision. I will argue below that punishment practices should limit choice-making only to the extent necessary to achieve the functions of punishment: whenever possible, punishment should preserve opportunities for the rational exercise of character and development of virtue. This means that even within a prison setting incarcerated offenders should be able to make some choices about their daily lives (e.g., regarding whether to follow the rules of prison, how to manage their relationships with other prisoners and prison staff, etc.). Offenders should also be offered opportunities to develop virtuous traits through rehabilitative programming such as drug addiction treatment, educational programming, and job training.

I will also argue that two contemporary punishment practices unjustly undermine an offender’s moral agency. The first is the overuse of isolation sanctions, which very severely limits offender choice-making. The second is chemical castration, which results in limiting an offender’s capacity to develop his character within a specific realm of choice-making. I conclude that these two punishments violate offenders’ moral agency, and that this violation cannot be justified by appeal to the aims of incapacitation, deterrence, retribution, and rehabilitation.

2. Contemporary formulations of character traits

Virtue theorists argue that character traits, which are in a constant process of development or decline, ground morally relevant human action. Aristotelian virtue theory claims that character traits like honesty, kindness and courage become stable as a result of the process of habituation (Aristotle 1985). Habituation involves practicing the trait via the use of practical reason, which allows a person to determine which actions are appropriate in any given situation. A stable disposition to act in accordance with a trait, such as honesty, is built up as a result of making appropriately honest choices over time.

Contemporary versions of virtue theory emphasize that both reason and character traits are vital to moral action, providing detailed accounts of the operations of practical reason and the structure of character traits, often taking into account psychological data (see, for example, (Webber 2006, Webber 2013)). Much recent work in virtue theory has defended virtue ethics against the threat of "situationism" lodged by John Doris (Doris 2005) and others. Evidence of the large effects relatively small features of the environment (such as ambient noise or whether one is late) can have on behavior led situationists to argue that robust or “global” character traits simply do not exist. Virtue theorists have responded by arguing that much of the situationist data has been overblown, and that despite small situational effects, character traits can be considered stable dispositions to action when one has an appropriately sophisticated notion of the way in which multiple environmental factors interact with numerous dispositions to act in real time to produce action (Annas 2003, Webber 2006). Thus Webber (2006) argues that situationism is only a threat if behavior is seen as produced by straightforward stimulus and response pairs. This view of human action is obviously untenable: human action results from the complex interaction of multiple motivating predispositions and environmental factors (Webber 2006). Character traits should thus not be seen as simple responses to environmental stimuli, but instead one disposition among many that might lead to certain behavior in certain situation; as "dispositions toward certain behavioral inclinations in response to particular kinds of stimulus" (Webber 2006). Even Doris admits to what he calls “local” character traits, where a trait can be considered stable given a particular context.

As an example of the complex ways character guides action, consider a case where the traits of kindness and honesty may demand different actions: your friend asks you how she looks in an expensive new dress. Kindness demands a “white lie,” but honesty demands that you tell her she looks pear-shaped. What is the right action? This is likely to depend on the circumstances. Can she still return the dress or is she already wearing it out at a restaurant? Is your friend very sensitive or does she have a thick skin? Here, as is the case for most human action, identification of the right act requires weighing the relative importance of the two virtues and various situational factors. Even one who held the character traits of kindness and honesty actor would need to employ her practical reason to determine the correct course of action.

According to Julia Annas, the capacity for practical reasoning has both an affective and intellectual component (Annas 2003, Annas 2004, Annas 2011). Emotions indicate whether one feels good or bad about performing a certain act, creating an internal system of reward and punishment. This component of Annas’ theory is necessary to explain why character traits motivate a person to act: a good moral education will teach a person to feel good about the right actions and bad about the wrong ones. The intellectual aspect of self is capable of understanding whether the reasons one has for acting are good or bad (and thus, whether the act should be considered good or bad). Our emotional and intellectual reasoning capacities are developed by the process of education begun by our parents, teachers, role models, and eventually peers, and then continued in our adulthood by our own ability to critically assess our moral opinions.

This process of moral education takes time, and it is a process that is never finished. Take as an example the trait of stewardship to the planet. At first, two year-old Gabby may learn that it isn't okay to litter from her parents. As an eight year-old, Gabby then gains an understanding (from lessons at home and at school) that taking care of the planet means recycling whatever we can so less gets thrown in a landfill. As a high school student, Gabby takes an environmental science course and sees films on environmentalism, thus developing a more sophisticated understanding of how consumption of disposable coffee cups and other packaging may be irresponsible even if they get recycled, and about the way in which American methods of consumption disproportionately hurt the poor and marginalized. As Gabby’s reasoning capacity grows, she becomes more deft, versatile, and thoughtful in the application of her value of stewardship to action.

Thus developing a virtuous character trait requires developing expertise just like being good at any craft. This is a point Aristotle makes very explicitly in the Nicomachean Ethics (Aristotle 1985)(1103a30) and Julia Annas examines in her 2011 book (Annas 2011). An expert electrician will know how to solve novel problems, and will be able to articulate to a novice why a particular solution is the right one (Annas 2011)(19). Similarly, expertise in a character trait will mean that a person can apply the trait in new or difficult situations, and later provide reasons as to why they acted in such-and-such way. Rote-memorization and rule-following is often the beginning stage of acquiring a skill, but expertise exhibits intelligent flexibility. Thus, practical reason is critical to the process of “…becoming just by doing just actions, temperate by doing temperate actions, brave by doing brave actions” (Aristotle 1985) (1103b).

To summarize, contemporary virtue theory examines the role environment, practical reason, and predispositions to act play in moral action. Reason plays two roles with regard to character. First, it is vital to development of character, via habituation of traits; and second, allows for the expression of those traits as action. To claim that a character trait is a “stable” means the trait predisposes one to act in such-and-such a way in such-and-such a situation. Human action is the result of many motivations and depositions to act which are relevant in any given situation.

3. Criminal Character

Virtue theory was the dominant approach in Western moral philosophy until roughly the Enlightenment, when utilitarian or deontological theories arose as the prevailing methods for justification of moral judgments (and by extension, criminal law and punishment). However, the past 50 or so years has seen renewed interest in virtue theory, partly due to Anscombe’s famous 1958 article “Modern Moral Philosophy” (Anscombe 1958). There has been specific interest in the intersect of virtue theory and criminal punishment in the last 15 years (see, for example, (Brown 2002, Huigens 2004) and (Tadros 2011)).

Virtue theory has been used to justify punishment by emphasizing the criminal law’s obligation to “promote human flourishing by instilling and cultivating the moral virtue, promoting sound practical reasoning and punishing those who display vice” (Yankah 2009). The theory is best suited to justify punishment’s function of rehabilitation, which aims to reform offender’s characters such that they won’t recidivate. However, many aspects of the common law system of punishment reference an offender’s character. For example, increased sentences in accordance with three-strikes and felony murder laws, and capital sentencing procedures indicate concern for an offender’s underlying character traits or dispositions (Huigens 2002). Even the recent focus on retribution as the primary justification of punishment – evident in the U.S. especially – seems to reflect moral judgments based not upon harmful acts, but upon vicious traits of character (Huigens 2002).

One of the central problems in the criminal law is that the imposition of punishment cannot be justified by a single ethical theory (Brown 2002). Different theories of justification best explain different functions of punishment: deontological theory most easily justifies punishment based on moral wrongs; and utilitarianism best justifies punishment based upon social order concerns via incapacitation or deterrence of dangerous persons. Because of this, attempts to make utilitarianism or deontological theory the sole justification for criminal law have been unsuccessful (Brown 2002). Indeed, many contemporary scholars, including Robert Nozik and Antony Duff, argue for a “hybrid” theory of justification, which utilizes multiple justifying theories (Nozick 1981, Duff 2002).

It is thus not surprising that very few believe virtue theory can act as the sole justification for criminal punishment. One issue is that criminal guilt does not seem primarily to depend upon assessment of character but instead on whether a person performed an intentional harmful act. An intentional killing of another human being is usually determined to be murder regardless of whether the act was in keeping with, or contrary to, an offender’s character (Duff 2002; Yankah 2004). Even so, all of the functions of punishment can be made sense of from the lens of virtue theory: deterrence and incapacitation can be are viewed as attempts to influence choices and character; and retribution as moral judgment which refers to, and should be respectful of, character. As noted above, rehabilitation is the function of punishment most easily justified from the perspective of virtue theory, because of its focus on altering in a more permanent way an offender’s choice-making. One of the reasons virtue theory has been less utilized by contemporary legal theorists than other justifying theories, at least until recently, may be due to the relative diminishment of the principle of rehabilitation in the past 50 years. For the first six decades of the 20th century, rehabilitation was often thought to be the dominant principle of punishment, especially among correctional elites and criminologists (Cullen and Gendreau 2000). Rehabilitation has since fallen out of favor, especially in the U.S., due to the monetary cost of rehabilitative programming and the political cost of supporting such programs. Drug addiction treatment, job training, educational programs, and therapy are all still used in many U.S. prisons, although cuts in funding and a lack of commitment to the programs have made their effectiveness questionable.

Although it has been underemphasized in the past, I feel virtue theory is an important tool for analyzing the operations of the criminal law because of its focus on moral development, and because it provides a fuller description of the way human rational agency creates culpable action than the other two theories. While it is helpful to see an actor as interested in maximizing his utility, or as motivated to act in accordance with moral duty, virtue theory provides a detailed account of how a moral agent develops a predisposition to act in such-and-such a way over time, and how law and punishment might influence this process. Whether a violator of law acted out of character or from viciousness can be important considerations with regard to punishment, even if they aren’t directly relevant to guilt. A murder performed in keeping with a disposition to act violently and to de-value life should be determined to be deserving of harsher punishment than an out of character act (e.g. a murder committed by a normally peaceful parent who discovers his child has been raped).

Considerations of character are also important when evaluating the overall effectiveness and justice of a particular system of criminal punishment. The threat of punishment should make the acquisition of virtue easier, not harder, for citizens, by providing external pressure to cultivate virtuous traits. As Huigens notes, general deterrence of the population from crime can be seen as an effect of virtue (Huigens 2002). It never even occurs to most people to rob a bank or a store, even though they see one every day. This internalization of moral and legal norms – as HLA Hart terms the phenomenon (Hart 1968) - reflects the acquisition of dispositions toward honesty, or lawfulness, of which the threat of punishment plays a role.

More specifically, virtue theory highlights a particular ethical side-constraint on punishment: methods of punishment should still allow for the development and exercise of character, at least in so far as this is possible within a system that serves the functions of incapacitation, deterrence, retribution, and rehabilitation. As legal scholar Yankah notes, “All would agree that a morally justified legal system cannot make impossible or overly difficult a life of value or virtue” (Yankah 2009). Ideally, punishment should not result in worse characters, especially as the vast majority of offenders are eventually released. Punishment ought not to preclude the possibility of the development of virtue, unless this preclusion is absolutely necessary to achieve one of punishment’s central aims (retribution, deterrence, incapacitation, rehabilitation). Any punishment that infringes upon moral choice-making and thus agency, where the infringement is not clearly designed to accomplish one of the four functions of punishment, is unjust.

 4. Virtue and punishment: an example

The ethical constraint virtue theory places upon criminal punishment can be explored further by use of an example. Webber (2006) discusses a study regarding the regional differences in the disposition to be violent. According to the study, in the U.S. white males in large southern cities are no more likely to commit homicide than their counterparts in large northern cities, but those who do commit homicide are significantly more likely to do so as the result of an argument; and outside cities, southern white males are twice as likely as their northern counterparts to commit homicide as a result of an argument (Webber 2006). Experimenters guessed that these differences were due to a southern culture of honor, and designed a study to test this hypothesis. In the study, northern and southern male college students were asked to finish a story about a situation where one man saw another trying to kiss his fiancé (Webber 2006). Half of the men were insulted in the hallway just before being told the story. Seventy-five percent of insulted southerners ended the story with one of the men suffering injuries or threats, whereas only twenty percent of control southerners did so (Webber 2006). Having recently been insulted made no statistically relevant difference to how northerners ended the story (Webber 2006).

This tells us, according to Webber, that the trait of being strongly inclined to respond violently when insulted is more prominent in southerners than northerners (Webber 2006). In my mind, the difference in strength of inclination to respond violently in certain situations can manifest in two different ways. First, it may be a difference in the strength of the disposition to act aggressively itself. For example, as a general rule, males have a stronger disposition to act aggressively than women. So the reason southern males react more strongly may be that the emotional component of aggression after being insulted is stronger in southern males than in northern ones. Or, it may be difference in the rational processes of the actor that give effect to the feelings of aggression. One might feel very angry and aggressive in response to some environmental stimulus, but still not act aggressively or violently because one determines via the reasoning process that such action is wrong or unwise.[[2]](#footnote-2)

To take the example a bit further, imagine Jack, a white southerner. He was at a party one night when another man, Tom, starting flirting with his girlfriend. When Jack approached Tom and accused him of being inappropriate, Tom insulted him. Jack then beat Tom severely, and Tom ended up paralyzed.

Jack has been found guilty of attempted murder. At sentencing, a jury is asked to consider the following three options: (1) life in prison without the possibility of parole; (2) a 25 year sentence with involuntary anger management therapy, and the possibility that Jack can earn early release; or (3) a short sentence of 3-5 years with the involuntary administration of aggression-reducing drugs for the rest of Jack's life.

Both anger management therapy and the aggression-reducing drugs might be considered rehabilitative treatment. Before discussing in detail Jack’s punishment, let me say a few words about these rehabilitative programs from the virtue theory perspective more generally. Traditional rehabilitative programs such as anger management and behavioral therapy often aim both at enhancing reasoning processes and diminishing the strength of certain dispositions to act via the process of habituation. For example, anger management therapy may train an offender to stop and count slowly to ten before acting upon a feeling of anger. This encourages the use of practical reason before acting. Another tool commonly used by therapists who do cognitive behavioral theory is called “systematic desensitization” (McGlynn, Smitherman et al. 2004). The technique exposes a person to stimuli to which he tends to have a very strong emotional reaction, with instructions on how to better manage and reduce that reaction over repeated exposures to the stimuli (McGlynn, Smitherman et al. 2004).

Other rehabilitative programs focus on changing situational factors that encourage destructive dispositions, such as educational programming or job training (Bouffard, Mackenzie et al. 2000). By providing an offender with an education or job prospects, the programs attempt to remove an environmental factor that is linked to criminal behavior (joblessness) and place the offender in an environment where following the law is an easier choice.

Treatment of addiction or other psychological disorders also attempt to either diminish the strength of certain dispositions (in the case of addiction), improve reasoning (in the case of many psychological disorders), or both (Wexler, Falkin et al. 1990). Drug rehabilitation can work to try to decrease the strength of the disposition to administer the drug via pharmaceutical and situational means. In the former case, drugs such may be given that lessen cravings or even make the addict sick when they administer the drug they are addicted to. Drug rehabilitative programs also attempt to increase the addict’s ability to make a reasoned choice not to take the drug via cognitive behavioral therapy (Bahr, Masters et al. 2013). Often these two sorts of treatment are given in tandem, where drugs may be prescribed to decrease cravings, while therapy works to increase rational control (Bahr, Masters et al. 2013). Similarly, an offender with obsessive-compulsive disorder (OCD) may receive medicine which lessens his anxiety levels, in coordination with cognitive behavioral therapy which increase his ability to use his reason to keep his dispositions to certain behavior (locking doors, washing hands, etc.) in check.

Note that all of the rehabilitative interventions discussed so far work within the normal structure of habituation and practical reasoning except the use of certain medicines to treat addiction or psychological disorders such as OCD. As such, the majority of programs are "indirect" in that they work via the rational processes of the offender and not directly on the offender's dispositions themselves. In the latter case of addiction or psychological treatment, however, these programs seem to work to lessen certain dispositions directly via brain interventions.

Let’s return to Jack's punishment. Option one was to sentence Jack to life in prison without the possibility of parole (or an LWOP sentence). LWOP sentences are meant to be reserved for very serious crimes and our most deserving criminal offenders, although they are relatively common in the US.[[3]](#footnote-3) One of the problems with locking offenders up and “throwing away the key” – besides the obvious cost to taxpayers - is the psychological impact this will have on offenders. Offenders with no possibility of release would seem to have little opportunity or motivation to improve their characters. First, LWOP offenders are less likely to be offered rehabilitative programming, and second, they are less likely to participate in any programming they may be offered. There is no reason for the state to assist in Jack’s rehabilitation such that he will be less likely to recidivate, because he will never be released. And there is no need for Jack to learn new skills that might assist him in the community (such as job skills). Finally, many of the character traits that might benefit Jack once released may be of dubious value in a maximum security prison where LWOP offenders are often held, such as the traits of moderated aggression, a good work ethic, and honesty.

Of course, it is still at least *possible* an LWOP offender might wish to develop virtuous character traits, and be able to do so, even given the very limited opportunities for virtuous choice-making in prison. However, it is clear that an LWOP conviction makes this much less likely than sentences of incarceration with a chance of release. This infringement upon moral development may be warranted where an offender commits a particularly heinous crime (or series of crimes): for example, one might imagine a serial killer or pedophile for which an LWOP would be warranted. In Jack's case, however, especially if this is his first offense, an LWOP sentence seems much too extreme. Life in prison seems a disproportionate punishment for Jack from a retributive perspective. Let’s assume Jack is 25: fifty years seems much too long a sentence, even given the hardship he caused his victim. Further, if the therapy mentioned in option two works to help Jack manage his anger, life in prison won’t be necessary for incapacitation; and even without therapy Jack, like many violent offenders, is likely to “age out” of his violent tendencies by middle-age.[[4]](#footnote-4) Finally, there is no evidence that an LWOP sentence is more likely to deter potential violent batteries than a substantial sentence of 25 years (Tonry 2008). In short, none of the aims of punishment seem to be served by Jack serving an LWOP sentence.

Option three (early release with life-long involuntary administration of aggression-reducing drugs) alters Jack's disposition to act aggressively directly via brain interventions. Initially, one might not think this is such a bad thing. It is very likely to result in Jack being less dangerous. One problem, however, is that administration of these drugs will not just alter Jack's disposition to respond aggressively to insults, but also alter his disposition to respond aggressively in every situation. And one can easily imagine a scenario where responding aggressively would constitute a virtuous act: If Jack sees a little girl being beaten by a gang of boys, responding with the appropriate amount of aggression would constitute the virtues of courage and good Samaritanism. A more likely scenario might be Jack needing to exhibit aggression to keep from being victimized if he released back into violent neighborhood. The capacity to get angry, and even the willingness to threaten aggression, might be absolutely necessary for Jack to take public transport or walk safely down his street.[[5]](#footnote-5) Such actions may not be considered wrong or vicious - and may even be considered virtuous – if they constitute the right amount of aggression exhibited under the right conditions (assuming Jack only threatens violence and does not commit a violent act).

In general, we ought to worry about the way in which such aggression-reducing drugs might work. Would they remove Jack’s ability to get angry completely and make him permanently docile? Would Jack’s ability to play competitive sports or compete for clients or with other workers be compromised due to the drugs?

Upon close examination the aggression-reducing drugs do not seem act as a rehabilitative treatment, but instead as an attempt by the state to incapacitate Jack without the cost of incarcerating him. As already discussed, according to traditional virtue ethics the development of virtue is like development of expertise in a craft. This expertise allows one to make very specific, detailed decisions regarding virtuous action given a particular situation. If the aggression-reducing drugs completely remove Jack’s aggression, and are given to him for the rest of his life, Jack will never be given the opportunity to develop many virtues associated with the considered practice of aggression, including courage. That is, he will never have the chance to learn to express just the right level of aggression under the right circumstances. In this way the drug would severely undermine Jack’s moral development and agency.

Contrast this result with the administration of medication to diminish an offender’s cravings for illegal drugs. This direct intervention does not interfere with dispositions that might be virtuous: such medicines tend to suppress withdrawal symptoms, relieve cravings, or block the effects of certain drugs so the motivation to take them is removed (Mitchell, Wilson et al. 2012). When such a drug is given in concert with therapy, it may assist moral development by decreasing the salience of very strong desires such that an agent can better use his practical reason. Administration of such drugs is rarely permanent, but continues only as long as is needed to assist in an addict’s rational decision-making. Similarly, a drug that decreased a person with OCD’s anxiety to normal levels would not on its face inhibit moral development. As long as the patient could still experience anxiety in adequate levels in truly anxiety-deserving situations, the medicine would not seem to impact his moral agency.

Several conditions would have to be met for Jack’s aggression-reducing drug to play a similar rehabilitative role to the medication given to drug addicts or an offender with OCD. First, the drug would have to “tone down” and not fully remove his aggression, so as to target mental causes likely to cause criminal harm (e.g. very strong desires to harm others) and be less likely to impact legal behavior (e.g. scaring someone off with a show of aggression). Second, the drug would have to be given in tandem with therapy, so that a therapist might help Jack learn to make better choices with regard to his expressions of aggression while his aggression levels are low. This also may require that Jack be released while on the medication and in therapy, so that he is subject to situations where he is asked to moderate his aggression. (Given the conditions of prison, it would be quite difficult, and possibly unsafe, to ask Jack to take these drugs while incarcerated.) Third, the administration of the drug should not be permanent but temporary, until his therapist or other medical professional determines that they are no longer needed because Jack is no longer likely to cause harm due to his aggression. And fourth, such drugs should be given only voluntarily, where Jack has consented that he wishes to change his trait of aggression. (More on this requirement immediately below.) Only if all of these conditions were met could a sentence of aggression-reducing drugs be a justified rehabilitative punishment. If aggression-reducing drugs are given as stipulated - a permanent sanction, and provided without therapy or the oversight of a medical professional - then Option Three violates Jack’s rational agency.

Option two (a prison sentence in conjunction with anger management therapy) is most respectful of Jack's rational capacity to form his own character, despite the fact that the therapy is involuntary, and seems appropriate, given the severity of Jack’s crime and the various functions of punishment. Therapy could help Jack develop expertise regarding which sorts of situation require aggression, and which don't. Or, if Jack practices psychological resistance, his character won't change in response to the therapy. If he does resist, he will continue to be incapacitated but his character will remain his own. The reason why aggression-reducing drugs should only be given voluntarily is precisely to preserve this opportunity for an offender to resist a state-imposed character change. The state ought not to require an offender to make changes in his character via direct brain interventions, because this would entail use of state power to force conformity with a state notion of virtue.[[6]](#footnote-6) Certainly, a criminal conviction does not justify state-mandated changes in an offender’s character. However, if a character change is desired and the therapy works, Jack may undergo character development and be a good candidate for early release.

Above I claimed that any punishment that infringes upon moral choice-making and thus agency is unacceptable unless that infringement aims to fulfill a function of punishment. The above example provides further evidence for this claim by examining a hypothetical case where certain punishments – involuntary administration of aggression reducing drugs and LWOP - were unjust because they eliminated or severely compromised the possibility of moral development and virtue without justification.

5. Isolation Sanctions and Current Chemical Castration Programs

In this section I will explore in more detail certain contemporary punishment practices through the lens of virtue theory. Specifically, I will argue that many cases of isolation sanctions, and every instance of chemical castration, unduly infringe on moral development agency without sufficiently promoting a principle of punishment.

a. Isolation sanctions

Philosopher Lisa Guenther provided this description of solitary confinement in a 2012 opinion piece for the New York Times:

There are many ways to destroy a person, but the simplest and most devastating might be solitary confinement. Deprived of meaningful human contact, otherwise healthy prisoners often come unhinged. They experience intense anxiety, paranoia, depression, memory loss, hallucinations and other perceptual distortions. Psychiatrists call this cluster of symptoms SHU syndrome, named after the Security Housing Units of many supermax prisons. Prisoners have more direct ways of naming their experience. They call it “living death,” the “gray box,” or “living in a black hole.” (Guenther 2012)

Two different studies, one performed in 2000, and one in 2005, found that in the U.S. over 80,000 prisoners were serving time in solitary confinement at some point in the year (proper cite).[[7]](#footnote-7) Rikers Island alone has over 80 solitary confinement cells, according to the New York City Bureau of Prisons. Across the US, use of solitary confinement is on the rise: in supermax prisons, tens of thousands of prisoners are isolated, and many traditional prisons also isolate some portion of their population (Weir 2012). Although isolation sanctions were originally designed to be a sanction of the last resort, prisoners are now often forced into isolation upon a first offense of failing a drug test, arguing with a guard, or fighting with another prisoner (Guenther 2012).

Isolation sanctions can almost completely remove an offender’s capacity for choice-making. All versions of solitary confinement mean living 23 to 24 hours a day in a cell. Sometimes inmates are granted one hour for exercise, which usually takes place alone in an exercise room or a “dog run” (Haney 2003). Solitary confinement cells generally measure from 6 x 9 to 8 x 10 feet. They can have solid metal doors so inmates cannot see outside, and inmates inside are often banned from using a TV, radio, or reading supplies (Haney 2003). Supermax prisons are specially designed facilities for isolation, and can be either stand-alone or connected to larger prisons. Supermax prisoners are confined to single cells around the clock, released only 3-5 hours a week for showers or exercise, and subject to continual surveillance (Lovell, Johnson et al. 2007). On the very rare occasions when they are in the same room with another person, supermax prisoners are often caged or bolted down (Lovell, Johnson et al. 2007).

In response to successful lawsuits filed by prisoners, some states have moved away from the most severe forms of solitary confinement to “administrative segregation” where inmates are allowed to communicate with other prisoners during their one hour of recreation, receive visitors, mail and phone calls, and take part in religious and educational services (Berger, Chaplin et al. 2013). One recent study, which attempted to examine the impacts of administrative segregation in a Colorado prison, found elevated levels of mental illness amongst those prisoners in segregation, but failed to find that these illnesses worsened as a result of the segregation (O'Keefe, Klebe et al.). However, some have questioned the validity of the study, partly because the prisoners studied had already been subject to an extreme version of solitary confinement for up to a week before they meet with researchers, and then were sent to less restrictive segregation (Weir 2012). In addition, there is some evidence that prisoners in solitary confinement at supermax prisons fare worse than prisoners in the general population once released. A 2007 study found that prisoners released directly from a supermax prison committed new crimes sooner than prisoners who were transferred from segregation to the general population for several months before being released (Lovell, Johnson et al. 2007).

There is no doubt that all prisoners experience a diminishment of their capacity for habituation of traits. There will be less opportunity in prison to practice vicious traits (although many bad actions are performed by incarcerated offenders), but also virtuous traits such as honesty, kindness, or courage than there would be outside of prison. However, prisoners usually retain choices regarding who to talk to, what to read or watch, and whether to exercise, follow the rules, or work a prison job. Some take advantage of these little freedoms to develop virtuous character traits, although many don’t. In isolation sanctions, even these small opportunities are often removed. The forced idleness of isolation can deny offenders any choices short of the position they sit, stand, or lay in, and whether to eat the food delivered to them. This complete lack of choice doesn’t just halt character development, but can lead to psychological hardship in the very least and complete breaks with reality for some. It isn’t surprising that denial of the most basic human capacity for choice-making, the capacity that grounds the formation of character and self, comes at a price.

Supporters of isolation sanctions often claim that they are necessary to incapacitate unruly prisoners. In very rare, extreme cases it is possible that isolation is necessary to stop an offender from seriously injuring other prisoners or prison staff. However, due to the extent of the infringement on development and character, proof of an imminent and serious threat to self or others should be necessary to justify isolation on the basis of incapacitation. And this level of proof is certainly not met in most cases where prisoners earn isolation sanctions now (Guenther 2012).

Retribution, deterrence, and rehabilitation do not support the practice. Even our worst offenders, those sitting on death row, do not automatically earn isolation as retribution for their crime. And the impact of isolation is too unpredictable to justify a deterrent effect: a prisoner would often not know if he was likely to be subjected to isolation if he were sentenced again to prison. Finally, there are obviously no rehabilitative gains from the practice.

Rarely the psychological impacts of isolation are so extreme that repeated exposure to isolation could make an offender permanently incapable of moral development, even once released from prison. As one offender subjected to the practice noted: “I went to a standstill psychologically once — lapse of memory. I didn’t talk for 15 days. I couldn’t hear clearly. You can’t see — you’re blind — block everything out — disoriented, awareness is very bad…I think I was drooling — a complete standstill. I never recovered” (Guenther 2012).

b. Chemical castration

Chemical castration is used in different ways by different criminal jurisdictions. In the US, it may be used as punishment to be applied in addition to incarceration; or, it can be a restriction placed on offenders when they are released on parole (Scott and Holmberg 2003). In some cases an offender may be eligible for a shorter sentence if they agree to castration, and in others, offenders will have served a full sentence before being released on parole with the condition that they agree to castration. At least six US states, and quite a few European nations (including the UK, Denmark, Sweden, Poland and the Czech Republic) have chemical castration programs as a part of their criminal justice system. In the US, the drug medroxyprogesterone acetate

(MPA) is most often used for chemical castration (Scott and Holmberg 2003). MPA is an analogue of the female hormone progesterone, used to reduce the normal level of testosterone in a male by fifty percent – a level equal to the level found in pre-pubescent boys (Smith 1998). The drug reduces sex-drive in men, often diminishing ejaculation fluid to zero, and may eliminate the capacity for an erection (Smith 1998). Chemical castration is not only used as punishment for sexual assaults against children. In the state of Louisiana, for example, chemical castration is a possible sentence for all persons convicted of rape (Millholon 2008).

The aims of retribution and incapacitation are both used by policymakers to justify the imposition of chemical castration. Sexual offenders are thought by some to deserve the removal of a sexual life in accordance with the old-fashioned interpretation of retribution as *lex talionis*, where an eye-for-an-eye is legitimate punishment. Chemical castration also holds the allure of incapacitating a sexual offender for the rest of his life without taxpayers bearing the cost of life-long incarceration. However, neither of these offered aims justify state-enforced chemical castration of sex offenders. With regard to the aim of retribution, state-sanctioned mutilations or physical harms caused for retributive purposes can undermine the state’s moral authority and rule of law, and assessing what sort of harm constitutes proper eye-for-an-eye punishment is dubious, at best. Modern liberal democracies do not usually punish offenders who are found guilty of battery via physical beatings, or sexually assault offenders who are found guilty of rape.[[8]](#footnote-8) It is fairly easy to understand why once one attempts to figure out what aspect of a criminal’s person should bear the brunt of *lex talionis*-style retributive sentiment. For example, is rape a crime of physical violence, or sex, such that a rapist be punished by a beating, or by forced sex? What if the offender enjoys forced sex, or physical harm? In the case of chemical castration, why is the removal of sexual capacities a proper *lex talionis* response to sexual assaults, many of which are best seen as crimes of violence? What if the offender is a pedophile, who desperately wants to rid himself of his sexual desire for children? In this case, chemical castration wouldn’t seem retributive enough. Hopefully these disturbing questions make clear why most nations reject punishments based upon old-fashioned notions of *lex talionis*.

Chemical castration can also not be justified by the aim of incapacitation. When compared to a traditional sentence of incarceration, it seems clear that chemical castration is likely to have a weaker incapacitative effect than a long prison sentence. Chemical castration may stop an offender from committing a sex crime – although this is debatable, see Ryan (forthcoming) regarding the lack of evidence that chemical castration has any effect on recidivism - but incarceration incapacitates offenders from almost all crime. Even if chemical castration severely limits sexual desire, if a sex offender committed his sex offense due to a desire for violent control of women or children castration may fail to incapacitate.

Neither can chemical castration cannot be justified by appeal to its deterrent effect. There is little evidence that changes in punishment regimes – even fairly extreme changes such as the imposition of the death penalty – have any effect on rates of crime (Tonry 2008). And certainly, possible offenders are just as likely to be deterred by a threat of a long incarceration as chemical castration, especially where chemical castration is offered as a condition for early release.

Even so, from the virtue theory perspective it might seem that chemical castration is an appealing option. If chemical castration worked as some of the US castration statutes seem to assume (Scott and Holmberg 2003), the state would be able to remove one area of choice-making from sex offenders – choices that have to do with sex – and not others. This means that an offender could continue to develop his character in most realms, while at the same time be incapacitated with regard to the type of crime for which he was convicted. In this way castration would seem to infringe less on an offender’s moral development than traditional sentencing options.

However, on closer examination, there are several problems with chemical castration when viewed through the lens of virtue theory. First, as indicated above, it isn’t at all clear that chemical castration is capable of actually fully incapacitating sex offenders with regard to sexual capacity (Ryan, forthcoming). But more importantly from the virtue theory perspective, chemical castration is often legislated as a permanent sanction which in the US is often administered to offenders without adequate medical oversight and accompanying therapy (Scott and Holmberg 2003). The statutes that allow chemical castration position the sanction not as a means to rehabilitate sex offenders, such that they can make more virtuous decisions with regard to their sexual expression, but as retributive or incapacitative punishment. This means that an offender who is sentenced to castration may be expected to continue to take the castrating drugs for the rest of his life, and as a result will experience permanent diminishment of his sexual life. Such permanent castration will make moral development with regard to an offender’s sexual life very difficult, if not impossible.

Remember Jack, the southerner discussed above who was found guilty of attempted murder. I argued that the involuntary administration of aggression-reducing drugs would not only impact his disposition to respond violently to threats, but would also impact his capacity to develop virtuous traits related to aggression such as courage. So too does chemical castration impact not only an offender’s disposition to desire illegal sexual partners, but any sexual partner. The removal or diminishment of sexual capacities will have a suffocating effect on an offender’s ability to develop virtue with regard to being a kind and thoughtful partner, one of the most central and important components of a human life. That is, if a chemically castrated sex offender experiences severe and permanent diminishment of his sexual desire, he will never have the opportunity to redirect his sexual desire to legal, consenting targets, or learn to express his sexuality in the right way, at the right time.

My analysis might be different, however, if MPA was given to sex offenders accordance with the criteria I discussed above with regard to administration of aggression-reducing drugs. If those criteria are met, MPA might actually be considered rehabilitative treatment for certain sex offenders that could encourage rational moral development. First, MPA would have to be administered only to sex offenders who experienced overwhelming and intrusive sexual desires, and where these desires where the cause of the crime for which the offender is being punished. This means the court, like drug courts, would have to be in the business of determining whether an offender was a good candidate for medical treatment. Second, MPA would have to “tone down” and not fully remove sexual desire, so it targeted mental causes more likely to cause criminal harm (e.g. overwhelming and persistent desires for illegal partners) and would be less likely to impact legal behavior (e.g. desires for legal partners). Third, the drug would have to be given in tandem with therapy, so that a therapist might help the chemically castrated offender re-target his sexual desire while such desires were less salient. Fourth, MPA would have to be given to offenders only once they were released from prison, so that they can be subject to situations where sexual desire might be legally expressed. Fifth, the administration of the drug should not be permanent but temporary, until his therapist or other medical professional determines that they are no longer needed because the sex offender is no longer likely to recidivate. And sixth, MPA should be given only voluntarily, where a sex offender who is a good candidate for treatment has expressed a wish to get treated with MPA, and thereby wishes to change his character.

In sum, the virtue theory perspective allows us to see that permanent removal of any particular realm of decision-making denies an offender the possibility of moral development within that realm. While prison denies an offender the ability to make most harmful choices based upon their desires, it still preserves some possibility that the offender may practice a virtue such that he can align his desires with the moral good and develop a virtuous character. Similarly, prison may allow an offender to maintain a vice if he wishes. Direct brain interventions, such as MPA, are ethical only where they assist an offender to change his character as he desires. Permanent or involuntary direct brain interventions deny an offender his moral agency and thus his humanity.

6. Objections to the use of virtue theory as a constraint on criminal law

Although Yankah recognizes that virtue theory places an important ethical constraint on criminal law and punishment, he worries that use of “virtue jurisprudence” could lead the law to label criminal offenders as possessing a permanent character flaw, and further encourage the use of sanctions which already serve to create a criminal “caste” of persons who are viewed as unfit citizens (Yankah 2009)(20).[[9]](#footnote-9) Some of these sanctions include revocation of rights to vote and work in many fields, and permanent monitoring of previous offenders. Others are “informal” sanctions: society’s treatment of prior offenders as outcasts who no longer deserve our respect, which can manifest as rampant discrimination.

I disagree that this is a likely or even logical outcome of the application of virtue theory to punishment practices. One problem with Yankah’s analysis is that he seems to confuse stability with permanency when speaking of character traits. As indicated above, contemporary virtue theory envisions character traits as dispositions to act that are constantly evolving, depending on choices a person makes and ones’ environment. It is true that both vicious and virtuous traits can become so stable that they are habitual, such that acting in accordance with these dispositions is almost second nature. But while it may be difficult to dislodge a well-established trait, it often is still possible, especially with help. Just many people with severe phobias of flying can, with assistance, manage their fear well enough to begin to fly, so too can many violent persons, with help, learn to control their anger and aggression.

Yankah’s simplistic portrayal of character traits reflects a shallow understanding of the role of practical reason and environment play in choice-making, especially for those who commit crimes. I have met many offenders who claim that prison, where they are assured of their “three squares” and a bed to sleep in, allows them to make better choices than the neighborhoods they come from. Within this environment, they can begin to abide by simple moral rules, even if they feel deeply ambivalent about following them. Eventually, they might begin to feel good about following certain rules and staying out of trouble, or even about being helpful. In 2012, a New York Times article documented the rise in prisoners with dementia, and program that allowed other prisoners to work as care-givers for the demented. As a result of the program, Shawn Henderson, who got 25 years to life for a 1985 double murder and was twice denied parole, earned his release. Mr. Henderson claimed that doing a job where “you get spit on, feces thrown on you, urine on you, you get cursed out” helped teach him to cope outside prison. “Now when I come into an encounter like that on the street, I can be a lot more compassionate,” he said.

It may be that Mr. Henderson joined the program solely due to a selfish desire to get out of prison. He may have cared for his patients solely from duty at first. But it is possible that via the program, he actually was able to cultivate the trait of compassion. Another inmate care-giver is quoted in the article as saying, “I didn’t have any feelings about other people. I mean, in that way, I was a predator.” As a result of the program, he says, “I’m a protector.”

I’m not going to claim that this sort of moral development in prisoners is common. However, the program discussed above seemed to provide the environmental push some inmates needed to start down the road to developing virtue. Instead of envisioning offenders as members of a permanent criminal caste, virtue theory can recognize the potential of offenders, and endorse offering offenders opportunities for development. This is precisely because it claims persons, including offenders, are constantly evolving moral agents. Only in the rarest of cases should a person be seen as permanently vicious; instead, offenders need personal and environmental support to encourage the strengthening of virtuous traits.

7. Conclusion

From the perspective of virtue theory moral agency requires choice-making as a means to develop and exercise character traits. I have argued above that any punishment that infringes upon moral choice-making and thus agency, where the infringement is not clearly designed to accomplish one of the four functions of punishment, is unjust. I then examined current chemical castration punishments, and certain uses of isolation sanctions, and concluded that they are unethical punishments, because they deny choice-making and undermine offender’s ability to maintain or develop his own character.

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1. *Johnson v. Phelan*, 69 F3d 144 (1995), Posner dissenting. [↑](#footnote-ref-1)
2. My colleague Bill Hirstein and I have argued elsewhere these rational processes are necessary to criminal responsibility, and that they can be understood in terms of executive functions in the brain. Hirstein, W. and K. Sifferd (2011). "The legal self: executive processes and legal theory." Consciousness and Cognition **20**(1): 156-171.. We have also argued that many criminal defenses can be understood as deficits in this rationality. Sifferd, K. L. and W. Hirstein (2013). "On the Criminal Culpability of Successful and Unsuccessful Psychopaths." Neuroethics: 1-12.. [↑](#footnote-ref-2)
3. In contrast, the European Court of Human Rights recently ruled that all offenders sentenced to life imprisonment have a right to a prospect of release (Smit, Weatherby et al. 2014). [↑](#footnote-ref-3)
4. The justification for granting life without parole (LWOP) sentences is usually retribution, although some argue the sentence serves the function of incapacitation, the idea being that very dangerous offenders should never be trusted to leave prison. However, life-long incapacitation of offenders is rarely necessary to keep them from recidivating. Inmates serving long sentences who are then released have a very low rate of recidivism, partly due to their advanced age when released. Sentences in the US are five to seven times longer than sentences for comparable offenses in Europe, but despite this, recidivism rates in Europe are lower than in the US. (Dow, D. R. (2012) "Life Without Parole: A Different Death Penalty." The Nation.) One study found that four of every five (79.4%) lifers released in 1994 had no arrests for a new crime in the three years after their release. This compares to an arrest-free rate of just one-third (32.5%) for all offenders released from prison. This means that released lifers are less likely than the general prison population to recidivate. [↑](#footnote-ref-4)
5. It may be that these situational conditions are the reason why Jack cultivated a trait of aggression to begin with. [↑](#footnote-ref-5)
6. The idea of state-enforced character changes via direct brain interventions is especially worrying when one considers the changing notions of what constitutes a bad character: e.g. the fairly recent shift from seeing homosexuality as a criminal wrong to a constitutionally protected right in the US. [↑](#footnote-ref-6)
7. http://solitarywatch.com/wp-content/uploads/2012/01/solitary-confinement-faq-short-version.pdf [↑](#footnote-ref-7)
8. In the US, certain states with capital punishment statutes do kill offenders who murder. However, there is much debate regarding whether capital punishment is indeed a just punishment. Capital punishment is rarely used in first world countries outside the US. [↑](#footnote-ref-8)
9. Yankah also claims that virtue jurisprudence necessarily conflicts with “the autonomy of the legal subject” Yankah, E. N. (2009). "Virtue's Domain." U. Ill. L. Rev.: 1167. (35), but this concern only applies when one is using virtue theory to justify the structure of criminal offenses and the application of force in punishment. As I do not use virtue theory in this way, I need not address this concern. [↑](#footnote-ref-9)