

VIRTUE'S DOMAIN

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If at the end of your life you were told you had fulfilled all your moral duties, you would be proud. If you were told you had only fulfilled your moral duties, you would be less proud. We all aim to do more than fulfill our duties. We wish to have been more generous than obligatory, more patient, more wise—in short, we wish to be virtuous.

The insight that there is more to moral well-being than either our moral duties or good consequences is central to modern virtue ethics. In its important neo-Aristotelian strain, virtue ethics advocates that success in life is also determined by living an ethically rich life, showing sound practical reasoning and exhibiting the human virtues.

Virtue ethics is also importantly influencing jurisprudence. Understanding the role virtue plays in law reveals the way in which our criminal punishment regimes are based on a view of underlying poor character. When these insights are embedded in law, however, things go horribly awry. Because virtue theories premise blame, in part, on a failing of character within the offender, they alter our view of the offender and create a permanent criminal caste. With our compassion for the offender blunted, our ugliest prejudices flourish, and we fail to notice that our criminal law has become a powerful tool of racial and class suppression. Equally disturbing, even the most sophisticated character theories cannot be reconciled with our commitment to liberalism, particularly with the central place of autonomy within liberalism.

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This Article argues that only by returning to Kantian and Hegelian Act theories of punishment can we dissolve the view of offenders as permanently tainted and stay true to our liberal commitments.

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INTRODUCTION

It is impossible not to notice the growth of virtue ethics in philosophy. Having exploded as a field in moral philosophy, virtue ethics is beginning to importantly influence jurisprudence. The reason is clear. Deontic theories, which focus exclusively on determining one's moral duties, do not capture the richness of our moral life. If at the end of your life you were told you had fulfilled all your moral duties, you would be proud. If, on the other hand, you were told you had *only* fulfilled your moral duties, you would be less proud. To have never been more graceful than your duty, more generous or forgiving, would feel a sort of shallow victory. In short, one wishes not to have only been dutiful but to have been virtuous.

That there is more to our moral well-being than negotiating duties and prohibitions is related to but does not fully capture modern virtue ethics. At the bottom, virtue ethics, of the neo-Aristotelian variety, is grounded in the contention that human flourishing is the best and ultimate end for persons. What is morally good is not measured by rigid observance of moral rules or duties, as proposed by Kant, or maximizing a particular good as a consequentialist. Rather, what is good is found by asking how actions and institutions contribute to human flourishing. Legal theory and criminal law are just beginning to come to grips with the

implications of virtue ethics, constructing a virtue jurisprudence or aretaic theory of law. Because virtue jurisprudence is only now coming into focus, it can be hard to determine the core of virtue jurisprudence. This Article examines the distinct but related current models of virtue-based legal theories and explores the difficulties of transferring virtue ethics from moral philosophy to law.

Among the places in which virtue theory has made the greatest impact in law is in criminal theory. Here, virtue ethics has been nested in the question of the appropriate grounds or justification for criminal punishment. Virtue theory has been reflected in the work of scholars identified as “character theorists” who, grounding their work in a blend of Humean and Aristotelian foundations, asserted that criminal punishment was fundamentally justified by the defect in character that was revealed by a criminal’s act. Modern virtue theory has become a great deal more sophisticated and strongly aligned with the Aristotelian strain of character theory. Thus, mirroring the contention in virtue ethics that morality is measured by human flourishing, virtue jurisprudence in criminal law has asserted that the goal of the criminal law is to promote human flourishing by instilling and cultivating the moral virtues, promoting sound practical reasoning and punishing those who display vice.

This is a powerful claim and, so bluntly stated, may be implausible. The aim of the assertion is not to be unfair; the sophistications of virtue theory will be given fair attention. Rather, the reason to put the claim straight forwardly is to reveal its power. To assert that the fundamental aim of law is to promote virtue and secure human flourishing is to argue for a radical shift in our current debates. It is to leave behind the entrenched positions of deontological requirements or the consequentialism of welfarism and economic theory and aim the law at something entirely different.

Virtue theory insists we meet the fundamental questions of political philosophy squarely. Can the law legitimately seek to inculcate virtue? May criminal law punish in light of the underlying character defects criminal acts reveal? Does the law outlaw behavior because it is incompatible with virtue? Are criminal prohibitions simply instantiations of vice: murderousness, greed, lustfulness, etc.? Moreover, is character-based punishment possible while respecting the borders of a liberal political theory? Further, we must clarify the consequences of answering these questions. If one should realize that a robust virtue theory is incompatible with liberalism, does this dispositively disqualify virtue theory or is this “so much the worse for liberalism”? Whether ultimately successful, virtue theory has called into question the long-held liberal touchstone that the State ought not make the inculcation of virtue a legitimate goal or forward a particular conception of the good. These significant challenges call for exploration. The question is, simply put, what is the proper role of virtue in law generally and criminal law specifically? I will ar-

gue that in contrast to our private lives, virtue's role in law should be restricted.

Let us lay out the path ahead. First, we will briefly outline virtue ethics as a position in moral philosophy. Though far from complete, it will be enough to explain the basic tenets of virtue theory and how it differs from deontological or consequentialist theories. We will see how virtue ethics or aretaic theory is concerned not only with right action but with an agent's dispositions and the ends a person adopts. That is, virtue ethics is concerned in a particular way with a person's character. Understanding virtue ethics will set up the problem with extending its moral insights into law. In particular, virtue ethics reminds us that thinking about law is not solely an exercise in moral philosophy.

Part II explores the transition from virtue ethics into law, particularly criminal law. Here we will explore the most straightforward claim for a virtue theory. Is the purpose of law to promote virtue and prohibit viciousness? To what extent does virtue ethics describe the grounds of criminal liability? Are criminal prohibitions instantiations of vice?

To the extent virtue jurisprudence is meant to be descriptively accurate, it fails. Virtue jurisprudence on this first reading is implausible. Most criminal prohibitions are not couched in terms of the vices in ways that capture our common moral intuitions, much less anything as sophisticated as a philosophical theory of virtue. Further, there are many vices or at least shallow pursuits, which the law leaves untouched. Put another way, criminal law prohibitions do not aim at the acquisition or the exercise of virtue.

That said, Part III argues that the opening salvo against virtue jurisprudence may be unfair. The interest criminal law takes in our character is deeply ambivalent. Although criminal liability does not, on its face, depend on vice, subtle notions of bad character are embedded in the law. Even though criminal liability does not ostensibly turn on poor character, much of our punishment regime has underlying and justifying it an image of the offender's bad character. So, for example, punishment regimes draw on the idea that committing multiple felonies, whatever their nature, is evidence of an irremediable character that deserves to be permanently imprisoned. Strikingly, the state's most awesome display of power, the death sentence, explicitly turns on whether the offender's moral character is worthy of saving. Further, the steady growth of inchoate and non-intentional fault crimes reflects the criminal law's hunger to punish for underlying poor character. Because crimes such as conspiracy, criminal negligence and felony murder often depend on proof that the offender willingly ran a risk of harm, a temptation often arises to use the character of the offender as evidence of the crime. It should not be surprising that the picture becomes muddy; this is inevitable when our professed commitment to avoid punishing character comes into conflict with our righteous anger to punish the wicked. Though it is possible to

point to the ways the law attempts to exclude underlying character, it is important to acknowledge the truth that virtue theories of law reveal.

Virtue theories of law are also important because they intuitively alter our view of criminal offenders. An important worry is that aretaic theories ultimately place the locus of criminal punishment in part within the character of the offender. The image of a criminal character allows the construction of a criminal caste system. Offenders, when viewed as permanently bad characters, are increasingly isolated from society and viewed as unworthy of reintegration. Thus, we have seen the steady growth of collateral sanctions that exclude ex-offenders from obtaining everything from student loans to gainful employment. Most disturbing of all, this image of the permanently tainted offender interacts with our ugliest images of race and class, fueling anxieties and blunting compassion.

If the practical effects of aretaic theory are disturbing, the philosophical implications afford no comfort. Part IV explores the tension between virtue theories of law and our liberal commitments. Recall aretaic theories are primarily committed to the promotion of human flourishing as the aim of law. By contrast, liberal theories are premised on freedom from state interference and respect for individual autonomy. This is not to say that modern aretaic theory has no place for autonomy; autonomy, after all, is almost certainly one condition for human flourishing. Still, virtue jurisprudence ultimately fails to fully resolve the tension between aretaic theory and liberalism. Of course, virtue jurisprudence may take its task as providing an alternative to classical liberalism rather than being constrained by it.

Part V explores the tension between virtue jurisprudence and the liberal demands of law from a different angle. This Part explores how an aretaic conception of law may meet the critique of illiberality. Because virtue jurisprudence forwards a particular end and justification of law, it takes a distinctive view on what qualifies as law proper. As virtue jurisprudence is just beginning to take shape, the precise contours of competing aretaic models vary greatly. Part V explores two competing models, Lawrence Solum's model based on Aristotle's virtue of justice, interpreted as the virtue of lawfulness, and Kyron Huigens's specification model.

One exciting feature of virtue jurisprudence is that it once again makes sharp that analytical jurisprudence has important normative implications. One important reason to explore—that is not to say alter—a model of law is to understand the moral implications that follow from our best understanding of law. Inspecting the places where virtue jurisprudence parts company with other models brings to the fore that the heart of jurisprudence has never been solely concerned with conditions of legal validity. Rather, the question, now a bit obscured, has always been what *follows* from certain conceptions of legal validity. In this most important way, virtue jurisprudence may remind us all of why we care so

much about jurisprudence in the first place. Though sensitive to liberalism's commitment to the plurality of conceptions of the good life, ultimately, virtue theory fails to meet the liberal critique.

The practical and philosophical problems facing a virtue theory of law should give one serious pause. What is needed is a theory of punishment that allows condemnation of the acts that hurt and wrong us but does not do so at the cost of creating a permanent criminal caste. Thus, Part VI argues for a criminal law based on Kantian duties. Kant's admittedly incomplete theory of punishment focuses on protecting persons from invasions of freedom and eschews inquiry into the underlying vicious nature of the offender. Building on Kant's theory, we will explore how Hegelian punishment theory compliments Kant's and addresses the failures of aretaic theory. Hegelian act theory limits the justification for legal punishment to criminal acts. Doing so avoids attaching criminal punishment to permanent character flaws that naturally lead to ostracization.

A Kantian theory is naturally connected to a model of law that highlights law's coercive nature. This is more than an interesting side note. It is an exciting payoff. A model of law highlighting coercion entails a law focused on the enforcement of Kantian duties and tells us something important about how law must be justified. Surely such a normative payoff both reminds us of the importance of jurisprudence and hints at the proper aims of law far beyond criminal punishment.

Gracious! This is a daunting task. It almost goes without saying that tackling such a breadth of subjects means that we can only begin to explore their implications. The task is made more difficult by the very different models that various aretaic scholars have forwarded. These models are only now being fleshed out as aretaic theories of law or politics. In many cases, strands of the various models are brought together or arguments found within these models or in Aristotle are extended. The following thoughts are only the beginning of a more complete project and await further developments and responses from the proponents of aretaic theories of law. The goal is not to finally conclude that virtue ethics cannot be translated into a viable virtue jurisprudence or even that virtue jurisprudence, in some form, could not be compatible with liberalism. Rather, the goal is to illustrate some of the ways in which virtue ethics may be problematic when translated to a virtue jurisprudence. We may realize that law most appropriately focuses on our deontic obligations as opposed to the wider demands of our aretaic judgments. In coming to understand this, we recognize the proper borders of the law and once again commit to liberalism.

To begin we must first briefly fix what we mean by virtue ethics and virtue jurisprudence.

I. VIRTUE: FROM ETHICS TO LAW

Modern virtue ethics, in philosophy, is commonly regarded as revived by Elizabeth Anscombe's classic article *Modern Moral Philosophy*.¹ Among other things, Anscombe sounded a deep dissatisfaction with moral philosophy's fixation on moral "oughts," that is, on duty-based notions of moral obligation.² At best, Anscombe saw this fixation as an inconvenient shift from Aristotelian concepts of virtue to duty-based concepts found in Christianity's more lawful conception of ethics.³ At worst, it drained moral oughts of meaning.⁴ Looking for a way forward, Anscombe charged philosophy with returning to the richer notions of virtue in human action.⁵

Though important conceptions of virtue can be found in Plato and Hume, Anscombe's article has given rise to a modern strand of virtue ethics that is distinctly Aristotelian in flavor.⁶ Virtue ethics occupies distinct ground from that staked out by the two dominant modern moral theories, deontological and consequentialist models of morality.⁷ Rather than focus on a specific conception of right action, Aristotle begins by asking what the highest achievable human goods are—what ends are the most worthy choices.⁸ Aristotle concludes that this highest good is *eudaimonia*, uncomfortably translated as "happiness," which more precisely translates to a life well-lived or a life of human flourishing.⁹ Because human beings are distinctly rational, for Aristotle, *eudaimonia* consists of reasoning well in accordance with the human excellences over the course of a full life.¹⁰ Such theories are also described as aretaic theories, stemming from the Greek word for good or excellence.¹¹

1. See G.E.M. Anscombe, *Modern Moral Philosophy*, in ETHICS 186 (Judith J. Thompson & Gerald Dworkin eds., 1968); see also ALASDAIR MACINTYRE, AFTER VIRTUE (1981); Phillipa Foot, *Morality as a System of Hypothetical Imperatives*, 81 PHIL. REV. 305 (1972).

2. See Anscombe, *supra* note 1, at 191–93.

3. See *id.* at 191–92, 204.

4. See *id.* at 195–96.

5. See *id.* at 204. Anscombe forwarded other (arguably more central) positions in this wide-ranging article, including the need for a more thorough understanding of moral psychology, but these are not our primary concerns.

6. Additionally, there are Thomist, Stoic, Humean, and even Kantian variations of character theory that have their own contours. I have criticized Humean character theories on related grounds elsewhere. See Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1033–37 (2004). Because our focus is on aretaic character theories, particularly those with Aristotelian roots, those variations are put aside here.

7. See Aristotle, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE 935 (Richard McKeon ed., W.D. Ross trans., 1941); see also Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65 (2006).

8. Aristotle, *supra* note 7, at bk. I, ch. 7.

9. I set aside for the moment the long-running intramural debate surrounding Aristotle's shift to contemplation as the ultimate end of persons in Book X of the *Nicomachean Ethics*. *Id.* at bk. X, ch. 8.

10. *Id.* at bk. I, chs. 7–10.

11. An Aristotelian view need not be aretaic. Such a view could conceivably be eudaimonistic or a non-eudaimonistic virtue theory. I am grateful to Larry Solum for raising this point.

In this framework the intellectual virtues are two: *sophia*, theoretical wisdom, and *phronesis*, good judgment or common sense.¹² The moral virtues are many and typically are exemplified as a moral mean between two vices.¹³ Thus, to be overly frightened when threatened is to be cowardly. To not be frightened enough or cognizant of danger is to be rash. To be courageous is to possess the appropriate mean between these vices.¹⁴

Note that on this picture the virtues are dispositions rather than defined states. Further, it is important to note that being virtuous is not simply to feel the proper emotion but to act upon that emotion. To be virtuous is the disposition to act appropriately in certain situations, whether that be bravely, generously, or prudently.¹⁵ Because the virtuous agent has the morally appropriate disposition, she does not have to force herself to behave in the right way.¹⁶ She does the right thing for the right reason. Further, because being virtuous is a disposition, it cannot be captured by a set of rules. This may illustrate that a virtue ethics is not, strictly speaking, action guiding. It is the virtue itself which inspires to action. The fully virtuous person does not engage in a particular action because an external moral standard or rule, e.g., virtue ethics, instructs her to do so but rather because she is sensitive to the appropriate reasons to engage in that action.¹⁷ The important conclusion, in contrast to Kant's famous categorical imperative, is that for virtue ethics there is no decision-making procedure to determine right action.¹⁸

This description was, of course, overly simplified. It is important to realize that despite the affinities of virtue theory's dispositional states and character theory, not all character theories are based on virtue.¹⁹ Because I focus here on aretaic theory and its relationship to character, I will set aside competing character theories. More troubling is our purposeful omission of Aristotle's virtue of justice.²⁰ Because the virtue of justice in Aristotle is relevant but inconvenient, we are better off leaving

12. *Id.* at bk. VI, ch. 1.

13. *Id.* at bk. II, ch. 6.

14. *Id.* at bk. II, ch. 7, §§ 1107a27–b3.

15. *See id.* at bk. II, ch. 6, §§ 1106b17–b23.

16. *Id.* at bk. I, ch. 8; Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 465, 468 (2004) [hereinafter Huigens, *Aristotelian Criminal Law*]; Kyron Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. REV. 97, 98, 105 (2002) [hereinafter Huigens, *Homicide in Aretaic Terms*].

17. I am grateful to John Gardner for inspiring the clarification.

18. Aristotle, *supra* note 7, at bk. II, ch. 6, §§ 1106b17–b23; Anscombe, *supra* note 1, at 205; Kyron Huigens, *The Jurisprudence of Punishment*, 48 WM. & MARY L. REV. 1793, 1821 (2007); Huigens, *Homicide in Aretaic Terms*, *supra* note 16, at 105; Solum, *supra* note 7, at 73.

19. For a character-based model of excuse embedded in a retributivist structure, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 10.3, at 800 (1978). For the same within a utilitarian framework, see RICHARD B. BRANDT, *MORALITY, UTILITARIANISM, AND RIGHTS* 215–34 (1992). For further elucidation, see Claire Finkelstein, *Excuses and Dispositions in Criminal Law*, 6 BUFF. CRIM. L. REV. 317, 324–25 (2002). I discussed some of these variations on character theory in Yankah, *supra* note 6, at 1033–37.

20. Solum, *supra* note 7, at 69–74.

it aside at the moment to be revisited later with greater focus. Still, though brief, this outline gives the flavor of virtue ethics as a moral theory.

Setting aside whether aretaic moral theory captures all our moral judgments, there are aspects of it that are clearly appealing. We do judge others on more than their dutiful behavior.²¹ We care about what kind of people they are. It is important to us that our friends and loved ones are disposed to do good—to be generous, caring, prudent and brave.²² We find this is of moral significance even, or perhaps especially, when it is difficult to isolate a moral duty to behave nobly. Even where one meets her moral duty, a complete assessment of a person includes how she relates to that duty; is it begrudgingly or is she naturally moved to her duties?²³ Lastly, we properly admire and think wise those who see through confusing moral situations to difficult answers, those who find the right action in the storm.

The attractiveness of virtue ethics as a moral theory, however, does not determine the attractiveness of virtue jurisprudence, i.e., aretaic theory as a legal theory. Of course, what is morally wrong is often appropriately considered or made a legal wrong.²⁴ Not all moral wrongs, however, are appropriately considered legal wrongs.²⁵ Legal punishment is not, after all, perfectly analogous to moral condemnation, even where the latter is a part of the former. The State imposes legal punishment through coercive measures. Indeed, there is an argument that what defines legal power is its inherently coercive nature.²⁶ Even if this contention is controversial, few doubt that the legal system as now experienced

21. See R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147, 148, 165 (2002).

22. See Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 468.

23. It should be noted that despite common perception, Kantian theories are not insensitive to these concerns. Kant's location of moral action in response to the rational will is best seen as ensuring that actions are not moral merely in light of the agent's desires but rather there are objective moral standards (the moral law) by which the agent can critique herself. This does not mean that the agent's desires are unconnected to or not tempered by moral laws. Thus the agent's desires and motivations themselves can be reason responsive, incorporating morally attractive desires which, in turn, help in moral judgment. See BARBARA HERMAN, *MORAL LITERACY* 1–13 (2007). Thus, there are ways to reconcile the Aristotelian notion of *pathe* with the Kantian account of *wille*.

24. This divide roughly straddles what is commonly referred to as the ethical-moral divide, where ethical describes the requirements of a life well lived and moral refers to the moral duties we owe one another. I say roughly because it seems plausible that there are some moral duties that are not properly made into legal duties.

25. See Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 321–22, 338–39 (2002); Duff, *supra* note 21, at 148–50, 165–67; Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927, 928 (1999); Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 773 (2004); Leo Katz, *Villainy and Felony: A Problem Concerning Criminalization*, 6 BUFF. CRIM. L. REV. 451, 455–61 (2002); Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1528 (2007); Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 89 (1995); Yankah, *supra* note 6, at 1057–58, 1062–67; Markus Dirk Dubber, *A Political Theory of Criminal Law: Autonomy and the Legitimacy of State Punishment* 2, 12 (Mar. 15, 2004), <http://ssrn.com/abstract=529522>.

26. See generally Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195 (2008).

is coercive. The coerciveness of law not only stands in need of justification in ways that our private judgments may not but also limits the type of reasons that can be given to justify law.²⁷

Notwithstanding that many scholars recognize this truth in passing, much of criminal theory proceeds as though it were pure moral philosophy.²⁸ Scholars write as though determining when an actor is most morally blameworthy provides the answer to when we ought to punish him.²⁹ This ignores that there are restrictions on the type of reasons that can be used to justify legal punishment and a liberal conception of the State, in particular. What shape virtue ethics takes when applied to law and whether it can satisfy these restrictions is the question to which we now turn.

II. OUTLAWING VICE

Among the fields in which virtue jurisprudence has made the greatest impact is criminal law. The reason is analogous to its growth in ethics more generally; character theorists were unsatisfied with traditional criminal law theories that seemed to ignore much that was important in how we judge criminal actors.³⁰ Initially, character theorists argued that many doctrines that excused punishment in criminal law did so by blocking an inference from the criminal act to the defendant's character.³¹ From this contention it is easy to deduce that criminal punishment is fundamentally related to the underlying character flaw that a criminal act reveals.³² The first question to examine is whether criminal prohibitions codify shared judgments of behavior constituting vice. Are criminal prohibitions a method of instilling and promoting virtue and prohibiting vice?

Bringing its strands together, aretaic theories of criminal punishment ground law in the inculcation of virtue, the promotion of human flourishing or the manifestation of sound practical reason.³³ To be sure, the relationship between justification, inculcation and punishment need

27. *Id.*; see also Dworkin, *supra* note 25, at 928; Yankah, *supra* note 6, 1057–58, 1062–67.

28. Binder, *supra* note 25, 321–22; Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 510–11 (1987); Dubber, *supra* note 25, at 2, 12.

29. Nor can this charge be aimed only at virtue jurisprudence. Retributivists and Utilitarians have been equally guilty with only a few notable exceptions. Katz, *supra* note 25, at 461–64. Among these few exceptions for retributivists have been MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 737–95 (1997); Binder, *supra* note 25, at 321–22; and Katz, *supra* note 25, at 461–64. For Utilitarians, one might detect a trace of this concern in Rawls's thoughts on punishment as an institution. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–12 (1955). For one notable exception, see DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

30. See V.F. Nourse, *Hearts and Minds: Understanding the New Culpability*, 6 BUFF. CRIM. L. REV. 361, 361–63, 385 (2002).

31. See FLETCHER, *supra* note 19, at 800–04; Finkelstein, *supra* note 19, at 319–20. For a fuller discussion see Yankah, *supra* note 6, at 1034–35.

32. See VICTOR TADROS, *CRIMINAL RESPONSIBILITY* 9–14 (2005).

33. Huigens, *Homicide in Aretaic Terms*, *supra* note 16, at 99, 103; Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 468.

not be simple or straightforward. It may be that the principle method of inculcating virtue comes from prohibiting behavior that reflects vice, thereby promoting virtuous behavior.³⁴ Equally, detention may admonish the prisoner, humble him appropriately and afford the offender the chance to rehabilitate himself.³⁵ Perhaps, punishing and separating offenders allows others to cultivate their virtue. In any case, an aretaic criminal theory embeds itself in the larger aretaic project of promoting the flourishing of both persons and their societies.

As ought to be expected, the extent to which virtue theory is meant to capture descriptively our current criminal punishment practices shifts from theorist to theorist and, in some cases, within a theorist's work as it develops. Kyron Huigens, who has been committed to developing a sophisticated model of aretaic punishment over many years,³⁶ has forcefully argued that an aretaic model of punishment describes much of what undergirds our criminal law. Huigens argues that criminal laws are codified generalizations prohibiting behavior that exhibits poor practical reasoning.³⁷ Similarly, John Gardner notes that the English criminal law defines theft partly in terms of dishonesty.³⁸ In so doing, the criminal law takes an interest not only in how we achieve the ends we adopt but also in the appropriateness of the ends we adopt at all.³⁹ Secondly, Huigens argues, by understanding that criminal law is justified by aretaic judgments, one can better understand otherwise inconvenient objective fault doctrines in the criminal law "such as felony murder, depraved mind murder, transferred intent, punishment for unreasonable . . . rape, accomplice liability . . . and the exclusion of intoxication . . . to negate recklessness."⁴⁰ After all, if criminal law is importantly focused on whether a person has exhibited good practical reason, then whether he is depraved of heart, unreasonable in assuming sexual license or prone to dangerous drunken behavior matters.

On this model, it is also important to note that criminal law norms help us to adopt appropriate moral behavior by teaching and guiding us as to what is virtuous behavior.⁴¹ As Aristotle describes it,

[I]t is difficult to get from youth up a right training for virtue if one has not been brought up under right laws; for to live temperately and hardily is not pleasant to most people, especially when they are

34. Huigens, *Homicide in Aretaic Terms*, *supra* note 16, at 103–05.

35. *Id.* at 102; Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677, 1742–44 (2005).

36. See Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 485, 497.

37. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 488; Huigens, *Homicide in Aretaic Terms*, *supra* note 16, at 115–16; see also Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1437–38 (1995); Nourse, *supra* note 30, at 365.

38. John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575, 575–76 (1998).

39. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 492.

40. Huigens, *Homicide in Aretaic Terms*, *supra* note 16, at 103; see also Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1233–34 (2000).

41. Aristotle, *supra* note 7, at bk. X, ch. 9, §§ 1179b20–1180b25; Huigens, *Homicide in Aretaic Terms*, *supra* note 16, at 101; Solum, *supra* note 7, at 65.

young. For this reason their nurture and occupations should be fixed by law; for they will not be painful when they have become customary. But it is surely not enough that when they are young they should get the right nurture and attention; since they must, even when they are grown up, practise and be habituated to them, we shall need laws for this as well, and generally speaking to cover the whole of life; for most people obey necessity rather than argument, and punishments rather than the sense of what is noble.⁴²

Thus, as children first learn to obey rules instructing them not to hit others and then slowly and genuinely internalize the rules as moral guides, so the law guides us both in learning the right ways to pursue our ends and, on the strongest view, which ends to pursue at all.

Related, if not identically, there are many theorists who, while not precisely aretaic in their theories, embrace a thicker view of the premise of punishment. Victoria Nourse has elegantly deployed a theory of criminal punishment that, if not purely aretaic, bears a family resemblance. For Nourse, criminal liability cannot be understood without locating it in historical context, noting that criminal acts have been recast from offenses against good to offenses against reason.⁴³ In this transformation, criminal punishment is inescapably infused with notions of selfishness and contempt for others.⁴⁴ Thus, attempts to describe liability for criminal malice or depraved heart murder that merely focus on the magnitude of the harm fundamentally miss the point.⁴⁵ After all, people often risk grave harms for perfectly legitimate reasons. Rather, criminal liability turns on indifference to interests that demand the attention of the criminal actor and her contempt for our shared humanity.⁴⁶ Thus, in codifying criminal punishment for these acts, we arguably capture in our legal prohibitions our judgments of appropriately moral or virtuous behavior.

In summary, there do seem to be times when legal prohibitions appear to be defined in part by vice or viciousness. This is partly obscured in the case where liability for a crime is premised on a simple act but liability for higher grades of the same crime are sensitive to the way the act is committed. For example, eligibility for the highest degree of murder in the United States may turn on certain vicious features of killing.⁴⁷ These are arguably cases where grades of punishment are premised on displays of vice, a subject addressed in greater detail in the following Part.

Whether any of these legal distinctions truly aims to isolate the virtue of a criminal actor, however, is open to serious doubt, especially on

42. Aristotle, *supra* note 7, at bk. X, ch. 9, §§ 1179b32–1180a4.

43. Nourse, *supra* note 30, at 372.

44. *Id.* at 373.

45. *Id.* at 377–78.

46. *Id.* at 378–79.

47. See MODEL PENAL CODE § 210.6(3)(h) (Proposed Official Draft 1962) (“The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.”). Of course, there is no clear distinction among these two things. Some instances of increased punishment can be seen as introducing criminal liability for a different crime and the reverse.

an Aristotelian account of virtue. For Aristotle, character states were more finely divisible than the binary virtue and vice.⁴⁸ There were those who possess heroic or divine states of virtue that transcend those of ordinary persons.⁴⁹ Then there are the virtuous, who are well constructed and have their ends and desires aligned with the good.⁵⁰ The virtuous person does not have to resist temptation to remain virtuous; he desires what is virtuous naturally and desires it because it is virtuous. By contrast, the person who displays *enkrateia*, continence or self-control, also acts rightly but does so because he recognizes virtuous action and is able to suppress temptation to do otherwise.⁵¹

Continuing to the other end of the spectrum, Aristotle argued that the mildest form of vice was *akrasia*, or weakness of will.⁵² A person exhibits *akrasia* when he is aware of a virtuous action or end and recognizes it to be valuable. Nonetheless, the weak-willed person is tempted away from the right act or end.⁵³ Still worse is vice. The vicious person not only does the wrong thing but, unlike the weak willed, the vicious fully identifies with these ends and adopts them as his own.⁵⁴ The vicious person is not confused, tempted or conflicted; rather he aims at the wrong.⁵⁵ Lastly, Aristotle identifies brutishness, a form of subhuman level of vice.⁵⁶ Thus, the Aristotelian model of various states of character is a subtle and complex one.

It seems unlikely that the law generally and criminal law in particular takes this intimate an interest in our characters.⁵⁷ First, it is unlikely that any tight connection exists between a particular action and the vice or virtue state underlying it.⁵⁸ Our judgments about the virtuousness of another's character typically depend on a tremendous amount of background information. Sometimes we allow numerous past acts, which do not directly bear on the act being judged, to infuse the current act with meaning, give it context or simply allow us to ignore it in light of our greater knowledge. And this is to bracket deeper questions of whether an action can be determinatively judged at all.⁵⁹

48. Aristotle, *supra* note 7, at bk. I, ch. 13, bks. II–IV, bk. VII, chs. 1–10. For an excellent discussion, see Duff, *supra* note 21, at 162–66; see also Garvey, *supra* note 35, at 1730–31.

49. Aristotle, *supra* note 7, at bk. VII, ch. 1.

50. *Id.* at bk. VII, ch. 2.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. This discussion is reflected in Thomas Nagel's discussion of evil in THOMAS NAGEL, *THE VIEW FROM NOWHERE* 181–82 (1986).

56. Aristotle, *supra* note 7, at bk. VII, ch. 1.

57. See Duff, *supra* note 21, at 168; Finkelstein, *supra* note 19, at 336–37.

58. See Duff, *supra* note 21, at 157; Yankah, *supra* note 6, at 1033–41.

59. See Finkelstein, *supra* note 19, at 337–38; Andrew E. Lelling, *A Psychological Critique of Character-Based Theories of Criminal Excuse*, 49 SYRACUSE L. REV. 35, 39 (1998); Yankah, *supra* note 16, at 1033–41.

Secondly, even where there is no epistemic gap between action and underlying character, virtue does not appear to be the basis of criminal liability. Rather, the criminal law simply insists we refrain from doing that which is prohibited. Whether we do so out of a virtuous alignment with good in the world or out of sheer terror of criminal sanctions may be hugely important in our estimation of a person but of no moment to the law itself.⁶⁰ The prohibitions of the criminal law themselves do not seem sensitive to fine, or even gross, distinctions between what we might loosely term virtue states. At least as to the grounds of criminal *liability*, the law is insensitive as to whether one purposefully murders out of despicable bloodlust or after struggling mightily with his conscience.⁶¹ And rape is equally prohibited whether he makes it an evil, wholehearted pursuit or collapses to a contemptible weakness for lust or power. Even in those cases where the law does inquire into the agent's reasons for acting, it makes no fine distinctions between, for example, virtue and self-control. As Duff persuasively notes, an agent who pleads necessity need not show that he had to control himself from running away from the necessary act.⁶² This is not to deny that criminal prohibitions do sometimes state character faults as constitutive of the prohibition and that fault elements may appear to invite concern with character or virtue. Yet still, even where the criminal offense prohibits theft by reference to dishonesty, the crime remains a crime whether the offender is habitually dishonest or caved in to a moment's temptation.⁶³

Of course we need not employ the entire Aristotelian apparatus to isolate important conceptions of virtue in our criminal punishment.⁶⁴ Our legislators presumably do not spend their spare time parsing Aristotle's ethics.⁶⁵ There are non-Aristotelian and more common uses of the concept of vice that plausibly could be a basis for criminal liability. The strongest claim would be to assert that all crimes are caused in some manner by vice—either persistent character flaws or a lack of reasonableness.⁶⁶ A weaker form of this claim would merely hold that vice plays

60. Duff, *supra* note 21, at 168; Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 388. Huigens argues that although this proves that a jury need not exercise or reward *phronesis* (a decision based in the excellence of human reasoning) in acquitting a defendant, this does not undermine the moral validity of their verdict. See Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 493–94. Agreed. What it does undermine, however, is the extent to which the jury need consider any conception of virtue in rendering a judgment at all.

61. Duff, *supra* note 21, at 169. Again, we bracket until the next section the variation not in liability but in punishment, which may ostensibly turn on viciousness.

62. *Id.* at 168.

63. *Id.* at 173.

64. *Id.* at 165–66.

65. Indeed, it may be preferable that legislators do not engage in deep, moral theorizing because disagreements on the deepest moral underpinnings of a legal doctrine may undermine agreement where it would otherwise be possible. See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1898 (1984); see also Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 492–93.

66. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 488–90; Huigens, *supra* note 18, at 1817–18.

some role in criminal punishment, even if that role is quite minor or mediated.⁶⁷

The strongest version of this claim is implausible because any engaged judgments of vice require greater information over time than criminal law accesses.⁶⁸ Further, the criminal law typically does not inspect or distinguish, in grounding liability, between even gross levels of vice. Because the law is uninterested in subtle character distinctions in the commission of a crime, this story is implausible.

The weaker version is problematic for different reasons. In practice, aretaic theory need not show the philosophical sophistication of an Aristotle scholar to be viable. But to ensure that the concept of virtue in aretaic theory is robust and not simply a definitional backstop, one must avoid simply denoting any definition of a crime as a display of vice.⁶⁹ As I have argued elsewhere, this move would simply reduce aretaic theory into an unfalsifiable veneer.⁷⁰ If commonly held distinctions between degrees of vice are brushed aside, aretaic theory becomes impossibly thin.⁷¹ After all, even common conceptions of virtue distinguish more finely than that someone has failed to reason correctly. Rather, shared concepts of virtue are sensitive to why and from what a person's faulty reasoning comes. Consequently, it is worrisome when aretaic theorists claim too modest or removed a role for virtue within their theory or when any criminal act is described as a failure of practical reason.⁷² Thus, it is troubling when Huigens argues for a role of rules in an aretaic theory by noting, "it is hardly an argument against the aretaic theory of punishment to note that the vices play no discernible role in the criminal law."⁷³ It must surely count against the descriptive viability of an aretaic theory of law to admit that vice plays *no* discernable role in the criminal law.

To be fair, the preceding argument may be searching for too direct a connection between vice and legal rules generally. After all, virtue ethics may have resources that address the way in which virtue is incorporated in legal rules in light of the special role law plays and the political demands that law makes.⁷⁴ These important counterarguments are addressed in Part V.

The point concerning the role of vice in grounding criminal liability or crafting legal rules can be seen another way. All would agree that a morally justified legal system cannot make impossible or overly difficult a life of value or virtue. Beyond that, however, American (or liberal) le-

67. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 488–90, 492.

68. Yankah, *supra* note 6, at 1038.

69. Duff, *supra* note 21, at 157; Yankah, *supra* note 6, at 1040.

70. Yankah, *supra* note 6, at 1040.

71. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 492–94.

72. *Id.* at 489–90, 492.

73. *Id.* at 490.

74. See Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 489–90; Huigens, *supra* note 18, at 1814–16; Solum, *supra* note 7, at 85–91.

gal regimes do little to mandate a life of virtue. Indeed, the law takes little interest in the ends that one adopts.⁷⁵ Of course, it is true that the law will not allow one to pursue certain ends. If your end is to kill me, the law will prohibit this. But surely this is at least adequately, if not more fully, explained as legal incorporation of moral duties.⁷⁶ If a central concern of aretaic theory is excellent use of practical reason, including the deliberation and adoption of worthy ends, the law seems little interested in aretaic theory.⁷⁷ After all, the law will do little to prevent a person from pursuing a shallow life relentlessly focused on the pursuit of money.⁷⁸ Even where we can all recognize the shallowness of filling one's life with nothing but work, jewels and fancy cars to the exclusion of personal relationships and developing other parts of one's life, there is no legal prohibition in pursuing this.⁷⁹ The point is clear. The law does not premise criminal liability on anything so nuanced as whether actions reflect underlying character states of vice and virtue. Nor does the law mandate or take a close interest in the moral virtue of the ends one adopts.

III. VIRTUE AND PUNISHMENT

Perhaps it is unfair to dismiss the claims of aretaic theory by arguing that criminal liability does not depend on behavior that displays a lack of virtue. Indeed, the interest the criminal law takes in our character strikes me as deeply ambivalent. Though it may not be the case that criminal prohibitions serve to outlaw displays of vice, much of aretaic theory can be read in a more subtle way. Although criminal liability does not ostensibly turn on a lack of virtue, much of our punishment regime has underlying and justifying it an image of the offender's poor character. If the function of punishment is not to outlaw vice, punishment is often justified by or premised upon the lack of virtue displayed in a criminal act. Liability and justification are awkwardly in tension. What you do makes you a criminal but it is who you are that justifies punishing you. Thus, criminal law responds to the tension between our professed commitment to exclude character and our righteous anger to punish the wicked by submerging considerations of vice.

75. Yankah, *supra* note 6, at 1063. For a fuller treatment of the role of rules in Aristotelian theories of law, see Ekow N. Yankah, *The Law of Duty and the Virtue of Justice*, 27 CRIM. JUST. ETHICS 67, 69–72 (2008).

76. Katz notices the same when he points out that lives that are vastly less attractive may not attract legal liability though rights violations are seen as an appropriate grounds for legal punishment. Katz, *supra* note 25, at 455.

77. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 485–87, 490.

78. Solum, *supra* note 7, at 77–78.

79. Perhaps it is too strong to say there are none; there are, after all, limits on working hours for some of the workforce. But notice, excepting a few extraordinary cases, work-hour limits rarely ban the excessive pursuit of wealth and, to continue the example, would not stop even those protected from taking a second job.

Much of criminal punishment seems to take the view that punishment can be premised on the underlying vice that criminal acts reveal.⁸⁰ Most dramatically, the California regime of “Three Strikes and Out” vastly increases prison penalties on one’s commission of a second penalty and can permanently imprison an offender on his commission of a third.⁸¹ The regime reflects the idea that multiple felonies reveal such immoral character that the law need no longer punish a person proportionately.⁸² Further, many felons are permanently stripped of their right to vote—in a very real way forfeiting their claim to political equality.⁸³ Asserting that former felons are no longer a part of the body politic reinforces the idea of a permanent character flaw—a metaphysical taint on the offender.⁸⁴ Likewise, a number of collateral sanctions prevent many offenders from working in jobs from bartending to hairdressing, thereby reinforcing stigma, ostracizing ex-offenders, and creating, in a very real sense, a criminal caste of those viewed unfit to rejoin society.⁸⁵

Related to the drive to get at the underlying vice of the wicked is the continued growth of inchoate and non-intentional fault crimes. By eroding away at the need for any obvious external criminal act, these criminal prohibitions give our legal regime greater flexibility in punishing those we suspect to be wicked.⁸⁶ Of course, this complicates the contention in Part I that criminal liability does not, in the first instance, turn on a lack of virtue. But we should not be surprised that the divide is not perfect and the drive to punish the wicked pushes us to blur the line.

Any social unease about punishment based on the underlying vice reflected in the controversies surrounding the Three Strikes and Out policy, disenfranchisement and other collateral treatment of prior felony offenders remarkably falls away when it comes time to sentence criminal offenders.⁸⁷ It is stunning that in the most awe-inspiring exercise of the State’s power to punish, we drop away any pretense of a liberal state. So despite the rigorous rules of evidence, which ostensibly cabin illegitimate considerations of character during the trial, the sentencing phase of a capital punishment trial opens the floodgates as to the offender’s moral

80. Yankah, *supra* note 6, at 1028–33.

81. Samuel H. Pillsbury, *A Problem in Emotive Due Process: California’s Three Strikes Law*, 6 BUFF. CRIM. L. REV. 483, 486–88 (2002).

82. Yankah, *supra* note 6, at 1029. For an insightful discussion on how such a regime detaches the offender from the emotional connection of those responsible for judging, see Pillsbury, *supra* note 81, at 505–16.

83. George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1898–99 (1999); Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law*, 11 CAN. J.L. & JURIS. 23, 24–25 (1998); Yankah, *supra* note 6, at 1029–31. Happily, this practice has come under pressure and is being reversed in some states. Abby Goodnough, *Florida Governor Is Hoping to Restore Felon Voting Rights*, N.Y. TIMES, Apr. 3, 2007, at A19.

84. Yankah, *supra* note 6, at 1029–31.

85. *Id.* at 1032.

86. *Id.* at 1026–27.

87. GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW* § 6.3, at 259–61 (2007).

character.⁸⁸ Sitting in judgment of whether the person in front of her shall live, the judge is permitted to invite any witness, from the offender's mother to his friends, to opine as to whether the offender's very character is worthy of life.⁸⁹ The judge, already given the power of life and death, steps into the role of priest and God, weighing the very soul of the offender, finding it worthy or wanting. It may be that the State's power to kill is so awesome that as a society we are at a loss as to how to measure it and seek solace in this ritual. One must admit, even given the strongest commitments against the State playing this role, the prospect of sentencing another to death leaves one searching for any footing. Yet, it is stunning that this occurs nearly unnoticed in a liberal democracy, so concerned with just such intrusions of the State into our most personal moralities.

The view that punishment is based on the vice revealed by criminal acts has a long and impressive pedigree in criminal theory. Vice as reflected in criminal acts has, in turns, been considered the justifying premise of punishment or a necessary condition for it, such that blocking the link between a criminal act and an offender's character prevented the imposition of punishment.⁹⁰ In the first vein, Joel Feinberg reduced the offender's autonomous choice to a proxy to ensure the proper level of attributability to the offender's character.⁹¹ In the second vein, George Fletcher once asserted that excuses prevented criminal liability by blocking the inference from the criminal act to the offender's character, though his most recent position has evolved.⁹² The particular link of character and excuse aside, many important philosophers have tied law and punishment broadly to vice, deficient practical reasoning or poor character on the part of the offender. Impressive thinkers such as Robert Nozick, Michael Bayles, Richard Brandt and George Vuoso have shown facets of this thinking.⁹³ Important modern thinkers such as Kyron Huigens, John Gardner, Claire Finkelstein, Nicola Lacey, Victoria Nourse and Stephen Garvey are also committed to this position in various forms.⁹⁴

88. This practice, at times, has extended, uneasily, to measuring the good deeds of the offender as well as the bad. Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1110-12 (2008).

89. *Id.*

90. Yankah, *supra* note 6, at 1034-35.

91. JOEL FEINBERG, *DOING & DESERVING* 126 (1970).

92. FLETCHER, *supra* note 19, § 10.3, at 800-04. For the evolution of Fletcher's position and subsequent turning away from this line of thinking, see FLETCHER, *supra* note 87, § 4.5, at 179.

93. RICHARD B. BRANDT, *ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS* 465-74 (1959); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 381 (1981); Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 L. & PHIL. 5, 7-15 (1982); George Vuoso, Note, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661, 1672-74 (1987).

94. See NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 65-68 (1988); TADROS, *supra* note 32, at 9-14; Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 265-70 (1995); Finkelstein, *supra* note 19, at 335-43;

If aretaic theorists are overly ambitious in proposing that underlying character flaws are the moral grounds on which liability for punishment is premised, it would be a mistake to dismiss the deeper truths their contentions can reveal. Despite the initial contention that a deep view of moral character plays little role in defining criminal prohibitions, there is clearly some ambivalence as to whether criminal punishment is, in some sense, premised on failings of character as suggested by aretaic theory. It is further worth noting that, in the examples highlighted, premising punishment on underlying character flaws has pushed to the fore many of our least attractive criminal punishment practices. Descriptive fidelity aside, the critical question surrounding aretaic theory in criminal punishment is its philosophical attractiveness. In what sense is criminal punishment related to exhibiting vice and what further connection does this have to underlying character? Lastly, when these relationships are clarified, do they leave us with an attractive picture of criminal punishment?

Elsewhere I have attempted to describe some of the problems of traditional character theorists and their Humean roots.⁹⁵ Aretaic theorists, sensitive to the critique that punishment premised on bad character alone is both descriptively ambivalent and unattractive, have responded with a sophisticated picture of the relationship between virtue, punishment and character.

Current virtue-based character theories attempt to dull the criticism that aretaic theories merely seek to punish for character. We noted earlier that Nourse's model of liability turned, in part, on the indifference the criminal actor displays in the criminal act. It is unclear to what extent Nourse feels the need to avoid the accusation that her theory seeks to punish underlying character. Indeed, Nourse's theory can be read as a serious and forceful call to resist the Model Penal Code's shrinking role for richer moral descriptions underlying a criminal offender's intentions.⁹⁶ Nonetheless, it is important to note that Nourse does not premise punishment directly on punishing the underlying viciousness of the offender. Nourse notes that criminal acts cannot be viewed as simply focused on the interaction between individuals.⁹⁷ Rather, criminal acts are often embedded in and express complex communal relationships.⁹⁸ Ultimately, punishment responds to the expression of inequality between offender and victim.⁹⁹ For Nourse, then, punishment must both account for a thicker sense of the moral values highlighted in aretaic theory as well as respond to the expression of inequality by the offender—a complex justificatory mix.

Gardner, *supra* note 38, at 575–85; Garvey, *supra* note 35, at 1718–26; Nourse, *supra* note 30, at 379–85; Victor Tadros, *The Characters of Excuse*, 21 OXFORD J. LEGAL STUD. 495, 501–08 (2001).

95. Yankah, *supra* note 6, at 1033–37.

96. See Nourse, *supra* note 30, at 380–82.

97. *Id.* at 365.

98. See *id.* at 372, 386–87.

99. *Id.* at 372.

Another aretaic model of punishment can be found in Garvey's work. While Garvey is concerned with avoiding punishment for mere character, he does believe punishment is appropriately premised on the offender's commitment to law abidingness. For Garvey, the provocation defense is best explained as an attempt to distinguish those who commit crimes out of weakness of will, *akrasia*, as opposed to those who are full-bloodedly committed to a criminal violation—something closer to vice.¹⁰⁰ Garvey explicitly premises punishment on an actor's defiance of the law and deviance from the virtuous person but attempts to do so in a way that avoids the critique of merely punishing for poor character.¹⁰¹ Thus, like Nozick before him, Garvey attempts to place the locus of punishment on the defiance of law—cousin to Nozick's flouting of the correct values—which allows the state to require penance, Nozick's "moral instruction."¹⁰² Still, the entire framework is thoroughly embedded in an examination of the actor's character.¹⁰³

Garvey is attendant to the claim that certain theories of provocation may be accused of punishing an offender for possessing bad character.¹⁰⁴ This is highlighted in the case where an offender is denied the defense of provocation due to the inadequacy of his provocation while another offender is granted the defense because the provoking reasons are adequate.¹⁰⁵ Because both offenders genuinely believe that the acts provoking them are serious insults, to punish to a greater degree the person who acts under inadequate provocation is to punish him for his poor judgment and character.¹⁰⁶ Garvey realizes that this would repudiate one of the very tenets of the liberal state—the State may punish criminal acts but does not simply punish for the lack of virtue.¹⁰⁷

Garvey claims that his theory of "punishment as *akrasia*" does not suffer from the same indictment.¹⁰⁸ Because his theory treats inadequate reasons for provocation as merely evidentiary—it is harder to believe that one killed out of weakness of will in the face of a trivial insult than a serious one—it does not punish the actor purely for the underlying character flaw of having been trivially enraged.¹⁰⁹ If the actor did kill out of

100. Garvey, *supra* note 35, at 1730–32, 1736–38. Huigens, on the other hand, believes that punishing weakness of will, *akrasia*, is one of the ways the criminal law incorporates considerations of our character. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 492.

101. See Garvey, *supra* note 35, at 1709, 1716, 1727, 1732.

102. Compare *id.* at 1727–31, 1744, with NOZICK, *supra* note 93, at 381. Garvey's motivation, to punish those who are fully defiant of the law and reduce punishment in the cases where one struggles to obey the law, strikes me as more convenient with a Kantian virtue theory—for the better or the worse. Nonetheless, Garvey seems to identify himself as loosely neo-Aristotelian.

103. Compare Garvey, *supra* note 35, at 1727–38, with NOZICK, *supra* note 93, at 381–82. See also Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 492–93.

104. Garvey, *supra* note 35, at 1708–11.

105. *Id.* at 1708.

106. *Id.* at 1708–09.

107. *Id.* at 1715–17, 1727.

108. *Id.* at 1735.

109. *Id.* at 1733–35.

weakness of will rather than defiance when provoked by a minor insult and there are no evidentiary problems, Garvey's theory would grant the provocation defense. That is to say that counting the genuinely but unreasonably provoked as willfully defiant (or vicious) as opposed to weak-willed (or akratic) counts for Garvey as a false positive.¹¹⁰ The focus, Garvey reinforces, is on the distinction between defiance and weak-willed legal violations.

Huigens's latest work is similarly nuanced in relating criminal law to underlying character. Huigens argues that criminal punishment focuses on failures of practical reason.¹¹¹ This does not mean that an aretaic theory punishes actions as a proxy for character.¹¹² Huigens holds that punishment is for acts; harmful acts are connected to our pre-legal understanding of wrongs.¹¹³ Harm and wrongdoing are not simply evidence of poor character.¹¹⁴ Thus, to say that the inculcation of virtue is an end, or even a justification for punishment, is not to say that this is so to the exclusion of wrongdoing.¹¹⁵

Notwithstanding that punishment is not solely premised on character, it is clear that underlying moral character or virtue remains the motivating force in this account in important ways. First, punishment, for Huigens, depends not only on harmful acts but also on failures of practical reason. Practical reasoning includes not only instrumental reasoning towards one's ends but the ends one adopts at all.¹¹⁶ Further, it is true that the adoption of certain ends or dispositions will make it more likely that one will violate criminal prohibitions. Because we are responsible for our practical reasoning (including our practical reasoning towards ends), criminal law may appropriately punish someone for his reasoning and ends.¹¹⁷ Put plainly, practical reason as defined by Huigens entails character.

This facet of practical reasoning is highlighted in the way Huigens views crime. For Huigens, criminal acts fundamentally reflect poor character traits.¹¹⁸ Crimes are not merely failures to reason instrumentally towards their ends but show immaturity, callousness, selfishness and anger. Even if punishment is for acts, acts that reveal a failure of practical reason—the locus of punishment is the offender's character. Ultimately, failures of practical reason and the inculcation of virtue remains the justification or end of criminal punishment.¹¹⁹

110. *Id.*

111. Huigens, *Artiototelian Criminal Law*, *supra* note 16, at 466–69.

112. *Id.* at 483–84, 488.

113. *Id.* at 483–84.

114. *Id.*

115. *Id.*

116. *Id.* at 485.

117. *Id.*

118. *Id.* at 488.

119. There are, of course, fascinating positions that use character theory in ways that are not clearly aretaic but seem sympathetic. One interesting example is Claire Finkelstein's theory of

There are important and interesting arguments that can be leveled at these various aretaic formulations of our punishment practices.¹²⁰ Important among these arguments is to note that our criminal law paradigmatically focuses on bare intentions in ways that do not deeply inspect the difference between viciousness and weakness of will or even deeply examine practical reason.¹²¹ Though the competing non-aretaic descriptions are valid, it is important to concede the thrust of the aretaic claims. There is a powerful way in which aretaic theories capture many of our punishment practices.¹²² Though no one practice shows aretaic theory to be descriptively accurate, it is hard to understand the body of our criminal law—Three Strikes and Out, collateral punishments, disenfranchisement and the rest—without seeing how a view of underlying immoral character looms behind it. Motivated by our righteous anger and a hunger to punish bad people, we have allowed criminal punishment to absorb our desire to punish the wicked.¹²³ Aretaic theory highlights the way in which fault alone does not capture our criminal punishment practices and forces us to reexamine our intuitions about which model of punishment is more attractive.¹²⁴

One deeply troubling concern with the growth of aretaic theory is the way in which it fundamentally alters our view of the criminal offender. As sophisticated as aretaic theories may be in addressing our concern that they *only* punish for character, an aretaic theory of law remains, at bottom, a character theory of law. In noting the advantages that aretaic theory offers in dissolving long-running impasses in our criminal law, aretaic theorists often claim that aretaic theories allow us to more elegantly understand, shape and expand non-intentional fault doctrines such as the felony-murder rule. Aretaic judgments are also said to dissolve other dif-

excuses, which asserts that we permit excuses where the standing dispositions manifested by the act excused are adaptive; that is, they are good for society and therefore dispositions we are willing to endorse. Finkelstein, *supra* note 94, at 251–52; Finkelstein, *supra* note 19, at 344–59; Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 647–49 (1996). One concern with Finkelstein's theory is the extent to which she is willing to find a morally worthy attribute in order to ground an excuse. So, for example, she thinks of the defense of entrapment as at least partially motivated by our endorsement of the disposition of being willing to cooperate with others. Finkelstein, *supra* note 19, at 352. But once one draws the range of endorsable traits that broadly and inclusively, I fear there are very few crimes that could not be attached in some way to a morally desirable trait. Because Finkelstein and other equally engaging models are not aretaic in nature, they are not the focus of this piece.

120. See generally Duff, *supra* note 21.

121. Of course, there is a sense in which an unexcused violation of the law could always be described as a failure of practical reason but that risks collapsing the distinction of practical reason into the violating act itself. See Duff, *supra* note 21, at 166. But see Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 483–84, 488.

122. Yankah, *supra* note 6, at 1028–33.

123. John Gardner, *Crime: In Proportion and in Perspective*, in FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH 31, 31–32 (Andrew Ashworth & Martin Wasik eds., 1998). It was to avoid succumbing to this personal drive and passion that Locke saw that punishment must be administered by an impersonal State. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT bk. II, ch. I, § 13, at 12 (C.B. Macpherson ed., Hackett Publ'g 1980) (1690).

124. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 491–92.

ficult problems in leveling blame or punishment for character flaws. Thus, it is only fair to lay at their doorstep the other paths to which aretaic theory naturally leads us.

I noted above that aretaic theories of law have led to the construction of our least attractive criminal punishment regimes. Now it is time to put the indictment forcefully. Aretaic theories of law generally, and of criminal punishment specifically, allow the creation of a criminal caste system. Worse, those who are placed in this caste are isolated from the rest of society, viewed as forever tainted and made the permanent other. Worst of all, the creation of the criminal other all too easily interacts with ugly racial concepts; the criminal other becomes embodied in the face of a young, Black man—further separating “them” from our common concern.¹²⁵

This is an ugly indictment indeed for a theory that takes as its point the promotion of human flourishing through the attainment of the human excellences. Still, aretaic theory, even in its most sophisticated forms, ultimately locates punishment in the character of the offender.¹²⁶ Whether punishment is premised on the failure of practical reason, fully willed defiance of the law or other formulations, punishment is in part due to something about and within the offender himself. And because character must describe a largely stable, if not unchangeable, set of traits or motivations, aretaic theory finally locates our reasons for punishing in something fixed, or nearly so, in the offender.¹²⁷ To be clear, it is not that character is unchangeable. But when we think of another's character, we think of a largely fixed set of traits. It is a strange thing to ask what was Bob's character on Wednesday. Character, unlike mood, is stable.¹²⁸

One may think that I have picked a particularly bleak or misguided virtue jurisprudence to attack or I have ignored the fact that people do sometimes change and redeem their poor character. But the point is not that people never change. It is that viewing someone as having poor character, placing the locus of blame within him, naturally leads to seeing him as tainted—as the other. The story of the redeemed bad character is striking because it is remarkable, an out of the ordinary tale to be shared. Moreover, there is little in our current punishment practices that supports the view that we communally believe in the redemption of character. Ex-felons are often not permitted to vote and are banned from re-

125. Noting the danger of separating criminal offenders from our ability to see them as full persons and share our emotive concern with them in sentencing, see generally Pillsbury, *supra* note 81. This is reflected in the disenfranchisement and numerous collateral sanctions that amount to a form of internal banishment and recalls Carl Schmitt's philosophical distinction between the law of friends and the law of enemies. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26–27 (1976); see also FLETCHER, *supra* note 87, at 172–73.

126. TADROS, *supra* note 32, at 48–49, 98–99.

127. MOORE, *supra* note 29, at 566–71; Yankah, *supra* note 6, at 1027–28.

128. Aristotle, *supra* note 7, bk. III, ch. 3, § 1114a; Yankah, *supra* note 6, at 1027–28.

ceiving welfare and federal aid to pursue an education.¹²⁹ They are excluded from many fields of employment, from sitting on a jury and from countless other roles that reflect any place within the political community.¹³⁰ These practices speak of the permanence of criminal character, not of redemption.

It is remarkable how quickly such a view leads to the conclusion that the criminal offender is no longer redeemable and owed no opportunity to rejoin our society. Indeed, Aristotle, who serves as the foundation for much of modern virtue ethics, reveals the connection between punishing those of inferior virtue and banishing those whose virtue cannot be repaired. Aristotle notes with seeming approval,

This is why some think that legislators ought to stimulate men to virtue and urge them forward by the motive of the noble, on the assumption that those who have been well advanced by the formation of habits will attend to such influences; and that punishments and penalties should be imposed on those who disobey and are of inferior nature, while the incurably bad should be completely banished.¹³¹

Once one is alert to this feature, its influence is easy to see. Notice that the unattractive punishment regimes surveyed earlier all share one thing in common. They are all fundamentally based on a picture of the criminal offender as a permanent bad guy.¹³² One cannot understand why someone should be banned forever from being a nurse, bartender, or receiving student loans unless one notes the image of an undeserving bad guy that underlies it. The very language of disenfranchisement, the effort to keep the ballot box pure, calls to mind a sense of metaphysical taint.¹³³ Criminal offenders are viewed as to be locked up and warehoused—with the key thrown away.

And, with our moral sensibilities blunted by the view that criminals are bad people, the other with whom we share no common humanity, we fail to notice the ugliest of interactions.¹³⁴ Our criminal justice system has become a powerful method of racial control and subjugation.¹³⁵ The argument here need not be directly causal. But that does not blunt its force. When we come to view criminal offenders as having permanently

129. See Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1336 n.67 (2008).

130. Yankah, *supra* note 6, at 1031–33.

131. Aristotle, *supra* note 7, at bk. X, ch. 9, §§ 1180a5–a9.

132. See Yankah, *supra* note 6, at 1027.

133. *Id.* at 1027–31.

134. Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 L. & HIST. REV. 113, 145 (1998).

135. That this is a crisis cannot, I think, be denied by the thoughtful observer. America's criminal law system is malformed enough that Paul Butler has argued for African-Americans to refuse to convict African-American defendants of drug crimes even when they believe them guilty. Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995). A system that can be reasonably indicted along these lines is not a healthy system.

poor character, comprising a criminal caste, we have little reason to ever care about “them.” No reason to see that offenders are ever reintegrated into society. We have little reason to monitor institutions that watch, arrest and imprison this caste. No reason to see that they are punished strictly but justly, as persons not as things. It is not that a virtue or character-based theory is essentially racist. Rather, character-based views blunt our compassion, erase our sense of shared humanity and thus allow other latent prejudices to flourish. Having turned our back on those perceived as in the criminal caste, we no longer notice that our drug laws often are built to punish minorities, that our police often target young minority boys or that our prisons have become disproportionately filled with the Black, Brown and poor.

We need not be simpleminded in making these arguments. It is clear that a large number of factors combine to create these regimes. Some may be driven by pure animus, which does not care about the state of an offender’s moral character. Others act on self-interest or as part of interest groups, which seek to erect barriers of entry into their profession and so on. This does not erase the fact that the social disdain for offenders relies, sometimes consciously and sometimes not, on the image of the immoral criminal who is beneath our caring. It is not important that this image be the only animating force. What matters is that a concept of a permanent and immoral underlying character has purchase in establishing these legal regimes.¹³⁶

As I have argued elsewhere, character-based theories, aretaic theories among them, lead to a view of criminals as permanently tainted.¹³⁷ By contrast, focusing on the criminal act leaves no such view. As we will see later, focusing on acts leads naturally to the view that the act can be negated—captured in the popular sentiment that a criminal who has been punished has paid for his crime.¹³⁸ Criminal offenders deserve our moral condemnation but trying to make our criminal punishment identical to our blaming practices results in deeply troubling criminal punishment.

I do not believe that aretaic theorists are motivated by these ugly results. Nor do I think that aretaic theory aims at or necessarily leads to this result. Indeed, I suspect that part of the reason for the extraordinary efforts of the most sophisticated aretaic theorists to avoid premising punishment exclusively on character is to avoid these consequences. Perhaps aretaic theorists will note that this stems from mistaken judgments of character or a system that insufficiently embraces public virtues such as forgiveness. Nonetheless, aretaic theories share the view that punishment is either partly justified by an offender’s poor moral character or

136. I am thankful to David Hyman and the participants of the Prawfsblog New Voices workshop for pressing me on these issues.

137. Yankah, *supra* note 6, at 1027–33.

138. *Id.* at 1061.

aims to repair the offender by comparison to a virtuous person. That is to say, aretaic theories are all bound by their special attention to the role the virtues play in an offender's character. In doing so, they cannot avoid drawing an image of the criminal offender as possessing a wicked and deformed character. And just as any theory deserves credit for its morally attractive social features, so too we have reason to be aware of its especially harmful features.¹³⁹

IV. VIRTUE AND LIBERALISM

If the social effects of aretaic theories are disturbing, its philosophical implications give little comfort. There is good reason to believe that even sophisticated aretaic theories of law and punishment cannot be squared with a liberal conception of government, particularly with the central place of autonomy within liberalism. This may not be fatal to adopting an aretaic theory; we can, after all, give up on liberalism but irreconcilable tension with our liberal commitments gives good reason to pause.

Finding a place for autonomy is important in constructing a plausible and appealing modern virtue jurisprudence. Still, any theory that remains recognizable as a distinctly aretaic theory cannot ultimately reconcile the liberal commitment to autonomy and the aretaic commitment to human flourishing as the end of law. Though I believe this to be inherent in all aretaic theories, let us explore the models developed by Huigens, Tadros and Solum as points of departure.¹⁴⁰

The illiberal tenet in aretaic theory lies in the fundamental end and justification of law and of punishment. Remember that, at bottom, an aretaic theory grounded in Aristotle holds that the end of law is to promote human flourishing.¹⁴¹ In Huigens's hands, criminal punishment focuses on the failure of practical reason.¹⁴² But it would be unconvincing for Huigens to stop there. Huigens asserts that practical reason itself is a proper demand of society placed upon each individual—thus the proper end of punishment.¹⁴³ The justification of this end, however, is complicated. Viewed in light of its Aristotelian roots, sound practical reasoning

139. Setting aside my other deeply held disagreements with consequentialism, Smart recognized this important truth of our theory construction when he noted that the moral consequences of informing others of a moral theory are themselves morally relevant facts. See J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in *UTILITARIANISM FOR AND AGAINST* 33, 50–52 (1973). Some may question the fairness of blaming a philosophical view for harm that comes from its misinterpretation, point taken. Still, it surely is worth noticing when a philosophical position has features embedded in it which have natural and unattractive ancillaries.

140. I am grateful to Larry Solum for many enjoyable and educational conversations on the topics discussed here. Much of my learning on the subject generally and this conversation in particular has been informed by our discussion and his views.

141. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 494–96; Solum, *supra* note 7, at 65, 94–95, 98.

142. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 494.

143. *Id.* at 492.

is to be understood as contributing to and required by the ultimate end of humans; that is, practical reasoning is the required, distinctive end of human flourishing—rationality in action, the *ergon*.¹⁴⁴ Because human flourishing ultimately requires our contributing and taking part in society, society is justified in requiring sound practical judgment. Sound practical judgment is thus required in light of our mutual interdependence.¹⁴⁵ Regardless of whether one shares Aristotelian notions of human nature, the undeniable fact of our social interdependence is enough, arguably, to justify the requirement of practical reasoning. Because no one could live freely and autonomously in an interdependent society without requiring sound practical reason from one another, such reasoning is a justified requirement. On this picture, aretaic theory promotes the liberal value of autonomy.¹⁴⁶

Huigens's model asserts that sound practical reason is a proper demand of a society because in its absence no one could live freely.¹⁴⁷ This is well as far as it goes. But if restricted to the thinnest formulation, the justification for demanding practical reason is derivative. It merely piggybacks on our right to be able to exercise some form of liberal or Kantian freedom. If this is all that is claimed by aretaic reasoning, then we all can be satisfied. But this is just to claim that underlying what seemed to be aretaic commitments was Kantian reasoning all along. Thus, restricting aretaic theory of human goods to a thin slice of the virtue of practical reasoning embedded in its role in preserving autonomy seems a slender reed for a theory of how the law values virtue.¹⁴⁸

I fear it is a slightly different thinness that is evident in Tadros's excellent work. Tadros has an ambivalent role for character and vice in criminal punishment.¹⁴⁹ As with other character theorists, Tadros grants that society levies punishment, in the first place, for criminal acts.¹⁵⁰ Nevertheless, Tadros argues that a criminal offender is not responsible for his acts if they do not reflect on his character.¹⁵¹ On this model, a relationship between a criminal act and the offender's character is a condition for holding the agent responsible.¹⁵²

For Tadros, character is central because criminal punishment inherently communicates moral censure.¹⁵³ Though acts do not serve merely

144. Aristotle, *supra* note 7, at bk. I, ch. 7; Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 495; Solum, *supra* note 7, at 71–72.

145. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 495; Solum, *supra* note 7, at 94–95.

146. Huigens, *Aristotelian Criminal Law*, *supra* note 16, at 496.

147. *Id.* at 497.

148. Thus, Huigens notes that the virtue of practical reason cannot be limited to an offender's reasoning in connection with the offense but rather must be a broader inquiry into the offender's character. Huigens, *supra* note 18, at 1817.

149. TADROS, *supra* note 32, at 99.

150. *Id.* at 9–10.

151. *Id.* at 9, 23.

152. *Id.*

153. *Id.* at 48–50.

as evidence of poor character, criminal punishment remains appropriate only when the offender reveals himself to be the kind of person who deserves moral censure. To the extent the offender accepts the values on which he acted (even where that action is atypical of the offender—that is, “out of character”), he is a responsible agent and the law can appropriately condemn him as morally vicious.¹⁵⁴ The offender’s displaying the relevant vice in the action remains a necessary condition.¹⁵⁵

But what Tadros means by vice and character is unclear. Tadros posits that atypical criminal actions may simply reveal that an actor has insufficient self-control or does not work hard enough to control the criminal impulse.¹⁵⁶ It is only where the actor works sufficiently hard to resist the impulse and does not identify with the action but cannot control himself that Tadros believes the action no longer reflects the actor’s character.¹⁵⁷ But at this level of abstraction, this picture seems little related to character at all. An actor who, despite diligent efforts, simply cannot control an impulse he disvalues, in the way Tadros describes, is one who lacks robust autonomous will.¹⁵⁸ As with Huigens, I fear that what is doing the work for Tadros is not an account of vice or character but rather that an act has not been a reflection of autonomous action.

A virtue-based theory must take some form of the promotion of human excellence as its primary commitment.¹⁵⁹ Of course, an aretaic theory of law may view autonomy as important *insofar* as it is crucial to the development of human excellence.¹⁶⁰ Viewing aretaic theory in this light makes it a great deal more plausible and attractive. After all, any sensible theory of the promotion of human excellence must make space for autonomy: space for choosing and learning to choose valuable ends. Aristotle, for example, importantly believed that part of becoming an excellent person was learning to choose the right acts for the right reasons.¹⁶¹ Similarly, it is a familiar argument in liberal thinking that one cannot be coerced into living the good life because it is a precondition for living the good life that one chooses it. Dworkin, for example, notes that one cannot live a good life if forced to live against one’s own convictions.¹⁶² Accordingly, Kymlicka has argued that an authentically good life must be lived “from the inside, in accordance with our beliefs about what gives value to life.”¹⁶³

154. *Id.* at 52–57, 96–99.

155. *Id.* at 99. Though it is clear that Tadros is deeply committed to a character theory of criminal punishment and he occasionally embeds moral censure in viciousness, it is not clear to what extent he is committed to an Aristotelian version of viciousness.

156. *Id.* at 30–38, 53–56.

157. *Id.*

158. *Id.* at 39–40, 45, 96–99.

159. Solum, *supra* note 7, at 95.

160. *Id.*

161. Aristotle, *supra* note 7, at bk. II, ch. 4 §§ 1105a26–b10.

162. Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 486 (1989).

163. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 81 (1995).

But one must be careful in making space for autonomy in a virtue ethic, for a single note may dominate the harmony. If an aretaic theory comes to view autonomy as constitutive of human excellence such that everything required to protect autonomy is coextensive with promoting human excellence, there will be little distinctively aretaic about it.¹⁶⁴ This may well be an acceptable détente, with both theories sharing every conclusion but disagreeing as to why. If this is true, so be it—but it does seem to be suspicious. One fears that this conclusion simply rereads aretaic theories as Kantian autonomy (perhaps without rules). A pale sort of virtue as veneer.

What is needed to disentangle the intrinsic values of virtue and autonomy is a case where they are in conflict. Let us take the case of a particular type of harm-to-self. Imagine a fully functioning, normal adult, free of excessive burdens on her choices, who has autonomously chosen a life that we will stipulate sets her against the human excellences. Let us say, despite a number of reasonable choices, that she has chosen to become a prostitute—a modern Séverine Serizy. Of course, some may find this example hopelessly parochial or prudish but grant, for the moment, that a proper relationship to one's own sexuality and sexual intimacy makes Séverine's submitting sex for sale harmful to herself. It is also fair to note that, though complicated to some, prostitution is a wrong that coincides with many people's prelegal sense of wrong. After all, it is currently illegal in all but a few places in the United States.¹⁶⁵ Let us, to be sure, propose that she also believes that she is making a poor choice.¹⁶⁶

I take it a robust aretaic theory of law would find Serizy deeply troubling, leveling punishment unless there were strong countervailing reasons that would weaken her well-being or society's well-being. It is important to note aretaic theorists may have good reasons to avoid punishing prostitution. Perhaps criminalizing this behavior will prevent people from making important decisions about the role of work and sexuality in their lives necessary to develop into successful persons. Perhaps sound practical reasoning requires the ability to exercise poor reasoning or prostitution is only mistakenly believed to be an act that harms others. More plausibly, the intrusive methods necessary to criminalize and enforce certain laws may be too damaging to human society. Thus, there is no need to assume that an aretaic theory would necessarily outlaw prostitution.

164. It would be a mistake to integrate autonomy so deeply into our conception of the good life as to lose sight of the fact that we can indeed get it wrong. See *id.*; David A.J. Richards, *Kantian Ethics and the Harm Principle: A Reply to John Finnis*, 87 COLUM. L. REV. 457, 463 (1987).

165. U.S. Federal and State Prostitution Laws and Related Punishments, <http://prostitution.procon.org/viewresource.asp?resourceID=119> (last visited June 10, 2009) (noting that prostitution is not illegal in Rhode Island and eleven Nevada counties).

166. Though she may believe she is making a poor choice, we need not posit that she has set herself to defeating her impulse to engage in prostitution. Thus, this example does not coincide with Tadros's example that led us to doubt the ability of the actor to make autonomous decisions.

Still, in the absence of the kind of countervailing reasons above, I take it an aretaic theory should be ready to prohibit Serizy's actions. Aretaic theorists are, of course, aware that moral and legal fault are not identical.¹⁶⁷ Yet, aretaic theories must treat human flourishing as primary. Even if moral fault is not identical to legal fault, an aretaic theory is committed to elevating human flourishing over autonomy where they conflict.¹⁶⁸ That is to say, unless aretaic theory is to be simply a veneer, the law ought to forbid or at least worry about Serizy. If this cinematic example does not grab, imagine a person who slowly corrupts his sexual well-being by watching too much pornography. Or the gambler who fails to live his best ethical life because he gambles away the portions of his wealth he is going to use for charity. The point is straightforward. An aretaic theory of law cannot simply make autonomy coextensive with virtue or human flourishing because people often choose paths that are, even by their own lights, bad for them. Thus, a virtue-based theory of law cannot fully meet the challenge to respect the autonomy of others. This strikes me as true on any aretaic conception, whether based on the failure of practical reason, the promotion of human flourishing or measuring criminal acts against the fully virtuous actor.

A law based on a modern understanding of Kantian freedom, however, would be importantly different.¹⁶⁹ A Kantian system may, depending on other facts, leave these particular harms-to-self untouched and unregulated.¹⁷⁰

Notice also that here the reason for leaving Serizy untouched may be related to but does not trade solely on the liberal value of uncertainty as to conceptions of the good. Pluralism in this context is the idea that there are multiple and perhaps incommensurate forms of the good life and, related, uncertainty regarding this range of valuable lives means the State ought to refrain from forwarding any particular conception. If there are numerous ways of living well, then each person is best suited to know what makes a good life for herself.¹⁷¹ In this guise, pluralism of the good and one's ability to independently determine a conception of the good life is, of course, central to the liberal project.¹⁷²

But uncertainty alone does not capture all the reasons that require respecting autonomy. Indeed, it is stipulated that she has set herself

167. Huigens, *supra* note 18, at 1799–1801.

168. Richards, *supra* note 164, at 470–71; Solum, *supra* note 7, at 97–98, 104–05.

169. Richards, *supra* note 164, at 463–65. This, of course, was not Kant's position. Rather, it follows from Kantian principles.

170. It goes without saying that I do not believe this highly stylized example accurately describes the world of prostitution and we may have adequate reasons concerning violence towards women and concerns over the scope of choice sets to prohibit prostitution.

171. John Christman, *Autonomy, Self-Knowledge, and Liberal Legitimacy*, in *AUTONOMY AND THE CHALLENGES TO LIBERALISM* 330, 344–51 (John Christman & Joel Anderson eds., 2005). Premising one's autonomy on one's ability to know either what is best for that person or even what one truly wants is what Christman helpfully termed epistemic authority. *Id.* at 346.

172. Richards, *supra* note 164, at 463–65.

against the good. To shore up the point, we have assumed that she believes that she is making a poor choice as well. It is important that this classic liberal pole is insufficient to ground Kantian freedom in law. Serizy's decisions are not to be respected merely because we are unsure they are bad. All told, we have good reasons to morally condemn the actor or the situation.

Nor is it clear that relationships unrestricted by liberal values must equally respect Serizy's autonomy. Parents obviously rightfully interfere with their children's "autonomy" and, though more troubling, Serizy's friends and family could perhaps rightfully intercede and force her to seek help. The borders of other relationships are unclear; other relationships may respect and promote autonomy but will not elevate it to singular justificatory importance.¹⁷³ Simply put, perhaps one ought to interfere with a friend for her own good. Yet law, which employs coercion, introduces an important distinction between our moral and political philosophies.¹⁷⁴ It is in this way that an aretaic theory can never fully resolve the charge that it is illiberal.

So ultimately we see that virtue-based theories have two critical and separable flaws. In practice, they naturally lead to the view of the criminal as permanently tainted, blunt our ability to see common humanity and allow our worst prejudices to flourish. In principle, they fail to properly respect the autonomy of the legal subject.

V. VIRTUE AND THE ROLE OF JUSTICE

I have argued that setting loose a virtue theory in law leads to ugly punishment practices that view a criminal offender as permanently tainted and thus worthy of ostracization. Further, virtue ethics is primarily focused on human flourishing. Though autonomy for citizens may be an important component of flourishing, it is easy to imagine that these two values will conflict. Where they do, virtue ethics cannot be reconciled with a commitment to liberal freedom; human flourishing precedes autonomous choice.

These critiques may apply when virtue ethics is transferred, root and branch, into law but perhaps virtue jurisprudence has resources to resolve these issues. Perhaps there are particular requirements in theories of virtue when dealing with the institution of law that adequately ad-

173. See Huigens, *supra* note 18, at 1803–04. Thus, where the relationship of the State's police power to the individual has been conceptualized as analogous to the family to the paternal head, the limitations on the State's legitimate punishments are correspondingly weak. Dubber, *supra* note 25, at 6–8, 18, 22.

174. Yankah, *supra* note 26, at 1195–1206. Here I give a first pass at explaining why legal coercion, which is imposed regardless of one's valuing the law, differs from other seemingly coercive behaviors that derive from relationships we engage in willingly. This feature, I suggest, changes the very nature of the reasons law can give to justify its coercion.

dress these concerns. Does the role of virtue change in a legal setting in a way that blunts the social and philosophical critiques leveled?

Aretaic theorists like Huigens have sought to build models of virtue that pay particular respect to the requirements of virtue in a legal context. Similarly, it was earlier noted that in Aristotle's ethics, which grounds much of modern virtue ethics, the virtue of justice played a particular role in mediating the relationship between virtues and law. The special role of justice is the foundation for Solum's model addressing the particular relationship between virtue and law. Having dealt with this particular question at length elsewhere, I will do no more than canvas why special legal requirements are insufficient to rescue a virtue jurisprudence.¹⁷⁵

Put too briefly, Huigens argues that aretaic theories of punishment need not be embedded in natural law theories that take human flourishing as their justification.¹⁷⁶ As we noted, for Huigens, virtue has a special role in law because legal prohibitions are generalizations about the proper conclusions of practical reasons to various situations—e.g., laws against possessing handguns in certain circumstances are generalizations that doing so is unreasonable. The role of a trier of fact is to examine a particular offense and determine (or specify) whether the accused properly applied the generalized conclusion to his particular circumstance.¹⁷⁷ Was this the kind of circumstance in which the law meant to prohibit carrying a handgun? It is the application of general rules to concrete circumstances that draws on the moral particularism of virtue theory.¹⁷⁸ Once the law has applied the general prohibition to concrete facts, there is no further need to inquire about the moral justification that supported the law.

Huigens argues that this model, the specification model, is justified in two ways. First, whatever justified the generalized prohibition in the first place justifies each prohibition's specification.¹⁷⁹ Secondly, this model of law is grounded in one of the offender's virtuous character traits, particularly that she internalizes and heeds the law.¹⁸⁰ In this manner, Huigens seeks to block the assessment of moral character and the justificatory force of human flourishing from playing primary roles in a virtue-centered theory of law.

The problem with this model is that it gives little justificatory reason and even less that is recognizably grounded in virtue. It is insufficient to assert that the justification for applying or specifying a general prohibition is the justification that supported the general prohibition. Those jus-

175. Yankah, *supra* note 75, at 69–72.

176. Huigens, *supra* note 18, at 1795–96.

177. *See id.* at 1818.

178. *Id.*

179. *See id.* at 1819.

180. *Id.* at 1826.

tifications are just the ones we seek to examine in the first place. Surely legal norms themselves must be justified before we worry about whether they are correctly applied. Worse yet, the justifications for various norms often conflict or are the products of mutually exclusive, competing (consequentialist or deontic) theories of criminal punishment.¹⁸¹ Nor is the virtue of norm internalization satisfactory, for without further justifying the goods legal norms promote, one can hardly justify internalizing them.¹⁸² Ultimately, Huigens cannot justify his specification model without relying on the underlying justificatory force of virtue theory—that of the promotion of human flourishing. Thus, Huigens's model cannot avoid the earlier critiques.

In contrast, Solum, building on Aristotle's virtue of justice, constructs a model of virtue that takes into account the special role law serves in securing human flourishing—the ultimate justification of a virtue theory.¹⁸³ Given this goal, it may seem lawmakers and judges ought to aim at promoting ethical lives. The problem, of course, is that there is wide, persistent and deeply held disagreement about what constitutes an ethical life. Thus, if each lawmaker were to act on her own conception of the good, it would lead to an endless clash undermining the conditions for human flourishing and the goods that law uniquely secures.

An aretaic system then ought not allow lawmakers to render legal decisions based on their first-order views of what is moral.¹⁸⁴ Rather, Solum proposes that the virtue of justice in an aretaic theory is governed by lawfulness—that is, by a judge's recognition and internalization of the publicly reached decisions on public controversies.¹⁸⁵ These public conclusions need not be only law but may include the widely held stable norms and customs of the society as well. Lawmakers in such a model have deeply internalized the shared norms of the community—in Aristotle's language they are *nomimos*. Further, laws on this model are only truly laws if they comport with the society's norms, the *nomoi*.

For Solum, the aretaic justification is integrated into his model in two ways. First, though controversial among Aristotelians, the *nomos* must themselves be aimed at promoting human flourishing.¹⁸⁶ Thus, to the extent that social norms are directly opposed to human flourishing, they may not qualify as true *nomos*.¹⁸⁷ Moreover, the virtue of justice is

181. Yankah, *supra* note 75, at 70.

182. *Id.* Moreover, one needs to know if there is something distinctly aretaic in the goods that norm internalization seeks to capture. After all, norm internalization by itself may be aimed at securing consequentialist or deontic goods as much as virtue.

183. Solum, *supra* note 7, at 68.

184. *Id.* at 87. I don't mean to suggest that Solum's contention that judges should not make decisions based on first order moral views is particular to aretaic views. Combined with his views of the premise of law, however, it does represent a particular way of mediating the role of virtue in an aretaic model of law.

185. *Id.* at 89–91.

186. *Id.*

187. *Id.* at 97–98.

only one part of human flourishing. To the extent lawfulness conflicts with human flourishing, the aretaic law giver must reexamine the value of lawfulness in her society. The aretaic law giver must, above all, be sensitive to the conditions that allow for human excellence. In Aristotle's language, a virtuous lawgiver must display practical wisdom or *phronesis*, he must be *phronimos* as well as *nomimos*.¹⁸⁸ Thus, Solum's model does not attempt to avoid the liberal critique I have leveled at virtue theory. Rather, his unabashed strategy is to provide an alternative. Finally, however, his alternative cannot avoid the dangerous focus on character of virtue ethics or resolve its tension with our commitment to liberal autonomy.¹⁸⁹ As I argue below, the inability of Solum's model to adequately address law's tension with liberalism renders it unable to legitimize the role of coercion in law.

VI. PUNISHING CRIMINAL ACTS—KANTIAN AND HEGELIAN SOLUTIONS

I have argued that virtue ethics does a poor job of describing the grounds of criminal liability, a contention with which all but the most extreme of theorists would agree. Setting aside this version of virtue jurisprudence, however, allowed us to notice that there are more subtle ways in which our criminal law regime does premise punishment on notions of vicious character. Unfortunately, the punishment regimes that most intimately tie punishment to virtue have gone awry. These policies interact in ways that create, isolate and banish a "criminal caste." The sense of a criminal caste both blunts our sense of common humanity with the criminal offender and, worst of all, interacts with our worst racial and class stereotypes, allowing criminal law to become a tool of racial management and suppression. Lastly, I have argued that because aretaic theory must be committed primarily to the promotion of human excellence, an aretaic theory can never ultimately be reconciled with our full-blooded liberal commitments. To be fair, on any theory autonomy will be necessary for an ethically rich life but where the commitments conflict, as they surely must, a virtue-centered theory will prize human flourishing above autonomy.

What is needed then is a theory of punishment that embodies robust moral blame but avoids the pitfalls of a character account and is true to our liberal values. It is important that our theory pay heed to each part. A viable theory must include a view of deep moral censure. Though we wish to avoid a theory that results in the perpetuation of a criminal caste,

188. *Id.* at 92.

189. I have also argued that because aretaic theory is insufficiently sensitive to coercion as both inherent in law and a social fact, it lacks the conceptual granularity to isolate the normative system that is law. A model of law that highlights that law is coercive in turn recognizes the importance of limiting justification of coercive interference with one's freedom with the protection of the freedom of others. See Yankah, *supra* note 75, 74–75.

we do not want a theory that fails to distinguish a criminal offender or absolves him from his blameworthiness. A theory of punishment that does not allow us to condemn, in no uncertain terms, violent attacks, murders, rapes and thefts is not a theory worth having.

Secondly, we need a theory that can be fully reconciled with our liberal commitments. There is nothing necessary about this; someone fully committed to an aretaic theory could simply argue that to the extent it is not reconcilable with liberalism, so much the worse for liberalism. However, to the extent that we have deep reasons to be committed to liberalism—some of which of course will be invoked in following arguments—any proposed theory must be liberal in nature. Not surprisingly, these two features are related, for the need for a theory to morally condemn is related to the need to retain respect for autonomy. Where a person has committed a terrible moral wrong, to not be able to condemn his action is to view the person as undeserving of moral censure. It is to deny them moral agency, an important form of autonomy; it is to treat them as a thing. But we are getting ahead of ourselves.

In searching for a legal theory that treats our liberal commitment to autonomy as the basis of law, it is only natural to take Kant as our starting point. Though Kant's moral theories have become well integrated in legal theory, important distinctions in Kant's legal theory have been left unattended. Taking note of these distinctions allows us to see why we have good reason to view law as appropriately capturing our duties to each other rather than concerning, in any deep way, our attainment of virtue. Kant makes clear why we should build a law of duties. Our first task will be to see how Kant's intriguing, if incomplete, suggestions on punishment allow us to address the contentions of aretaic theory in criminal punishment.

Granting that Kantian thinking serves as an important basis, it is Hegel's theory on punishment that serves as the foundation of an attractive liberal theory of punishment. A Hegelian theory of punishment prompts us to focus on the criminal act as the proper locus of punishment. Importantly, Hegelian theory allows us to preserve the moral condemnation of a criminal act without forever relegating the criminal offender to the status of political outsider, banishing the offender to a criminal caste. In doing so, Hegelian theory shows how punishment actually can promote responsibility, respecting the autonomy of the criminal actor and preserving the important commitments of our political morality. Even though Hegel's theory will dominate the criminal theory and Kant's the general theory, the model for both is deeply Kantian. Thus, in examining the specific application of criminal punishment, it is best to start with Kant's ideas.

Well known in Kant's moral theory is the idea that what makes an action moral is the purity of the will with which it is done; actions are

moral when they comport with a moral duty because it is a moral duty.¹⁹⁰ It is striking then that when Kant turned to his legal theory, he did not focus on internal will or intentions. Rather, Kant's focus in the *Rechtslehre* centered on external acts, which restricted the freedom of others.¹⁹¹ Kant argues that the nature and justification of state law is to enforce perfect duties to others, the duties of external performance that interfere with the rights of others.¹⁹² It is the external act of a person that interferes with the freedom of another that justifies State coercion.¹⁹³ For Kant, criminal conduct was not founded in the purity of will that determined the moral worth of one's acts—the *Wille*—but rather was centered on external action—the *Wilkür*.¹⁹⁴ In this way, criminal law belongs to the realm of justice, which differs from Kantian duties of morality.¹⁹⁵

To be sure, Kant's work on punishment is not without difficulty. It is often vague, incomplete or inconsistent.¹⁹⁶ Notwithstanding his centering legal punishment on external acts, Kant also broodingly argues that the law of retribution requires the death sentence in certain cases to punish the criminal in proportion to his inner viciousness.¹⁹⁷ In another place Kant describes a crime as a transgression of public law that makes an offender no longer fit to be called a citizen.¹⁹⁸ These are hardly the ideas with which to combat the illiberality and worries of political banishment of which I accuse aretaic theory. So although the Kantian focus on punishment as justified by external criminal acts is a starting point, the theory must be refined. To fully address these critical problems we look to the important refinements in Hegel's theory of punishment.

Influenced by Kant, Hegel suggests that freedom is the primary right from which other rights must flow.¹⁹⁹ Further, Hegel, echoing the Kantian distinction between the realm of morality and that of law, high-

190. FLETCHER, *supra* note 87, at 208; Mary Gregor, *Introduction* to IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 1, 13–14 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797). As noted before, it is possible to modify Kant's premises to note that what makes an action moral is that it comports with the rational, autonomous will as opposed to that it can never be influenced by desire. See HERMAN, *supra* note 23, at 2–7.

191. FLETCHER, *supra* note 87, at 139; IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797).

192. See KANT, *supra* note 190, at 231; Binder, *supra* note 25, at 353; Murphy, *supra* note 28, at 519.

193. FLETCHER, *supra* note 87, at 201; KANT, *supra* note 191, at 35–36; see Yankah, *supra* note 26, at 1232.

194. KANT, *supra* note 191, at 36–37; see FLETCHER, *supra* note 87, at 198–208.

195. Binder, *supra* note 25, at 355–56.

196. Jeffrie Murphy has come to wonder whether Kant can be properly described as having a full theory of punishment at all. See Murphy, *supra* note 28, at 509.

197. KANT, *supra* note 191, at 102–04; Murphy, *supra* note 25, at 79.

198. KANT, *supra* note 191, at 99–100.

199. See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 58–59 (Allen W. Wood ed. H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821). Hegel's thinking differed from Kant's in interesting ways, importantly decoupling the will from the autonomous rational will that seemed closer to universally understanding duty. Hegel instead notes that the sense of will here is that of the individual, including space for arbitrary (or presumably immoral) wills. Thus, for Hegel, the basis of limiting the will, in this sense, is its interference with external freedom.

lights that it is constitutive of a *legal* right that one could enforce coercively.²⁰⁰ Thus, a criminal act is an act that aims to impose upon, restrict or violate another's freedom. In coercively imposing on another's freedom, the offender does not merely undermine the victim's claim over a specific good but seeks to attack and negate the very existence of another's rights.²⁰¹ The offender's criminal act stands as a negation of the victim's right.

Building on this, Hegel contends that punishment is not simply an evil act visited on the criminal offender to deter future criminal behavior.²⁰² Rather, punishment by the State is called for by the criminal act itself.²⁰³ The act itself invokes and justifies the State's jurisdiction.²⁰⁴ The criminal act has negated the right of another and punishment negates the negation. The punishment declares the offender's attempt to negate the victim's rights invalid and reaffirms that right.²⁰⁵ At the same time, punishment cancels out the offense, rendering it a nullity.

Some may find this Hegelian language unfamiliar and thus off-putting. But beneath Hegel's language are quite familiar and intuitive ideas. A criminal wrong is often viewed as an attack on one's rights. An offender attempts to brush aside our right to bodily integrity or property; the criminal act attempts to "negate" these rights. State punishment publicly denies the criminal offender's attempt to do so. By standing beside the wronged victim, we as a society "negate the negation," that is, deny the offender's ability to attack or undermine the rights of others. When this is done, the offender's action is destroyed. Though we ought not pretend harm can disappear from the world, we understand the idea that a harm can be rendered null. In common parlance, we recognize a former felon's meaning when he says, "I have paid my debt to society." One ought not let the romance of Hegel's language obscure the quite intuitive ideas he reveals.

It is also interesting how Hegel conceptualizes the relationship of the offender to punishment. Punishment, on this model, is embedded in the criminal's act. Thus, punishment responds to the offender's act.²⁰⁶ Punishing the offender respects his rationality and rescues the offender's humanity.²⁰⁷ Thus, Hegel views punishment as the right of the criminal

200. *See id.* at 121–22.

201. *See id.*; Markus Dirk Dubber, *Rediscovering Hegel's Theory of Crime and Punishment*, 92 MICH. L. REV. 1577, 1583 (1994) (reviewing MARK TURNICK, *HEGEL'S POLITICAL PHILOSOPHY: INTERPRETING THE PRACTICE OF LEGAL PUNISHMENT* (1994)); Yankah, *supra* note 6, at 1060–61.

202. HEGEL, *supra* note 199, at 124–25.

203. *Id.* at 115–16, 120, 123.

204. *Id.* at 129.

205. *Id.* at 124.

206. *Id.* at 124–26.

207. *Id.*

offender!²⁰⁸ A right most prisoners surely would be surprised they had and likely a right they would, at first blush, happily surrender. But only at first blush. Hegel's right to punishment is grounded by the criminal offender's human rationality and the claim that one shares basic human rationality is a claim that many guard jealously, even on pain of many years of incarceration.²⁰⁹ This is even more true when one reflects on the role he would assume if he were to surrender his claim to basic human rationality, the role of ward of the State. Thus, the Hegelian model of punishment focuses on acts alone as both the premise and justification for punishment and views punishment as negating the offense and responding to the criminal's autonomous act. With this in mind, let us see how it addresses the weaknesses of the aretaic account.

Earlier it was noted that aretaic theory fundamentally alters our view of the criminal offender, locating blameworthiness in something permanent within him. Focusing on autonomous acts that infringe on the freedom of others has the opposite effect. To focus on acts is to focus on something outside the offender, something that is temporal and can be destroyed. In Hegel's words, to punish the criminal act is to negate the negation, to erase that which invaded the victim's right.²¹⁰ In common parlance, we recognize this when we say that a person has paid for his crime.²¹¹ The criminal must pay for the offense but in so doing is restored.²¹²

It is important to see how this Hegelian model both theoretically and practically undermines the creation of a criminal caste. Locating something permanent and blameworthy in the offender distances the offender from us and blunts our concern for any shared humanity.²¹³ The proposed Kantian and Hegelian model of punishment does the opposite. It focuses on the culpability of the offender's act in his having autonomously acted to violate another person's freedom.²¹⁴ The Hegelian mod-

208. In this sense, it is the criminal who calls for his punishment. Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law*, 24 CARDOZO L. REV. 2481, 2497-98 (2003).

209. This is not to deny that facing enough pressure some people do not resort to claiming temporary insanity. But few would permanently relinquish the claim to their rationality. Perhaps it is this notion Kant held when he proposed that we would lose respect for those who refused their punishment. KANT, *supra* note 191, at 103-04; *see also* FLETCHER, *supra* note 87, at 183-84.

210. HEGEL, *supra* note 199, at 124.

211. Yankah, *supra* note 6, at 1061. George Fletcher has noted that this concept is intriguingly echoed in ancient Jewish thought as well. FLETCHER, *supra* note 87, at 124, 131.

212. Yankah, *supra* note 6, at 1061.

213. Dubber, *supra* note 201, at 1588; *see also* Pillsbury, *supra* note 81, at 485.

214. It is important to note here that the locus of punishment is the criminal actor's autonomous decision. In prior work, I too quickly collapsed this "act" theory with a "choice" theory. *See* Yankah, *supra* note 6, at 1054-57. Because these will often overlap, for many of our autonomous choices are chosen, I do not think the space between the two is large. The gap is further closed because this theory focuses on autonomous action. But this will not always be the case for there are some acts one does autonomously that are hard to describe as chosen. Finkelstein, *supra* note 19, at 321-23. Some acts are committed in a split second or without anything like the deliberation we often associate with choice. Nonetheless, I think on the best reading of choices, to the extent the person could have acted

el views the offender's choices as based in his human rationality, in need of condemnation but worthy of respect.²¹⁵

A moment is needed to unpack the idea that the criminal offender's choices are worthy of respect. When someone violates another's freedom, she wrongs another. A criminal offender may kill a loved one, steal something precious, rape or maim. These wrongs violate both our political and moral rights. There is a sense in which it is absurd to say we could respect *those* decisions. Any theory that does not allow us to recognize these acts as wrong, as violations of our rights to be condemned, is not a theory worth having.²¹⁶ Our theory must allow us to see the differences between those who respect the rights of others and criminal offenders who attack those rights. But it must do so in a way that does not sever permanently the offender from the community or deny his humanity.

It is just this balance that the Hegelian model proposes. The Hegelian model does not weaken our ability to condemn the condemnable criminal acts an offender commits; indeed, it requires that he be punished to erase his claim of superiority and reaffirm the victim's rights.²¹⁷ Rather, this model of punishment locates the offender's punishment in his rational nature itself. That is, it is not the criminal decisions that deserve respect but the offender's human rationality, his very moral agency, which requires respect.²¹⁸ It is this common and shared rationality that requires us to punish the offender's act as the act of a person, not simply a morally disgusting creature gone wrong or the product of a social disease.²¹⁹ Nor does it treat him as having insufficient capacities of reason, a child open to moral instruction.²²⁰ Some critics will claim that this is circular; that retributivists claim that responsible agents must be punished and thus, to fail to punish is to fail to recognize the criminal as a responsible agent.²²¹ This critique deserves more attention than can be afforded but it does miss that our views of responsibility and agency are contextual; we do not discover them in isolation when we turn to criminal law.

otherwise, we can still consider these chosen acts. See MOORE, *supra* note 29, at 552–62. More subtly, there are some acts that we think of as deeply expressive of our autonomy that we still would not think of as choices. It is easy to see that if one said to his new bride, “After giving it a lot of thought, weighing the pluses and minuses, I choose to love you,” the bride may well find this insulting. We can perfectly understand the sense in which one can say, “I did not choose to love her; I just fell in love with her,” without imagining that this undermines the autonomous nature of the act. I am grateful to a conversation with Moshe Halbertal for leading me down this line of thinking.

215. Dubber, *supra* note 134, at 118–19. The classic piece in American jurisprudence is Herbert Morris, *Persons and Punishment*, in PHILOSOPHY OF PUNISHMENT 67 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).

216. Dubber, *supra* note 134, at 118–19.

217. HEGEL, *supra* note 199, at 124.

218. Dubber, *supra* note 134, at 118–19; Morris, *supra* note 215, at 71–73, 75–77.

219. Dubber, *supra* note 201, at 1583.

220. Dubber, *supra* note 134, at 127, 137, 140.

221. Alice Ristroph presses this line of attack in her excellent article. See Alice Ristroph, *Respect and Resistance in Punishment*, 97 CAL. L. REV. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1071048.

As argued previously, a criminal offender would be loathe to give up the claim that she could be a responsible agent in other parts of her life—to surrender to being a ward of the State. Because she would not deny her basic responsibility elsewhere, we rightfully insist, absent special circumstances, that she is responsible for her criminal acts.

Where crime is not seen as a product of a responsible and rational agent, it becomes more naturally viewed as social deviance and punishment, as a sort of benefit to fix the offender's broken character.²²² It is shared rationality that ultimately also binds the offender, the victim, and society.²²³ It is this rationality that allows and requires us to reincorporate the offender into society once he pays his debt. It is in this sense that punishment respects the offender.

Markus Dubber, whose work has deeply explored the model of Hegelian punishment, has argued that crime represents the most dramatic of alienation from society.²²⁴ Increasingly, this is certainly the case with punishment. Our criminal law system focuses its attention, both in investigation and in punishment, on a sizable minority of the population; one that is bounded, to a remarkable extent, by race and class. Disproportionately Black, Hispanic or poor, much of the rest of society has difficulty seeing itself in the criminal offender.²²⁵ In a society defined by such a divide, increasingly the answer is to lock "them" up and throw away the key. Endlessly increasing the scope of criminalized offenses, disenfranchising ex-offenders and imposing collateral sanctions has done nothing to stem the high recidivism rates that ensure a revolving prison door and a solidified criminal caste.²²⁶

Focusing on the offender's rationality undermines the establishment of a criminal caste. Simply put, when we realize that criminal offenders are responsible persons, persons who must pay for their actions but persons nevertheless, we are reminded of our shared humanity.²²⁷ It is to recognize not only the duty of the offender to be punished and pay for his crime but also the reciprocal duty of the body politic to reincorporate the offender into society. It is to realize that there is something we all share, offender and society, something substantial and worth saving, even in those who have wronged us.

If recognizing the rationality we share with criminal offenders is a substantial step in bridging the alienation of our current criminal punishment practices, centering punishment on autonomous acts that vi-

222. Dubber, *supra* note 134, at 137–38.

223. *Id.* at 118; Dubber, *supra* note 201, at 1580–83, 1588.

224. Dubber, *supra* note 201, at 1601–02.

225. Dubber, *supra* note 134, at 144–45; Pillsbury, *supra* note 81, at 499.

226. See Husak, *supra* note 25, at 768; U.S. Dep't of Justice, Office of Justice Programs Bureau of Justice Statistics, Reentry Trends in the U.S., <http://www.ojp.gov/bjs/reentry/recidivism.htm> (last visited June 10, 2009).

227. See Dubber, *supra* note 201, at 1581; Yankah, *supra* note 6, at 1060–62.

olate another's freedom secures our liberal values.²²⁸ Focusing on autonomous acts is to be committed to a political theory that views the State's legitimate jurisdiction in legal punishment as restricted to the criminal act that imposes on another's freedom.²²⁹

Notice that focusing on acts elegantly resolves the uneasiness in searching for the proper limitations of the state's inquiry into our character. By contrast, character theorists must go through awkward convulsions to explain why, if character is at the center of punishment, the State should not be permitted to inquire into one's virtue directly. For example, Fletcher, in his earlier position, struggled to find a way to limit the State's ability to inquire into the quality of one's character on pain of his theory surrendering its liberalism entirely.²³⁰ Recognizing this, Fletcher proposed that although punishment was premised on character, an independent right of privacy served as a side constraint on the State's inquiring into one's character where there was no criminal act.²³¹ But surely this is unconvincing; evidence of vicious character may be revealed in ways that do not implicate privacy at all.²³² If one openly manifested a character flaw or we had some perfect way of easily determining this, we still would resist the idea that poor character was sufficient for punishment. Thus, Fletcher subsequently has repudiated this position, recognizing that privacy could not account for the political commitment that the protection of our rights justifies and constrains the State's jurisdiction.²³³

The same tension in Fletcher's prior position will, I fear, follow with any rich aretaic theory. Perhaps this could be avoided if the premise of punishment is restricted to the thinnest description of a failure of Aristotle's practical reasoning. If practical reasoning could be collapsed simply to the mental process that results in a violation of another's freedom, perhaps this strategy would work. But I have argued that no description this thin could be recognizably aretaic, for even a thin description of practical reason includes one's deliberation on ends.

The Kantian-Hegelian model, and its focus on acts as the premise of State action, takes heed of our liberal commitment by preserving the separation of punishment as a political and not a moral theory. It does so

228. For a sophisticated structure of the nature of actions, see MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (1993); MOORE, *supra* note 29, at 249–331.

229. See HEGEL, *supra* note 199, at 120–22; LACEY, *supra* note 94, at 104; MOORE, *supra* note 29, at 578; Michael S. Moore, *Patrolling the Borders of Consequentialist Justifications: The Scope of Agent-Relative Restrictions*, 27 *L. & PHIL.* 35, 94 (2007); Yankah, *supra* note 6, at 1054.

230. FLETCHER, *supra* note 19, at 800–01. Fletcher was torn between two poles. His deep commitment to liberalism led him to propose that punishment was imposed for the act in abstraction of the actor. Yet, wishing to find a place for the character of the actor, Fletcher focused on how certain characteristics played a role in assessing the *responsibility* of the actor. See George P. Fletcher, *What Is Punishment Imposed For?*, 5 *J. CONTEMP. LEGAL ISSUES* 101, 105–11 (1994).

231. FLETCHER, *supra* note 19, at 800–01.

232. See Yankah, *supra* note 6, at 1041–52.

233. See FLETCHER, *supra* note 87, at 5.

by addressing the first question that any political theory must address; it is a theory aimed at justifying the State's coercive power. In doing so the Hegelian theory elegantly matches our intuitive understandings of the distinction between political morality and the demands of our ethical lives.

I have argued elsewhere that law is inherently coercive.²³⁴ This is because the law reserves the right to restrict a person's behavior by placing him under pressure that cannot be reasonably resisted. It is important to realize that the law can impose this on a person, regardless of how one morally regards the law.

Notice the difference between coercive pressure in this sense and (coercive?) pressure in other realms. We may find the dictates of our church irresistible because we feel our place in the church is too valuable to surrender. Likewise, one's spouse may put her foot down, leaving a person little choice but of course he has to value for himself his relationship with his spouse.²³⁵ The reasons the law gives for compliance at least seem different. They are the type of reasons that impose themselves regardless of whether one internally values them.²³⁶ The State can take away one's resources. One can be imprisoned by being hauled away bodily. The State's application of the power to execute does not turn solely on one's normative stance.

In contrast, while a healthy respect for another's freedom is part of every friendship, it does not seem to me that a friend's primary duty is to respect her friend's autonomy. One may badger her friend into being a better person and perhaps one is morally permitted to force a loved one to wrestle with her demons or change her corrupt ideas of a good life.²³⁷ The State's coercive power changes the very nature of the reasons that may justify law.²³⁸ It can be no argument against one's autonomously chosen acts that forcing one to do otherwise is for her own good. This is simply to deny the claim of autonomy altogether. Pointing out, however, that one's exercise of freedom interferes with another's is to engage the claim of autonomy in a way that potentially can justify coercion. Thus, a model of law that notices that law is coercive leads to law that can be justified only by protecting Kantian duties of external freedom as opposed to aretaic duties of human flourishing.

Placing this much weight on autonomy may lead one to question its importance. If the value of autonomy is not (only) to attain human flourishing, then what good is it? Given the amount that has been written on the subject, it would be foolhardy of me to pretend to offer anything new.

234. Yankah, *supra* note 26, at 1198.

235. See JEREMY WALDRON, *A Right to Do Wrong*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 75 (1993); Yankah, *supra* note 26, at 1231–32.

236. See JOHN RAWLS, *A THEORY OF JUSTICE* 340–43 (1971).

237. The attempt to actually force them to do so, however, may violate one's superseding political-legal duties. See FLETCHER, *supra* note 87, at 159.

238. See FLETCHER, *supra* note 87, at 152–54; Yankah, *supra* note 26, at 1214–32.

For Kant, the preservation of autonomy was the only reason a rational person would recognize the right of others to coerce her.²³⁹ For others, autonomy is a first principle for which it is impossible to give supporting reasons. The earlier paragraphs noticed that restricting autonomy only when it clashes with that of another may be one way the State commits to respecting citizens equally.²⁴⁰

Let me offer one more facet in what is surely a complex matrix of reasons. Without the ability to ascribe to ourselves the choices we act upon, we cannot ascribe to ourselves responsibility as agents.²⁴¹ It is that moral agent, that person who stands in front of the State and demands equal respect and consideration for her choices. It is that person and not another person that she *could* be to whom the State owes its duties.²⁴²

The claim here is that the State's use of legal coercion to interfere with one's autonomy, even in the name of what is morally good, is tied up with and does violence to one's ability to act as a moral agent. This is a complex claim, in need of more explication. Proponents of aretaic theories of law may argue that the appropriate relationship to a well-functioning character is also a necessary condition for moral agency.²⁴³ A full exploration of competing theories of moral agency and the interaction with political rights must wait for another day but it seems to me it is on this question that competing political theories will ultimately turn.

So finally, we arrive at the conclusion we were hunting all along: the ultimate grounding of our liberalism that an act-theory captures. A liberal state's laws generally, and punishment in particular, are premised on and justified by the enforcement of each person's political duty not to invade the freedom of others. Given the inherently coercive structure of law, State law must be a law of duty. The development of our virtue, the pursuit of human traits of excellence around which we organize our lives is not merely important, it may be our highest goal. But these are matters for us in our ethical lives, expressed in personal relationships, communities and our duties to ourselves and, for many of us, God. It is not only appropriate but also important that we apply our aretaic judgments in our personal lives. Where someone dutifully visits his sick mother but is concerned only for his inheritance, we rightfully find him unattractive. And where sheer luck prevents the attempted murderer from violating another's freedom to the extent of the successful murderer, we may think

239. KANT, *supra* note 191, at 35–39.

240. See Yankah, *supra* note 6, at 1054.

241. Though we may still imagine that we retain moral worth in other, perhaps aesthetic, senses. See THOMAS NAGEL, MORTAL QUESTIONS 24–38 (1991).

242. See William Nelson, *Liberal Theories and Their Critics*, in THE BLACKWELL GUIDE TO SOCIAL AND POLITICAL PHILOSOPHY 197, 212 (Robert L. Simon ed., 2002); JEREMY WALDRON, *Theoretical Foundations of Liberalism*, *supra* note 235, at 62; Yankah, *supra* note 75, at 73–75.

243. Indeed, Tadros's reason that punishment must be grounded in character is that without the right attribution to character, the criminal actor is not blameworthy as a moral agent. TADROS, *supra* note 32, at 27–38, 49–51.

his evil is equal to that of the successful murderer.²⁴⁴ In contrast to our personal relationships, virtue's domain is not that of law or of the State.²⁴⁵ The domain of the State belongs to duty.

VII. CONCLUSION

Aretaic theories supply us with a richer picture of what it means to meet our moral demands. However important our moral duties are to one another, obligations are only a part of our ethical lives. Some will be tempted to redescribe all our ethical aims in such terms, constructing infinite numbers of duties to self, duties of friendship, duties of charity and so on. I am doubtful that such a project could be completely successful and in any case wonder why we should be compelled to adopt such a cramped view of the world. It is better to realize that human beings aspire to more than to fulfill even their most stringent moral duties; human beings and human societies rightfully aim at full and flourishing lives.

Nonetheless, when we pursue virtue through the use of the law, much goes wrong. Virtue jurisprudence is a newly developing field, with its leading advocates evolving and new scholars joining their ranks. Perhaps as the field develops, answers will be found to these challenges that preserve a robust virtue jurisprudence but I fear the challenges are significant. When we integrate our conceptions of virtue with criminal punishment, we begin to imbue our legal punishments with our moral view of virtuous and wicked people. We erect an image of criminal offenders who are permanently tainted and condemned to an internal banishment. We deny those we have judged disgusting the ability to reenter the body politic. With our hearts hardened, we fail to notice that our criminal caste, locked up and warehoused, is not coincidentally poor, Black and Brown. We give in to the temptation to seek ultimate justice through the law, to weigh the very hearts of men.

Just as disturbingly, we fail to notice that a law dedicated to instilling virtue brushes aside our deepest liberal commitments. The power of the law is an awesome one; a power that is in need of constant vigilance and justification. This is not simply based on the classic liberal conception of a pluralism of the good, though it does importantly protect that commitment as well. Rather, as we allow the law to be guided by concepts of ethical flourishing, we deny to others their choice in building an authentic life of their own devising. Because law coercively curtails the autonomy of others, it is best justified not by noting that people chose incorrectly but by showing how our interdependence entails restrictions to allow all maximum freedom.

It is worth taking a moment to briefly sketch the implications of such a renewed and grounded conception of liberalism. Particularly, we

244. MOORE, *supra* note 29, at 191–245; Moore, *supra* note 229, at 65–68.

245. See FLETCHER, *supra* note 87, at 234–35, 238; Yankah, *supra* note 75, at 75.

can explore where this view of a law based on duty will lead us to change our current legal practices, where it will insist we cannot alter others and where it will have nothing to say at all. The most obvious place a duty-based law will have impact is in our criminal punishment regime, particularly in offenses based on harms to oneself. The use of criminal penalties to prohibit prostitution, drug use, gambling and suicide are rightfully controversial on just these grounds. If the law is justified only when limited to our duties to each other, we will need to reexamine our justifications for the prohibitions surrounding these practices.

That is not, I hasten to add, to say that we may not be justified in prohibiting these practices. If the autonomy that is the basis for my claim of autonomy is crippled by the use of certain drugs, then perhaps drug use is properly criminalized. Perhaps we note that consenting adults ought legally be justified in trading money for sex but prostitution may be too rife with violence, coercion and the tragedy of human trafficking that we cannot permit it. After all, philosophy does not get us all the way down and our philosophical commitments must interact with facts on the ground. Still, philosophical commitments are not without importance, for they may guide our aim. If so, then surely that other countries have experimented with legalized sex industries deserves our attention. More subtly, noting that our law is based on the preservation of autonomous choice must surely have implications not just for what we punish but how we punish. Seen in this light, our current regime of warehousing criminals—crushing prisons bursting at the seams and utter disregard for reintegration into society—is an unjustifiable use of legal punishment, as well as obviously a pragmatic failure.

Here we have explored the conception of a duty-based law in criminal punishment. Now it is time to confess the true (if unwise) ambitions of the project. It takes little to see that once a robust conception of a law based on duty is grounded, criminal punishment is but one field in which the law is properly restrained. It is unclear if and how a virtue jurisprudence may one day develop into a virtue theory of legislature. Similarly, there are guideposts reminding us of a liberal theory that aims to guide our legislative practices and shape a complete theory of legitimate law. This, of course, is the heart of a reinvigorated liberal theory. Its implications for current liberal theory and its tensions with perfectionism will command future attention.

Lastly, I think it is only fair to admit that not all is happy with the picture of a law based on duty. I confess that there is much to be unhappy about. A world in which sex could be commoditized is, in my view, a deeply troubling one, to note just one example. It is surely hard to imagine that prostitution is anything but a poor life. But if troubling, this is no reason to abandon the liberal project. This picture of a duty-based law is a political theory, one that responds to the demands of our political lives, namely how we can justify the coercive normative system that is the

law. Happily, law plays only one role in our lives and for many of us, a rather contained role. Our lives are embedded in a much richer landscape than that defined by the law. We are friends and family. We are colleagues and volunteers. We aim to improve our work, commit ourselves to hobbies, eat, drink and share our time and resources with others. We have civic responsibilities and we are engaged in our churches. It is here we must seek to integrate the lessons of virtue ethics; it is here we strive to achieve and push others to lead lives of human excellence. If law is to remain duty based, we may remain glad that the domain of virtue remains ample.