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The Moral Good Theory of Punishment

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THE MORAL GOOD THEORY OF PUNISHMENT

*Robert Justin Lipkin**

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I. INTRODUCTION

Generations of legal philosophers have divided theories of punishment into two categories.¹ Theories of the first type explain and justify punishment by appealing to the socially desirable consequences² of

1. G. FLETCHER, *RETHINKING CRIMINAL LAW* 414-15 (1978). Within the consequentialist and non-consequentialist categories, further distinctions may be drawn. One court described the various principles of punishment as the

[r]ehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.

State v. Chaney, 477 P.2d 441, 444 (Alaska 1970); *Pears v. State*, 698 P.2d 1198, 1203-05 (Alaska 1985) (applying the *Chaney* criteria). See also *In re Parole Application Trantino*, 446 A.2d 104, 116-17 (N.J. 1982) (stating that different aspects of punishment include retribution, rehabilitation, and deterrence).

2. Theories of the first type are consequentialist theories, such as utilitarianism. A consequentialist theory holds that a theory of the right is determined by a theory of the good. Specifically, consequentialist theories maintain that an act is right if it brings about more good than an alternative course of conduct. A. QUINTON, *UTILITARIAN ETHICS* 1 (1973). See also A. DONAGAN, *THE THEORY OF MORALITY* 189 (1977) (describing consequentialist theories as deriving from the principle that an act is right if and only if its consequences are preferable to any available alternative action).

punishing wrongdoers.³ Theories of the second type explain and justify punishment, not in terms of its consequences,⁴ but rather because justice demands punishing the guilty.⁵ An intriguing possibility now exists of a new⁶ type of theory, promising to transform the way we think about punishment. This new type of theory is the moral good theory of punishment.⁷ The moral good theory of punishment is intriguing because it promises to explain and justify punishment by showing how punishment restores the moral identity of the offender. Rather than focusing on socially desirable benefits or abstract notions of justice, the moral good theory grounds punishment in something fundamental to the offender: his identity as an autonomous, rational, moral agent. This article's central concern is whether, and in what way, this new theory contributes to our systematic understanding of punishment.

Currently, there are three versions of the moral good theory of punishment:⁸ the moral education theory,⁹ the "penance theory,"¹⁰ and

3. Deterrent theories and rehabilitation theories are two types of consequentialist theories of punishment. See THEORIES OF PUNISHMENT 117-226, 229-330 (S. Grupp ed. 1971); see also *United States v. Bergman*, 416 F. Supp. 496, 498-500 (1976) (endorsing a general deterrent theory of punishment); *People v. Sargeant*, 60 Cr. App. Rep. 74 (1974) (arguing that retribution, deterrence, prevention, and rehabilitation should be the principles used in sentencing).

4. Non-consequentialist theories look to some intrinsic feature of the act in order to determine if it is right. C. FRIED, *AN ANATOMY OF VALUES* 125-32 (1970); P. TAYLOR, *PRINCIPLES OF ETHICS: AN INTRODUCTION* 83 (1975) (characterizing deontological theories as rendering an action of a certain kind as right if it conforms to a moral rule).

5. See THEORIES OF PUNISHMENT, *supra* note 3, at 13-14. Alternatively, non-consequentialist theories of punishment often hold that punishment is just because the offender *deserves* to be punished. See also Von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 23-24 (1983) (describing a desert, or proportional, system of sentencing).

6. This "new" type of theory has ancient beginnings. Plato's conception of punishment has features resembling the moral good theory. See PLATO, *THE GORGIAS* 103 (1980) (claiming punishment makes a person better); PROTAGORAS 16-20 (C. Taylor trans. 1976) (contending that punishment instills a sense of excellence in the wrongdoer); *THE LAWS* 245, 278 (T. Pangle trans. 1980) (arguing that punishment makes the offender a better person and teaches the offender to never commit the crime again). See also M. MACKENZIE, *PLATO ON PUNISHMENT* 204 (1981) (arguing that in Plato's theory of punishment, the punishment's objective "is to make the criminal virtuous, for his own benefit"). Inchoate versions of the moral good theory are also found in works of other philosophers. Some theorists believe that the moral good theory is found also in Hegel. Cf. McTaggart, *Hegel's Theory of Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 40, 41 (G. Ezorsky ed. 1977) [hereinafter PUNISHMENT].

7. "The moral good theory of punishment" is shorthand for "the moral good of the offender theory of punishment." A theory of punishment is a moral good theory of punishment when its principal aim is the offender's moral restoration.

8. This is not to suggest that these three versions are exhaustive. Some believe that Nozick's theory of punishment is a type of moral good theory, but see *infra* note 147.

9. Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984).

the paternalistic theory.¹¹ This article critically examines the paternalistic formulation of the moral good theory, to determine what role, if any, the theory has in explaining and justifying punishment.¹² Additionally, the article introduces a voluntaristic alternative¹³ to the paternalistic conception and defends¹⁴ it against some serious objections. The article concludes the evaluation of the moral good theory by examining one important type of objection to ideal moral theories generally.¹⁵

II. PUNISHMENT AND AUTONOMY IN LEGAL THEORY

A. *The Problem of Punishment*

The problem of punishment concerns the appropriate explanation¹⁶

10. The "penance theory" of punishment is my characterization of R. Duff's "Kantian" theory of punishment presented. R. DUFF, *TRIALS AND PUNISHMENTS* (1986). Duff's theory is "Kantian" because it is based on a moral theory using rationality and autonomy as the foundation of ethics. Duff's theory is "Kantian," but not purely Kantian, because Kant himself endorsed a retributive theory of punishment. Consider Kant's words:

Even if a civil society were to dissolve itself by common agreement of all its members [. . .], the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.

I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102 (J. Ladd trans. 1965); cf. Atkinson, *Justified and Deserved Punishments*, 78 *MIND* 354 (1969) (arguing that this last act of the hypothetical state would not be justified). Kant's theory of punishment is both formally and substantively retributive. It is substantively retributive because guilt is both a necessary and a sufficient condition for punishment. J. MURPHY, *KANT: THE PHILOSOPHY OF RIGHT* 141 (1970); but see Scheid, *Kant's Retributivism*, 93 *ETHICS* 262 (1983) (arguing that Kant's theory of punishment is only *partially* retributivist).

11. Morris, *A Paternalistic Theory of Punishment*, 18 *AM. PHIL. Q.* 263 (1981).

12. Both the moral education theory and the penance theory are paternalistic theories of punishment. Consequently, if my argument here succeeds against the paternalistic theory, it succeeds against the moral education and penance theories as well.

13. See *infra* notes 119-37 and accompanying text.

14. See *infra* notes 160-209 and accompanying text.

15. See *infra* note 211 and accompanying text.

16. Providing a systematic explanation of punishment first entails providing an analysis or definition of "punishment." For example, Hart gives the following definition of "punishment"

- (1) [Punishment] must involve pain or other consequences normally considered unpleasant.
- (2) It must be for an offence against legal rules.
- (3) It must be of an actual or supposed offender for his offence.
- (4) It must be intentionally administered by human beings other than the offender.
- (5) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

and justification¹⁷ of the legal institution of punishing wrongdoers.¹⁸

H. HART, *Prolegomenon to the Principles of Punishment*, PUNISHMENT AND RESPONSIBILITY 4-5 (1968).

Note that in Hart's definition, the voluntarist conception of punishment is not a conception of *punishment*. See *infra* notes 119-37 and accompanying text. I do not believe that such definitional ploys are useful. Hence, I would not define punishment in this way. If, however, one insists on this definition of punishment, then the voluntarist conception of "punishment," for me, becomes the voluntarist counterpart to the practice of punishment in a society taking autonomy seriously.

A theory of punishment explains the meaning of "punishment" by developing a systematic linguistic account capable of identifying actual instances of punishment. This is not merely a dictionary definition of the word "punishment," rather it is itself a descriptive theory of what practices count as punishment.

A definition of punishment may be very general. For example, one writer defines "criminal punishment" in the following way: "Criminal punishment means simply any particular disposition or the range of permissible dispositions that the law authorizes . . . in cases of persons who have been judged through the distinctive process of the criminal law to be guilty of crimes." H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35 (1968).

Notice this definition does not necessarily entail coercion. If wrongdoing is a necessary condition of punishment, we begin to analyze the meaning of "punishment" by indicating that it is a response to wrongdoing. Incidentally, legally state imposed punishment as a penalty is a recent phenomenon.

17. The justification of punishment as a legal institution rests on certain presuppositions concerning criminal responsibility. In order for someone to be a candidate for punishment, he must be blameworthy. In turn, blameworthiness requires responsibility for one's own conduct. Finally, responsibility requires free will. See J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 296 (2d ed. 1947) (distinguishing three types of responsibility: competence, causality, and accountability).

The controversy over free will is one of the important philosophical problems underlying criminal law. Generally, the problem is set up by asserting that causal determinism entails that events (effects) invariably occur whenever other events (causes) occur. If an action is caused, then it occurs invariably; hence, one is not free to decide whether to perform that action (determinism). Indeterminists accept the premise that causality precludes freedom, but insist that actions are not caused. Compatibilists attempt to reconcile these two positions by pointing out that actions may be caused, yet remain free. In the compatibilist view, it all depends on the cause. If the cause is a *reason*, a combination of a belief and a desire, then the person's action can be caused, but is nonetheless free because it is caused by the reason for action.

For a discussion of this problem, see A. FLEW, *CRIME OR DISEASE* 109-15 (1973) (arguing a compatibilist view concerning action in general and criminal responsibility in particular); A. KENNY, *WILL, FREEDOM AND POWER* 157 (1975) (arguing that the incompatibility of determinism and freedom has not been proven). For a general overview, see the collection in *FREEWILL AND DETERMINISM* (B. Berofsky ed. 1966). For a classical statement of the thesis that reasons can be causes, see Davidson, *Actions, Reasons, and Cause*, 60 J. PHIL. 685 (1963); see also Brandt, *Determinism and the Justifiability of Moral Blame* in *DETERMINISM AND FREEDOM: THE AGE OF MODERN SCIENCE* 149 (S. Hook ed. 1961); Cohen, *Distinctions Among Blame Concepts*, 38 PHIL. PHENOM. RES. 149 (1977); Gallagher, *Utilitarian Blame: Retrospect and Prospects*, 12 J. VALUE INQ. 13 (1978); Smart, *Free-will, Praise and Blame*, 70 MIND. 291 (1961).

This is a theoretical matter, but ultimately society must confront the present intractable practical troubles facing the American Penal System.¹⁹ This article attempts to evaluate an interesting theoretical an-

That free will is a moral condition of criminal responsibility is considered a truism in Anglo-American jurisprudence. See G. GORDON, *THE CRIMINAL LAW OF SCOTLAND* 54-55 (1978) (indicating that retributive theories make free will a condition of culpability). It would be unfair to punish those who are not free to choose not to engage in wrongdoing. Fairness aside, if deterrence is a goal of punishment, it would be pointless to punish someone who could not have acted otherwise.

18. The general question of justifying punishment involves two elements. First, what forms of punishment actually exist in contemporary society. And second, what forms of punishment ought to exist. Lacey, *Dangerous and Criminal Justice: The Justification of Preventive Detention*, 36 *CURRENT LEGAL PROBS.* 32 (1983).

Once we have an adequate definition of punishment, we may then inquire whether punishment is justified. Many possibilities exist. First, our conception of punishment might apply perfectly to existing practices of punishment and be justified according to some shared moral perspective. At the other extreme, our conception of punishment might no longer apply to any of the practices called "punishment," or such practices may not be justified.

We justify a conception or practice of punishment by showing that its defining principles are required or encouraged by some shared moral perspective.

19. This is a worldwide problem. Generally, "[t]he success of present prison systems according to all the data accumulated is highly questionable, and prisons are no more successful by almost any set of criteria than they were twenty or fifty years ago." C. DODGE, *A WORLD WITHOUT PRISONS* 238 (1979).

The prison population in the United States has reached a record 528,945 inmates, a rise of more than 5% in the first half of 1986. *U.S. Prison Population Swells to Record High*, N.Y. Times, Sept. 16, 1986, at A21, col. 2. Overcrowding inmates causes innumerable problems, including assaults on prisoners. From 1979 to 1984, living space has dropped 11% in state prisons. *The Nation*, L.A. Times, Dec. 15, 1986; pt. 1 at 2, col. 1. See R. GOLDFARB, *JAILS* 268-414 (1975) (describing the dreadful conditions in American jails).

Further, the cost of incarcerating prisoners is staggering. It costs \$30,000 per year to maintain a cell and \$70,000 to \$100,000 to build a single new maximum-security cell. S. BOWLES, D. GORDON, & T. WEISSKOPF, *BEYOND THE WASTE LAND* 371 (1983) [hereinafter *WASTE LAND*]. The prohibitive cost of conventional prison facilities has prompted some cities to create innovative alternatives. *Ferryboat Jail to Open in '87*, N.Y. Times, Oct. 28, 1986, at B17, col. 5. A bed on the retired ferries will cost \$30,000. Some jurisdictions have experimented with private, profit making penal facilities. For a discussion of some of the problems associated with the private prison management trend, see Woolley, *Prisons for Profit: Policy Considerations for Government Officials*, 90 *DICK. L. REV.* 307 (1985).

Overcrowding became so severe in Tennessee's prisons that a federal district judge recently ordered them closed. Additionally, when prisons are mere warehouses for criminal offenders and prison conditions are too inhumane, escaping from prison becomes more than a prisoner's unwillingness to serve time. Rather, escape might be a reasonable choice in dealing with a deplorable situation. The question then arises whether such prison breaks are excusable. Some courts have responded to the contention that certain kinds of prison conditions warrant escape. *People v. Lovercamp*, 43 Cal. App. 823, 118 Cal. Rptr. 110 (Cal. Ct. App. 1974). The question is whether intolerable prison conditions should function as a defense to prison breaks, and if so, what is the nature of this defense. See, e.g., Gardner, *The Defense of Necessity and the*

swer to the problem of punishment:²⁰ that punishment is justified when it restores the moral identity of the offender. But this answer is not self-contained. In assessing this explanation and justification of punishment one must discuss the purpose of law,²¹ the nature of morality,²²

Right to Escape from Prison — A Step Towards Incarceration Free from Sexual Assault, 49 S. CAL. L. REV. 110 (1975) (examining whether a right to escape from prison exists to avoid sexual assaults); compare Comment, *Intolerable Conditions as a Defense to Prison Escapes*, 26 UCLA L. REV. 1126 (1979) (arguing that intolerable conditions constitute a necessity for which the prisoner is justified in escaping) with Fletcher, *Commentary, Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355 (1979) (arguing against the view that such conditions justify escape).

Dreadful prison conditions strongly suggest that prisoners' rights are being violated. For a framework discussing prisoner's rights, see Bedau, *How to Argue About Prisoners' Rights: Some Simple Ways*, 33 RUTGERS L. REV. 687 (1981).

20. Generally, the problem of punishment is a challenge to morally justify punishment. This problem exists because coercing and inflicting pain requires justification. Wasserstrom, *Some Problems in the Definition and Justification of Punishment*, in VALUES AND MORALS 229 (A. Goldman & J. Kim eds. 1978). Therefore, any relatively complete moral theory must deal with the problem of justifying punishment. We need to justify punishment for yet another reason. Besides coercing offenders, the institution of punishment also coerces non-offenders. Consider Honderich's words:

The problem of punishment arises mainly, but not only, for the reason that the practice involves what traditionally has been called suffering. It involves a deliberate and avoidable infliction of suffering [P]enalties now imposed on offenders . . . do raise a question of moral justification The moral question arises . . . with respect to any system of punishment, as a consequence of a different fact: that others, than those punished, are coerced by it [T]he moral problem arises because the whole quality of life in a society, the quality of its public and private institutions and relationships, is influenced by the existence of a central practice of an authoritarian and repressive nature.

T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 11-12 (1984).

21. Traditionally, the law's salient aim is to regulate the conduct of private, independent, autonomous, and self-interested agents. On this conception of the state, law's primary aim is to protect people. According to this classical conception, the state should be a minimal state. T. HOBBS, LEVIATHAN 129 (M. Oakeshott ed. 1982) (describing protection as one of the basic motives for entering political society). See R. NOZICK, ANARCHY, STATE AND UTOPIA (1974) (arguing for a minimal state); see also READING NOZICK (J. Paul ed. 1981); Levin, *A Hobbesian Minimal State*, 11 PHIL. & PUB. AFF. 338, 339-41 (1982).

Primary among the regulatory rules is the harm principle: a person is free to act in any manner as long as it does not harm anyone else. In this view, the state has the right and duty to prevent people from harming others. J. MILL, ON LIBERTY 13 (C. Shields ed. 1956) (arguing "[t]hat the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). See J. FISHKIN, TYRANNY AND LEGITIMACY 123 (1979) (discussing the relationship between harm and interference with liberty). A corollary of this view is that the state has the right to punish an individual who violates the harm principle. See also J. FEINBERG, HARM TO OTHERS (1984). Harming another person triggers the operation of law.

The harm principle is designed to restrict the law's reach. But what is harm? Surely one is harmed by a physical assault. But what if bad things are said or offensive conduct performed? What about injurious acts of which the victim is unaware? What about one doing things in private that affect the victim only indirectly? For a classical statement of the limitations on Mill's harm principle, see J. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 145 (R. White ed. 1967) ("Men are so closely connected together that it is quite impossible to say how far the influence of acts apparently of the most personal character may extend"). One can grant Stephen's point, yet still insist on the important moral benefit in restricting the law's reach to those acts which directly and significantly injure someone else. Of course, the vagueness associated with "directly" and "significantly" render the view unverifiable. *But see* C. FRIED, *RIGHT AND WRONG* 39 (1978) (arguing that directness is required to make practicable the proscription against doing harm).

This debate has spawned a perennial controversy over the role of law in enforcing morality. Recently, Hart has taken up the gauntlet by defending a Millian position against Lord Devlin defending Stephen. *See* P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H. HART, *LAW, LIBERTY AND MORALITY* (1963); D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977); J. SMITH, *LEGAL OBLIGATION* 131-49 (1976); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986 (1966); Hart, *Social Solidarity and the Enforcement of Morality*, 35 *U. CHI. L. REV.* 1 (1967).

22. Social and legal institutions are grounded in ethics. Ethics is that form of practical reasoning concerned with our values, rights, and obligations. For the purposes of this article, an ethical or moral theory is a general, systematic account of the relationship between the right and the good. R. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* (1979); W. ROSS, *FOUNDATIONS OF ETHICS* (1939), *THE RIGHT AND THE GOOD* (1930). A theory of the right explains and justifies principles containing practical requirements on action. These principles dictate which actions ought to be performed. A theory of the good determines what has moral value.

Ethics co-exists with another form of practical reasoning, namely, prudence. Prudential reasoning involves devising strategies for maximizing the interests over a period of time of an individual or institution. For Aristotle, prudence is an intellectual, not a moral virtue. *See* ARISTOTLE, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 927, 952, 1023-24 (R. McKeon ed. 1941); *see also* T. NAGEL, *THE POSSIBILITY OF ALTRUISM* (1970); *cf.* D. GAUTHIER, *PRACTICAL REASONING* (1963); Kraut, *The Rationality of Prudence*, 81 *PHIL. REV.* 351 (1972).

Prudential reasoning does not exhaust all reasoning about an individual's self-interest. *See* Falk, *Morality, Self, and Others*, in *MORALITY AND THE LANGUAGE OF CONDUCT* (H. Casteneda & G. Nakhnikian eds. 1963) (describing prudential reasoning and other forms of self-referential reasoning).

For ethics to provide a comprehensive explanation of punishment, ethical principles should be objective. Generally, this article assumes an objectivist view of ethics. "Objectivist" means an ethical perspective that assumes rationally persuasive principles can be used to distinguish good ethical arguments from bad ones. For an illuminating attempt to demonstrate the objectivity of ethics, *see* Brambrough, *A Proof of the Objectivity of Morals*, 14 *AM. J. JURIS.* 37 (1969); Wellman, *Emotivism and Ethical Objectivity*, 5 *AM. PHIL. Q.* 90, 92 (1968). More tendentiously, one might say that moral judgments are true and reflect a moral reality. *See* G. MOORE, *PRINCIPIA ETHICA* (1922); T. PERRY, *MORAL REASONING AND TRUTH* 126 (1976) (describing a model of truth in ethics); Moore, *Moral Reality*, 1982 *WIS. L. REV.* 1061 (1982); Werner, *Ethical Realism*, 93 *ETHICS* 653 (1983) (arguing that Quinean and Harmanian epistemology can be used to show the existence of moral facts).

the relationship between law and morality²³ and the appropriate

23. Morality may be involved in determining the nature of crime and moral blameworthiness. Oliver Wendell Holmes believed that "[t]he law is the witness and external deposit of our moral life." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Crimes that are inherently wrong derive their status from morality. We desire a class of actions "that is viewed, without significant social dissent, as immoral." H. PACKER, *supra* note 16, at 264. Presumably, such acts as murder, theft, and fraud are generally agreed upon as morally wrong. But a person can endorse laws proscribing these acts on prudential grounds, that is, based on justificatory factors to which every rational person is susceptible, including the moral skeptic, cynic, or nihilist.

Morality is relevant to criminal law in yet another way. A person may not be prosecuted unless morally blameworthy. A person might perform an action which, though unfortunate, is upon reflection right, or she may perform an action that is wrong without being blameworthy. In the former case, the action is justified; in the latter case the person is excused. W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* (1972).

Morality conditions the law by providing it with a class of acts which are not legally tolerated. This does not mean that morality must be a part of the persuasive or justificatory force behind the law. One traditional conception of law maintains that the law's authority or justification derives from rational self interest. Each individual, whether moral or not, understands that obeying the law is in her rational self-interest. Morality, though perhaps providing the content and conditions of the criminal law, is not required for its justification. Morality compels the law to punish only those who meet the conditions of legal responsibility. The criminal law has largely the same content as morality. A. GEWIRTH, *REASON AND MORALITY* 135, 295 (1978). The law proscribes acts "that most people would think [are] clearly immoral." Greenawalt, *Violence — Legal Justification and Moral Appraisal*, 32 EMORY L.J. 437, 443 (1983). Legal rules, whether derived from moral concerns, appeal to prudential motivational factors in the context of justification.

Morality consists of a system of rules or precepts concerning right conduct. These include self-regarding as well as other-regarding activities. But morality also includes duties to other persons. These duties include fairness, justice, compassion, and love. Fairness also has implications for prudence and consequently, leads a double life as both a moral and a prudential concept. Prudence, on the other hand, primarily involves rational self-interest. Recently, this distinction has been succinctly characterized as follows: "By a 'moral' reason I mean roughly a reason that is concerned with the interests or well-being or rights of others, as opposed to prudential reasons that affect only one's own interests." Soper, *The Moral Value of Law*, 84 MICH. L. REV. 63, 66 (1985). A person can be prudent without being moral and practically rational in being prudent, though not moral. Hence if the law against murder, theft, and fraud depends upon morality, in the context of justification, there may be some people (moral skeptics, nihilists, or cynics) who are rational and yet reject the law. If, however, prudence grounds the criminal law, even the rational moral skeptic must accept the criminal law's force. *But see* Hubin, *Prudential Reasons*, 10 CAN. J. PHIL. 63, 73 (1980) (arguing "that prudential reasons are not necessarily reasons for every person").

The traditional view holds that a person need not endorse any moral view whatsoever. Of course, this is not to say that "criminal law . . . is . . . a code different from the moral code." S. SCHAFER, *THE POLITICAL CRIMINAL* 83 (1974). Rather, "[t]heir likeness is not an illusion, and the similarities between their vocabularies are real. The theme of morality is no different from the theme of criminal law." *Id.* But in the context of justification, the criminal law need not rely on morality, instead it is based on a rational concern with one's self-interest and survival. Societal norms, values and laws derive from "survival needs, common to all human groups." D. TAFT & R. ENGLAND JR., *CRIMINOLOGY* 120 (1964). Whether conceived of as moral or pruden-

methodology in ethical theory²⁴ and legal and political philosophy. To

tial concerns, these needs ground the criminal law. Every rational person is susceptible to the persuasive force of the law. Consider Gross' characterization of the relationship between criminal justice and morality.

"Crime is morally wrong, and punishment for it is morally right." Though it is altogether too simple and hides a nasty tangle of problems, this statement seems uncontroversial. But even the plainest truths are sometimes challenged, and it is not inconceivable that some skeptic may ask why crime is morally wrong and punishment of it morally right. We must then take a look first at our penal laws and show why it is morally wrong to violate the rules of conduct they establish.

H. GROSS, A THEORY OF CRIMINAL JUSTICE 13 (1979).

It may be possible to provide a moral argument justifying punishment. But if Gross' skeptic is a *moral* skeptic, such an argument will be pointless because the skeptic doubts the authority of moral arguments. In this case, however, an egoistic or prudential justification can be provided which should convince the moral skeptic that reasons exist to obey the law. Hence, since the bottom line in the traditional conception of law is rational prudence, any rational individual is susceptible to the law's demands. Whatever one's moral beliefs, a rational person will endorse the criminal law even though it restricts freedom in the short-term because it maximizes autonomy, privacy, and self-interest in the long run. Therefore, the criminal law is justified because any rationally prudent individual is motivated to obey the law.

People are capable of practical reasoning or rationality. Whether or not someone is moral, a rational person will obey the law because he is self-interested. This capacity for engaging in practical reasoning is among the essential features of being a person. Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091, 1148-49 (1985).

An alternative conception of law provides a minimal conception of morality. According to this conception, law expresses persistent moral intuitions. Though not required to express the entire moral fabric, the law must express those basic moral imperatives necessary for social life. A third conception of law requires law to be consistent with and nurture key features of moral personality, for example, autonomy and rationality.

24. The method advocated here proceeds in the following manner. Seeking a critical point of view, an individual collects his considered intuitions in order to determine whether they implicitly express any general principles. If so, these general principles represent the rationale of one's considered intuitions. In evaluating a principle, we test it against our considered intuitions as well as certain formal or metatheoretical factors. A theory should conform to our considered intuitions, but it should also be elegant. A theory is elegant when it is simple, general, fecund, and reenforced by theories in other domains. W. QUINE & J. ULLIAN, *THE WEB OF BELIEF* (1970); QUINE, *Posits and Reality*, in *THE WAYS OF PARADOX* 233 (1966) (describing various metatheoretical virtues such as fecundity and simplicity). For example, a moral theory should be consistent with and illuminate psychological theories of learning, especially those aspects of such theories which deal with developing or learning a moral sense. A moral theory must also meet meta-ethical or formal constraints. A moral theory must be stated in general terms and not contain any token-reflexives. The theory must guide actions and yield universal moral judgments. R. HARE, *FREEDOM AND REASON* (1963).

Theory construction in ethics and law requires systematizing our considered intuitions about punishment. In deciding which theory or systematic view of punishment is preferable as a moral, social, or legal practice, we must first decide how closely a theory must match our considered intuitions. There are at least three conventional approaches to this question: ethical intuitionism, ethical formalism, and reflective equilibrium. Each of these approaches answers the question of what to do when intuition and theory collide. See B. ACKERMAN, *SOCIAL JUSTICE IN THE*

understand punishment it is necessary to see its connection to other central issues in political philosophy and ethical theory. Finding the solution to the problem of punishment requires constructing a synoptic, political, philosophic vision of society in which that solution is a part.

B. *Punishment as a Response to Wrongdoing*

Generally, punishment is a response to wrongdoing. So conceived, punishment takes place in the family between parents and children, in friendship, in institutional settings such as churches, schools,²⁵ and clubs and in other important relationships. The state may initiate punishment²⁶ but so may many other actors. Punishment also may be conceived of as primarily a state function,²⁷ relegating other forms of "punishment" to a conceptual backseat.

LIBERAL STATE 349-55 (1980) (arguing against intuitionism); A. GOLDMAN, EPISTEMOLOGY AND COGNITION 66 (1986); R. HARE, MORAL THINKING 11 (1981) (contrasting the allegedly different epistemic roles of linguistic and moral intuitions); J. RAWLS, A THEORY OF JUSTICE 48-51 (1971) (describing how reflective equilibrium works); W. ROSS, FOUNDATIONS OF ETHICS (1939) (describing the ethical intuitionist program and its hostility toward ethical theories); Hare, *Liberty and Equality: How Politics Masquerades as Philosophy*, in LIBERTY AND EQUALITY 1, 3, 6 (E. Paul, R. Miller, Jr. & J. Paul eds. 1985) (illustrating Hare's ethical formalism); Hare, *Rawls' Theory of Justice*, in READING RAWLS 81-107 (N. Daniels ed. 1975); Bayles, *Intuition in Ethics*, 23 DIALOGUE 439, 452 (1984); Daniels, *Reflective Equilibrium and Archimedean Points*, 10 CAN. J. PHIL. 83 (1980); Quinn, *Truth and Explanation in Ethics*, 96 ETHICS 524, 530 (1986) (distinguishing three kinds of moral intuitions); Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 UCLA L. REV. 1103, 1201 (1982) (arguing that a theory of rights must be based on persistent intuitions); Singer, *Sidgwick and Reflective Equilibrium*, 58 THE MONIST 490, 516 (1984).

25. For example, the NCAA penalizes schools that are guilty of recruiting infractions. Is a theory of punishment relevant to these penalties? Which form of punishment is most appropriate here? The moral good theory of punishment may have special application in cases of this sort. See Smith, *The NCAA's Version of the Death Penalty: Or How Educators Punish Themselves and Others*, 62 IND. L.J. 985 (1987).

26. We now think of the state as having the exclusive right of law enforcement, but this was not always true. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 507 (1973) (discussing private enforcement); Bittner & Platt, *The Right of the State to Punish*, in CONTEMPORARY PUNISHMENT 24 (R. Gerber & P. McAnany eds. 1972).

27. Uncontroversially, the state has a responsibility to prevent crime. Indeed, "crime" has been defined as a voluntary violation of a law for which punishment may be imposed in the name of the state. D. JONES, CRIME AND CRIMINAL RESPONSIBILITY 13-15 (1978). Cf. R. QUINNEY, THE SOCIAL REALITY OF CRIME 15-18 (1970) (describing definitions of crime as reflecting conduct inimical to the interests of the powerful).

Preventing crime includes incapacitating offenders after they commit crimes. Incapacitating them prevents offenders from committing more crimes during incarceration. Crime is also prevented by incarcerating dangerous people before they commit crimes. See J. FLOUD & W. YOUNG, DANGEROUS AND CRIMINAL JUSTICE (1981) (discussing dangerousness and proposals for preventive detention). See also Schoeman, *On Incapacitating the Dangerous*, 16 AM. PHIL. Q. 27 (1979) (arguing, unsuccessfully in my estimation, that the same reasons which justify quarantine justify preventive detention).

C. *The Moral Good Theory and Traditional Theories of Punishment*

1. The Communicative Dimension of Punishment

One feature common to all types of punishment is its communicative, expressive,²⁸ or denunciatory²⁹ function. Here punishment sends a message to actual and potential offenders. The message states that society is committed to the norms of lawful conduct, and that crime is antithetical to and destructive of these norms. The message says that criminal conduct is bad and will not be tolerated.³⁰ This communicative function suggests an educative dimension to the political practice of punishment. The paternalistic formulation of the moral good theory of punishment emphasizes this communicative and tutelary function of punishment as a legal institution.

2. The Moral Good Theory and Retributivism

The moral good theory of punishment is retributivist³¹ in that it

28. Many writers have pointed out that punishment has an expressive function. See J. ANDENAE, PUNISHMENT AND DETERRENCE 110-26 (1974); P. DEVLIN, THE ENFORCEMENT OF MORALS (1965); A. EWING, THE MORALITY OF PUNISHMENT 73 (1929); C. FRIED, AN ANATOMY OF VALUES (1970); H. HART, LAW, LIBERTY, AND MORALITY 60-69 (1963); W. MOBERLY, THE ETHICS OF PUNISHMENT 202-37 (1968); Eckhoff, *Justification of Punishment*, in PHILOSOPHY AND THE CRIMINAL LAW 13 (A. Duff & N. Simmonds eds. 1984); Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397 (1965); Skillen, *How to Say Things With Walls*, 55 PHIL. 509 (1980); Tribe, *Trial by Mathematics, Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1391-92 (1971).

29. See N. WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 24-45 (1980).

30. But see E. DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 64-75 (S. Solvay & J. Mueller trans. 8th ed. 1964) (arguing that crime is necessary in any healthy society).

31. Retributivist theories originate in the Roman *lex talonis* and other early systems of punishment. See *Leviticus* 24: 17-22 (advocating "an eye for an eye"). Such theories maintain that punishment is the appropriate response to wrongdoing. See also *United States v. Bergman*, 416 F. Supp. 496, 500 (S.D.N.Y. 1976) (apparently endorsing retributive values in sentencing); G. HEGEL, THE PHILOSOPHY OF RIGHT 68-73 (1981). Cf. Posner, *Retribution and Related Concepts of Punishment*, 11 J. LEGAL STUD. 71 (1981) (explaining types of punishment economically).

Though retributivism has always had its detractors, recently the theory has experienced a rebirth. H. MORRIS, *Persons and Punishment*, in ON GUILT AND INNOCENCE 31 (1976); Galligan, *The Return to Retribution in Penal Theory*, in CRIME, PROOF AND PUNISHMENT 144 (C. Tapper ed. 1981); Beardsley, *A Plea for Deserts*, 6 AM. PHIL. Q. 33 (1969); Cottingham, *Varieties of Retribution*, 29 AM. PHIL. Q. 238 (1979); Davis, *They Deserve to Suffer*, 32 ANALYSIS 136 (1972); Finnis, *The Restoration of Retribution*, 32 ANALYSIS 131 (1979); Harward, *The Bitter Pill of Punishment: Retribution*, 10 J. VALUE INQ. 199 (1976); Morawetz, *Retributivism and Justice*, 16 CONN. L. REV. 803 (1984); Schedler, *Retributive Punishment and the Fall of Satan*, 30 AM. J. JURIS. 137 (1985); Wertheimer, *Punishing the Innocent — Unintentionally*, 29 INQ. 45 (1977).

views punishment as the just desert of the offender.³² But while most retributivist theories stop there,³³ the moral good theory further justifies punishment by indicating that the deserved punishment morally reforms and educates the offender by providing him the moral reasons for conforming his conduct to the law. In going beyond retributivism, the moral good theory avoids the traditional objections to retributive theories.³⁴

32. See Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47 (1986) (arguing that desert is central to any theory of punishment).

In explaining "just deserts," retributivist theories often appeal to the metaphor of restoring the moral order or the balance between good and evil. In violating a norm of conduct, the offender upsets the balance between good and evil by bringing evil into the world. Only by punishing the offender can this balance be restored.

Though this metaphor may have some explanatory value, it suggests "that justice is equally well deserved if crime is punished as if no crime is committed at all." A. KENNY, *FREEWILL AND RESPONSIBILITY* 72 (1978). But this is counterintuitive. A society in which there is no crime is probably more just than a society in which every criminal is punished. *Id.* Of course, much depends on the reasons for there being no crime in a society. A thoroughly efficient, repressive authoritarian state may have no crime, yet be totally unjust.

33. A more concrete conception of retributive punishment, but one still employing the balancing metaphor, contends that among citizens in most societies there is a rough equivalence of benefits and burdens. When an offender violates the law, she disturbs the balance by receiving the benefits while avoiding the burdens. Punishment restores the level of burdens that the offender originally was required to shoulder.

Herbert Morris has advanced an innovative theory of this sort. In Morris' view, social reality is structured by certain rules which distribute benefits and burdens. By violating the law, a wrongdoer receives greater benefits and foregoes burdens. Hence, punishment is justified as a way of correcting the unequal distribution of benefits and burdens. See MORRIS, *supra* note 31.

Of course Morris does not indicate why a person assuming greater burdens in advance of the crime cannot receive credit, thus obviating the need for punishment. Similarly, how does Morris' model work when benefits and burdens are not equally distributed? Does this mean poor people may have a right to commit crimes?

According to Morris, a person is entitled to be punished. Presumably, the argument is that the wrongdoer has a "moral right . . . to demand recognition of his person and his dignity as a moral being." See M. SCHELER, *FORMALISM IN ETHICS AND NON-FORMAL ETHICS OF VALUES* 366 (1973). But see Deigh, *On the Right to Be Punished: Some Doubts*, 94 ETHICS 191 (1984) (doubting that treating the criminal as a responsible, moral agent entails that he has a right to be punished). For an attempt to translate Morris' conception of the right to punishment into a constitutional right, see Gardner, *The Right to Be Punished — A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838 (1981).

34. Retributive theories require punishment irrespective of any socially desirable goals it brings about. Retributive theories often are criticized for being primitive, barbaric, or a mere rationalization for vengeance. More importantly, retributive theories deny that punishment involves rehabilitation, deterrence, or incapacitation. See, Shedler, *Can Retributivists Support Legal Punishment?*, 63 THE MONIST 185 (1980).

Though retribution is a controversial doctrine, there is one type of retributive principle that everyone believing in punishment can agree upon. Let us distinguish between two general types of retributive theories: formal and substantive theories. A retributivist theory of punishment is formally retributivist when it meets the following conditions. First, punishment may only be

3. The Moral Good Theory and Deterrence

The moral good theory of punishment is thrown into relief by contrasting it with deterrence theories,³⁵ both general³⁶ and specific.³⁷

invoked as a response to the offender's misconduct. Second, punishment must be proportionate to the crime committed. This constraint is designed to tailor the degree and kind of punishment to the type of misconduct. A retributive theory is a substantive theory of punishment when it explains and justifies punishment exclusively in retributive terms, while explicitly eschewing consequentialist or other factors. A substantively retributive theory appeals to retributive factors as both necessary and sufficient conditions for punishing an offender. Any theory regarding punishment as a matter of desert or as necessary to retain the balance of good over evil is a substantive theory of punishment. One consequence of this distinction between formal and substantive retributive theories is that a theory may be formally retributive while at the same time substantively non-retributive.

The result is that everybody supporting any form of punishment is a formal retributivist because the practice of responding to wrongdoing does not become *punishment* unless the wrongdoer is guilty of a crime. Thus, being guilty of a crime is required for punishment. This view does not entail that one *must* be punished if guilty of a crime, just that one *may* be punished. Any theory which meets these conditions is formally retributive. Yet, a theory of punishment may be formally retributive without being retributive in some more significant substantive sense.

The proportionality condition has been objected to on the grounds that it is required by retributive theories, which are non-consequentialist, yet the only way to explicate the condition is in terms of the consequences of different crimes. For a reply to this objection, see Davis, *How to Make the Punishment Fit the Crime*, 93 *ETHICS* 726 (1983).

35. Fundamentally, deterrent theories explain and justify punishment in terms of its effect in preventing crime. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165 (J. Burns & H. Hart ed. 1970). Deterrent theories of punishment are consequentialist or utilitarian theories. Charvet, *Criticism and Punishment*, 75 *MIND* 573 (1966). A deterrent theory of punishment is a particular example of an incentive theory of human conduct. An incentive theory of human conduct analyzes individual, collective, and social behavior as governed by rewards and penalties. See J. WILSON, THINKING ABOUT CRIME 121 (2d ed. 1983) (arguing that people are governed by rewards and penalties). In one perfectly vacuous sense all theories of human conduct are incentive theories. Deterrence theories explain and justify punishment in terms of the incentive it provides actual and possible offenders to refrain from committing crimes. Farrell, *The Justification of General Deterrence*, 114 *PHIL. REV.* 367 (1985). A comprehensive discussion and endorsement of punishment as general deterrence is presented by J. ANDENAES, *supra* note 28.

Preventing crime is a chief aim of deterrence theories. Such theories maintain "[t]hat punishment looks towards the future, and that at least one of its major functions is to prevent crime." M. FOUCAULT, DISCIPLINE AND PUNISHMENT 93 (A. Sheridan trans. 1977). For centuries preventing crime has been one of the chief justifications of the right to punish. *Id.*; see also R. CROSS & A. ASHWORTH, THE ENGLISH SENTENCING SYSTEM 121 (3d ed. 1981) ("[T]hat the aim of the penal system is to reduce crime by making as many people as possible want to obey the criminal law.").

36. General deterrence theories are concerned with punishment's effect on other people and on crime rates. J. SMITH & B. HOGAN, CRIMINAL LAW 12 (5th ed. 1983) (protecting the public is a chief objective of the criminal law). General deterrence theories have their origin in ancient Jewish law if not earlier. See THE PRINCIPLES OF JEWISH LAW 522 (M. Elon ed.

The difference between deterrence and moral good can be illustrated in the following way. Deterrence stops an offender's inclination to commit a crime;³⁸ what motivates or convinces the person not to commit the crime is irrelevant. What is relevant is that if the deterrence works the offender is disinclined to commit the crime. Deterrent theories focus on the conduct. The moral good theory of punishment focuses on the reasons the offender has in choosing not to commit the crime. When the reasons are moral reasons, the goal of the moral good theory of punishment is achieved.

1975); *Deuteronomy* 19: 16-22 (The New English Bible) (1970) (punishing wrongdoers instills fear in others).

Punishment as general deterrence informs people not to commit criminal acts if they value liberty. *United States v. O'Driscoll*, 586 F. Supp. 1486 (D. Colo. 1984), *aff'd*, 761 F.2d 589 (10th Cir.) (sentencing must carry out the threat of the law to deter others from committing crimes), *cert. denied*, 475 U.S. 1020 (1985). General deterrence theories maintain that everyone can see, as a matter of practical rationality, that crime does not pay. If loss of freedom results from committing crime, people will obey the law.

37. Specific deterrence theories hold that punishment's goal is to reduce crime and protect society from criminal acts by incapacitating an offender who already has committed a crime. Punishment specifically deters criminal acts because the offender cannot victimize the public during his incarceration. Further, punishment has a deterrent effect on the offender, once he is released from prison. See PACKER, *supra* note 16, at 45. Punishment functions both as a general and specific deterrent to crime. Every time an offender is punished, others are shown that crime does not pay. Punishment also isolates and prevents the particular offender from committing additional crimes throughout the duration of the sentence. Specific deterrence is especially tied to punishment because punishment protects society from someone who has shown willingness and ability to commit crime. Hence, even if punishment did not deter others committing crime, it is still justified by incapacitating a known offender and protecting society from her criminal inclinations.

Van den Haag argues that incapacitation does not affect the crime rate for most crimes because a compensating increase in crimes by others results. E. VAN DEN HAAG, *PUNISHING CRIMINALS* 52-55 (1975).

38. Deterrence theories have been criticized for several reasons. First, these theories do not explain fully why people refrain from committing crime. Nor do they explain why people commit crimes. Second, generally people do not rationally calculate the way deterrence theories claim they do. Third, it is difficult to determine whether deterrence theories have their intended effects. Kenney, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICK. L. REV. 1, 7-8 (1983). For a defense of deterrence, see Walker, *The Efficacy and Morality of Deterrents*, 1979 CRIM. L. REV. 129.

Some critics argue that deterrence theories only justify the appearance of punishment. Threats of punishment operate as a deterrent, not the actual punishment. But for threats to be effective, they must be carried out. See van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706 (1981); but see Goldman, *Beyond the Deterrence Theory: Comments on van den Haag's "Punishment as a Device for Controlling the Crime Rate,"* 33 RUTGERS L. REV. 721 (1981) (contending that van den Haag's deterrence theory tends to warrant punishment beyond that deserved).

A further difference between deterrence theory and the moral good theory is that the former justifies punishment for bringing about the socially desirable goals of stability and order irrespective of its effect on the offender. On the contrary, the moral good theory justifies punishment by what it does for the offender. The moral good theory promotes the moral good of the offender, "the moral good which punishment attempts to accomplish within the wrongdoer makes it something which is done *for* him, not *to* him."³⁹ The state's goal is to encourage the individual to obey the law for moral reasons, not self-interested ones.⁴⁰ Deterrence theories rely on self-interested motivational factors while the moral good theory depends on moral motivation.⁴¹

Deterrence theories coerce citizens to act properly. The moral good theory, on the other hand, aims at educating people to make the rational choice not to engage in unlawful conduct.⁴² Essentially, the moral good theory is designed to benefit the wrongdoer by helping the person to achieve moral insight and knowledge.⁴³ Deterrence theories aim at expunging certain forms of behavior⁴⁴ whether the offender is morally reformed or not. The moral good theory aims at the offender's character and his capacity for engaging in morally motivated conduct. Deterrence works if it prevents crime even if the potential wrongdoers remain rogues just so long as their behavior changes. The moral good theory prevents crime by encouraging the offender to develop his character as an autonomous, rational moral agent.

4. The Moral Good Theory and Rehabilitation

The moral good theory must be distinguished from a kindred though importantly different type of theory of punishment, namely, rehabili-

39. Hampton, *supra* note 9, at 214.

40. *Id.* at 213-14.

41. The difference between deterrence and moral good theories can be brought out this way. Deterrence stops an offender's inclination to commit a crime and what motivates her to not commit the crime is irrelevant. Deterrence theories focus on the offender's conduct. The moral good theory of punishment focuses on the reasons the offender chooses not to commit the crime. When the reasons are moral reasons, the goal of the moral good theory of punishment is achieved. See *supra* text accompanying notes 35-38.

The moral good theory of punishment presupposes that people have the capacity for autonomy and are responsible for their conduct. It also presupposes that there is objective moral knowledge. While these tenets must be proven, many moral and political conceptions of punishment share these presuppositions.

42. Hampton, *supra* note 9, at 214.

43. *Id.*

44. Deterrence theories punish the wrongdoer in order to promote "a larger social end." *Id.*

tation theory.⁴⁵ The former theory is concerned with the offender's identity as a moral being, while rehabilitation theories are concerned with social reformation.⁴⁶ Both theories consider how punishment benefits the offender, but disagree over what the benefits are. The moral good theory defines the offender's good "as moral growth," while rehabilitation theories define it as "the wrongdoer's acceptance of society's mores and [the offender's] successful operation in the community."⁴⁷ The offender's moral reformation may entail social reformation, but the reverse is not necessarily true. A person may take a place in society for amoral, immoral, or egoistic reasons. Or the offender may do so for fear of punishment, or because it is a clever strategy for financial success. The reason does not matter. The offender is rehabilitated just in case the inclination to commit crimes has abated, or is no greater than the inclination of the average citizen.⁴⁸

45. Many rehabilitation theories are based upon the conviction that a wide gulf exists between punishment and treatment. Rehabilitation theorists often argue that punishment is never justified because most criminals are psychologically or socially ill. Rehabilitation is the appropriate response to this illness.

One writer urges that social illness or social deprivation should be a defense at trial. See C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 117-65 (1978) (arguing the conventional wisdom that poverty causes crime). See also Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivations, 3 *LAW & INEQUALITY* 9 (1985) (arguing that social deprivation be a limited defense in certain situations).

46. A familiar, though controversial, goal of punishment is the *social* reformation of the offender. Proponents believe that rehabilitative methods "would no doubt lead to a transformation of prisons, if not to their total disappearance in their present form and function." K. MENNINGER, *THE CRIME OF PUNISHMENT* 251 (1968).

Many writers contend that rehabilitation as a systematic response to wrongdoing has been a monumental failure. Others contend that rehabilitation was never given a serious chance. Orsagh & Marseden, *What Works When: Rational Choice Theory and Offender Rehabilitation*, 13 *J. CRIM. JUST.* 269 (1985) (arguing that rehabilitation works when economic motivation is instilled in certain types of offenders). Still others point out that the last fifty years have borne fruit to three important rehabilitative practices: the juvenile court, probation, and parole. See F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 25 (1964). Interestingly, the pardon has been around since ancient times. See also W. RECKLESS, *CRIMINAL BEHAVIOR* 281 (1940). According to rehabilitation theories, punishment is justified when the offender excises anti-social tendencies and becomes a productive member of society. Rehabilitation aims at instilling socially acceptable inclinations in the offender. This does not necessarily entail reforming the offender's character or producing an understanding of why one should be moral. A socially rehabilitated individual does the right thing for whatever reasons, while a morally reformed individual does the right thing for the right reasons.

47. Hampton, *supra* note 9, at 215.

48. The law is concerned with the offender's interaction with other members of society. Morality is concerned with the offender's basic character. *Commonwealth v. Ritter*, 13 Pa. D. & C. 285, 290 (1930) (stating "secular law is concerned with one's relation to the community and not primarily with his inward moral development").

D. *Kinds of Autonomy*

Autonomy means many things.⁴⁹ First, a person is autonomous in a weak sense when free from external constraints. Obviously this is a matter of degree. A person may be free from external constraints in a room because she is not chained or shackled. Yet the room might be a prison cell. In this case the person is autonomous with regard to local physical movements, but not in coming and going as she pleases.

A stronger sense of autonomy requires that the individual be autonomous in the weak sense and have the capacity generally to act in accordance with her desires. An individual is autonomous in an even stronger sense when able to critically evaluate present circumstances and act in accordance with reflective desires. This involves the capacity to critically evaluate one's desires and beliefs to determine the reasonableness of one's final goals as well as the means to adopt in bringing about these goals. Autonomy so conceived requires that these plans and goals express one's essential nature as a person.⁵⁰

Moral autonomy requires critical evaluation of an individual's system of beliefs and desires as it pertains to her relations with others. The question posed by moral autonomy is how is it possible to be autonomous yet have obligations to others. This question reflects one of the primary questions of legal and political theory: how can a person

49. Autonomy is often characterized as a moral concept, but it is also a feature of individuals viewed from a prudential perspective. Autonomy refers to the most comprehensive form of human freedom. The right to autonomy is not, however, an absolute right. A person's right to autonomy is as extensive as is compatible with a similar right for everyone else.

50. This is, perhaps, the deepest sense of autonomy possible. So conceived, autonomy is authentic because it has its source in what is most basic to the individual. See M. TAYLOR, *COMMUNITY, ANARCHY AND LIBERTY* (1982); Sargent, *Human Nature and the Radical Vision*, in 17 *NOMOS: HUMAN NATURE IN POLITICS* 254 (J. Pennock & J. Chapman eds. 1977) (claiming that "[t]here is an authentic self within each of us to be discovered, and social conditions largely determine our ability to discover it"); see also G. Dworkin, *Autonomy and Behavior Control*, in *ETHICAL ISSUES IN MODERN MEDICINE* 362, 366-70 (R. Hunt & J. Arras eds. 1977) (describing autonomy as the sum of authenticity and independence); cf. D. RICHARDS, *SEX, DRUGS, DEATH AND THE LAW* 8 (1982):

Autonomy, in the sense fundamental to the idea of human rights, begins with the conception that persons have a range of capacities that enables them to develop, to want to act on, and in fact to act on higher-order plans of action that take as their object their lives and the way they are lived, and to evaluate and order their lives according to principles of conduct and canons of ethics to which they have given their rational assent.

See generally Young, *Autonomy and Socialization*, 89 *MIND* 568-60 (1980) (describing authentic autonomy).

be autonomous while at the same time be under the authority of the law?⁵¹ If it is possible to reconcile autonomy and duty, then realizing full moral autonomy requires integrating autonomy and duty within one's moral personality. In the context of punishment, the question is how a person can be autonomous yet subject to the sanctions of the criminal law. Conventional wisdom suggests that autonomy is compatible with incarceration, even perhaps with execution. The moral good theory, as presented in the article, raises skeptical doubts concerning the dogma that coercive punishment is compatible with moral autonomy.

Respecting autonomy as a fundamental, irreducible value does not entail regarding it as absolute. Nor does it entail regarding the autonomy of the offender as more important than the autonomy of other members of the community. Essentially, the question is how *much* autonomy a system of punishment can tolerate.⁵² If a system of punishment can tolerate *more* autonomy than ordinarily thought possible, then respecting the offender's autonomy as a fundamental, irreducible value requires adopting a system of punishment that respects autonomy more than our conventional system of punishment.⁵³

III. THE PATERNALISTIC FORMULATION OF THE MORAL GOOD THEORY

A. *Moral Theory and Autonomy*

A moral theory takes autonomy seriously when it regards it as an irreducible, moral value.⁵⁴ Such a theory requires that a justifiable

51. Contract theorists such as Hobbes, Kant, and Rousseau answer this question, though in very different ways, by indicating that the individual's consent is the basis of political obligation.

52. There are at least two places where a system of punishment may increase the autonomy of the offender. First, in choosing the type, length, and place of the sentence to be served, the offender may have some input. Second, even if the offender has no say in the sentence, prison officials should encourage ad hoc development of the person's moral autonomy.

53. Such a view regards consent as the justification of political authority. For a discussion of the problem of political authority when autonomy is a fundamental irreducible value, see R. TAYLOR, *FREEDOM, ANARCHY, AND THE LAW* 46-54 (1973); R. WOLFF, *IN DEFENSE OF ANARCHISM* (1970); but see J. REIMAN, *IN DEFENSE OF POLITICAL PHILOSOPHY* (1972); Martin, *Wolff's Defense of Philosophical Anarchism*, 24 *AM. PHIL. Q.* 140 (1974); Perkins, *On Reconciling Autonomy and Authority*, 82 *ETHICS* 114 (1972).

54. Jones' autonomy need not win out in every conflict situation. This is unacceptable for two reasons. First, it exaggerates the moral significance of Jones' autonomy as a fundamental irreducible value. Second, it fails to explain how Jones' autonomy has such value, but Smith's does not. Hence, to hold that autonomy is a fundamental irreducible value does not require that self-defense be unjustified because it interferes with the attacker's autonomy. If the victim

moral principle and a morally motivated act be subject to analysis in terms of autonomy.⁵⁵ What type of system or practice of punishment, if any, is possible according to a moral theory of this sort? This article contends that punishment as the moral good of the offender does not go far enough and is consequently inadequate unless the offender's autonomy is expressed at each stage of the criminal process. In short, the moral good theory of punishment is inadequate when it restricts itself to the paternalistic⁵⁶ formulation. Punishment as the moral good of the offender must give autonomy a more prominent role than the paternalistic conception of the theory. The appropriate formulation⁵⁷ of the moral good theory must not be *exclusively* paternalistic.⁵⁸

B. *Paternalistic Punishment and the Offender's Moral Good*

Herbert Morris' "paternalistic theory of punishment" is a novel and suggestive statement of the moral good theory of punishment.⁵⁹ In Morris' view the wrongdoer's "identity as a morally autonomous individual attached to the good"⁶⁰ should be the guiding light of a system of punishment. This view highlights the tension between autonomy and punishment by asking how a theory of punishment that takes autonomy seriously can justify restricting the wrongdoer's autonomy.

Punishment, as Morris conceives it, involves officially⁶¹ imposing a deprivation or penalty upon the wrongdoer. Since punishment is a complex communicative act, the wrongdoer must be made aware that the deprivation is being imposed because⁶² of wrongful conduct.

refrained from acting in self-defense because of the attacker's autonomy, the victim would undervalue her autonomy.

55. Minimally, this means that any acceptable moral theory must explain the importance of autonomy.

56. For an account of paternalism as a legal principle, see Feinberg, *Legal Paternalism*, in *RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY* 110-29 (1980).

57. See *infra* notes 119-379 and accompanying text.

58. Ultimately paternalism may be part of the moral good theory of punishment. But in that event, the moral good theory must explain why paternalistic punishment is a second best, though sometimes necessary choice.

59. See Morris, *supra* note 11.

60. *Id.* at 265.

61. For Morris, the notion of an officially imposed penalty indicates two things: first, the punisher must have the authority to inflict punishment; secondly, the punisher must have power to make the punishment stick.

62. There is an important ambiguity in the term "because" which may impede understanding the precise relationship between the offender's wrongful conduct and the subsequent penalty. In one sense "because" signifies a causal relation, such as, whenever it is 32 degrees Fahrenheit, water freezes. In another sense, the relation is normative. Whenever one performs heroically,

The principal justification of punishment is that it promotes the good of actual and potential wrongdoers.⁶³ Punishment fosters an appreciation of the evil caused by the wrongdoer, and encourages contrition and repentance.⁶⁴ As a result, the wrongdoer learns self-forgiveness and develops a renewed sense of being a morally responsible person.⁶⁵ The practice of punishment, according to the paternalistic theory,⁶⁶ is justified because it regenerates the character of the wrongdoer as a morally autonomous person concerned with the good.⁶⁷

Morris depends on the parent-child⁶⁸ relationship as the model⁶⁹ for his theory of punishment. The relationship between punishment and wrongdoing is more than a contingent relationship, punishment is logically tied to wrongdoing and to the child's capacity for acquiring the concept.⁷⁰ For this reason punishment is tied to the good of the wrongdoer in a way that blame and disapproval are not.⁷¹

Punishment encourages the child to realize that there are limits on conduct and values to which the parents are devoted.⁷² It communi-

one should be rewarded. For punishment to be a complex and communicative act, the punishee must know that a penalty will follow her wrongful conduct, but, moreover, she must know that it *should* follow because wrongful conduct justifies the penalty.

63. See Morris, *supra* note 11, at 264.

64. *Id.* at 265.

65. *Id.*

66. Morris' theory is paternalistic in two ways. First, it presumes to identify the moral good of the wrongdoer. Secondly, it authorizes the state to compel the individual to promote the state's conception of the individual's good. As a principle justifying legislation, paternalism is controversial. Essentially, its unsavoriness stems from the state presuming to know what is good for the individual. It is especially unsavory when deployed by theories counting liberty or freedom as a fundamental value. It is ironic to think that the state can compel someone to be free. *But see* Gerstein, *Punishment and Self Incrimination*, 16 AM. J. JURIS. 84, 92 (1971) ("Punishment . . . can intelligibly be described as an effort to force a man to be free — it involves the use of force to stimulate the free action of the conscience."). Even when this is possible, we must ask whether it is the best way to bring about this result. I believe that it seldom is.

Usually, when the state compels, it does not do so to benefit the wrongdoer. And when the state does compel for the sake of the wrongdoer, the compulsion usually fails. For an interesting statement of one type of paternalism, see J. FISHKIN, *supra* note 21, at 24 (describing paternalistic inferences as stating "that X's interests are served by some change even though none of X's own actual wants, aims, or preferences are satisfied by that change.").

67. See Morris, *supra* note 11, at 265.

68. Empirical evidence describing how children acquire a moral perspective is necessary. See, e.g., J. KAGAN, *THE NATURE OF THE CHILD* 112-53 (1984) (describing how the child acquires evaluative standards).

69. See Morris, *supra* note 11, at 266.

70. *Id.*

71. *Id.*

72. *Id.*

cates to the child the nature of the evil generated by transgressing these limits.⁷³ Punishment has the character of closure; it "rights the wrong" so that relationships that were disrupted by the child's wrongdoing may be restored.⁷⁴

Morris' reliance on the parent-child relationship as a model for understanding punishment is not without its difficulties. First it is not clear that the parent-child relationship illuminates punishment as a moral or legal practice. Second, what is required for a child to *learn* how to use a concept like "punishment" may not be included in what such a concept *means*.

The reason the parent-child relationship does not illuminate the concept of punishment as a moral and social practice is that this relationship is necessarily between two unequal moral beings. Select any quality thought to define "morality" such as rationality, self-consciousness, or autonomy, and generally parents have this quality to a greater degree than children. As children are developing into adults they are also developing into autonomous moral agents, but, as children, they are not yet fully developed moral persons. What the parent needs to do to facilitate the child's growth into a full moral person will be very different from the way two equally autonomous, individuals treat one another. For the child to develop into a moral person, the parent may need to penalize her wrongdoing. It is simply a *non sequitur* to insist that because this is true in the parent-child relationship, externally imposed penalties must be part of any moral or legal practice of punishment.

Second, it is a mistake to think that one can give a complete analysis of a concept or term by describing how it is acquired. It is an even greater mistake to insist that this is what we must do. There may be many features associated with the context in which a child learns to use a concept which are not necessary or even interesting features of the concept itself. No doubt a child acquires an elementary concept of "being good" in circumstances in which she obeys her parents, but surely "obeying parents" is not part of the meaning of being good. Or similarly, the child may learn the beginnings of the concept of "doing the right thing" by the parents' appealing to the child's self-interest, although this does not show that a theory of right must be egoistic. What is required for a person to learn a moral concept is not necessarily what is included in the analysis of that concept, let alone how that concept should be used in a moral theory.

73. *Id.*

74. *Id.* at 267.

The paternalistic theory explains punishing adult wrongdoers in terms similar to punishing children.⁷⁵ Punishment helps the adult wrongdoer appreciate that the offense violates the norms and canons of society to which other members are attached.⁷⁶ The wrongdoer becomes pained by the realization that he brought evil into the world and consequently, harmed others.⁷⁷ Ultimately, the wrongdoer is repentant, learns self-forgiveness and regains a place as a responsible member of society.

For those who believe that punishment must be justified in terms of the interests of the offender, this is a compelling account of punishment. What is so attractive about this theory is that it justifies restricting a wrongdoer's freedom, not in terms of some amorphous conception of justice or the welfare of others, but because it benefits the wrongdoer by promoting the person's moral good.

C. *Externally-Imposed and Self-Imposed Sanctions*

The problem with the paternalistic theory of punishment is that its sanctions or penalties are externally imposed against the will of the wrongdoer. There are two problems here. First, are externally-imposed and self-imposed sanctions both consistent with the wrongdoer's autonomy? If so, which, if either, is more consistent with the goals of the moral good theory? In other words, which type of sanction best illustrates the role of autonomy in punishment? Can a paternalistic theory best honor the wrongdoer's autonomy⁷⁸ or would self-imposed penalties be more successful? To answer this last question, one must first determine whether the notion of self-punishment is intelligible.

For example, suppose a person punishes himself for being an ungrateful son for not visiting his dying father. He may react to his own failings in several ways. He may sulk and become despondent over his failure, or he may adopt a course of conduct which may help him

75. *Id.* at 268.

76. *Id.*

77. *Id.*

78. According to the moral good theory, a theory taking autonomy as a fundamental, irreducible value may force us to reconsider ordinary notions about sentencing. For autonomy to be respected in sentencing, the particular sentence should be the result of formal negotiation procedures between the offender and the state.

The structure of the argument is first to show that self-imposed deprivations represent a possible conception of punishment. Once that is established, it will be shown that self- or jointly-imposed deprivations are conceptually and morally fundamental in the voluntaristic formulation. Consequently, even if paternalism has some role to play in the moral good theory, it cannot be the quintessential formulation of the theory.

become the sort of person who would not have failed his father in the first place. This latter course would qualify as self-punishment, and might involve becoming a volunteer in a geriatric hospital helping the old and abandoned deal with dying in a dignified manner. The offender may endure painful experiences and lose the use of time which could have been spent on other pursuits. It is not at all clear why this cannot conceptually count as punishment, especially if the activity achieves the other goals of punishment. The question is whether a person can follow self-imposed directives, and the answer is clearly yes. The individual may be well-disciplined and follow self-imposed directives as faithfully or more faithfully than externally imposed ones.⁷⁹

Similarly, consider the individual who punishes himself for being an inattentive father. He may blame himself for his son's suicide. His self-imposed deprivation may be to devote time he prefers spending in other ways to counseling other parents to avoid making the same mistakes.

Morris might reply that it is inappropriate to use "punishment" in these cases, since there is no way to make the deprivation work.⁸⁰ Punishment, as a social practice, must set limits on the wrongdoer's behavior. A deprivation that depends upon the goodwill of the wrongdoer cannot function as punishment. Therefore, these examples cannot count as self-punishment. But surely this begs the question. For only if we decide in advance that the notion of self-imposed deprivations is incompatible with punishment can we conclude that punishment does not depend on the wrongdoer's goodwill, which is precisely the disputed issue.

It probably sounds unusual to say that punishment requires, or is even consistent with, self-imposed deprivations. How can *that* be punishment? What relevance could such a conception of punishment have for contemporary American institutions? This is a natural and understandable response, but it misconceives the role of abstraction in political and legal theory. Additionally, it distorts how ideals function in moral theory.⁸¹ Ideals tell us what sort of social organization

79. In fact, following Kant, a person shows good will in the moral sense only when acting for duty's sake, that is, only when acting autonomously. See I. KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS IN THE MORAL LAW* 64-67 (H. Paton trans. 1967).

80. The argument here is that we need independent authority to compel compliance. In a theological context this involves "abandon[ing] ourselves to the will and love of God, shedding our wayward impulses, and feeling ourselves divinely known, forgiven, and revived" J. MCNEILL, *A HISTORY OF THE CURE OF SOULS* 323 (1951).

81. See R. DUFF, *supra* note 10, at 291-99.

we should strive for.⁸² If autonomy is a paramount, non-reducible ethical value, we must describe how a society honoring this value should operate. This does not require that we try to bring about such a society immediately. The social structures required for autonomy to be completely respected do not yet obtain. But once a concept or value, such as autonomy, is sketched in ideal circumstances, it functions as a vehicle for criticizing contemporary social reality and institutions.⁸³ In this way, we can move closer to the ideal.⁸⁴

Similarly, Morris is mistaken in supposing that one cannot punish someone who wants to be punished. Morris' claim is:

[P]unishment by its nature characteristically involves a deprivation that individuals seek to avoid, with the implication that there is some conflict between what people want and what they get [T]he practice [of punishment] is such that the desires of a person at the time of the deprivation are not determinative of what they receive.⁸⁵

This conflates wanting something for its own sake and wanting it because it is part of some larger complex which one wants. A person may not want punishment for its own sake, but rather for the role it plays in moral development or restoration. In such a case, it is perfectly

82. *Id.* at 292.

83. A gap exists between ideal and actual penal institutions. But "[s]uch a radical gap between the ideal and the actual does not . . . show the ideal to be misguided or inadequate; it rather reminds us of the radical imperfection of our existing social and legal structures" R. DUFF, *supra* note 10, at 293.

84. There is great danger in thinking that the present generation somehow has the wisdom to settle all problems once and forever. B. MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY* 509 (1969). Objectivity in developing reasonable proposals for social and legal change often means restricting oneself to a defense of the status quo. *Id.* at 522. Instead of celebrating the virtues of contemporary society, we should socratically attack imperfect social institutions still having cruel and ugly implications for the sick, poor, and abandoned. *Id.* Additionally, focusing on moral ideals suggests a more critical attitude toward contemporary social life. Consider:

Too often it is taken for granted that punishment should be used roughly to the extent and in the way that it is actually used in one's own country at the present time; much of the discussion concerning justification has been a search for premises suited to back up this preconceived conclusion. We need . . . a more critical attitude. We should be willing to admit that irrational forces have played a part in the development of the criminal law, and that by no means everything done in this field can be justified.

Eckhoff, *supra* note 28, at 19.

85. Morris, *supra* note 11, at 264.

intelligible to describe the wrongdoer as wanting to be punished. Although the person does not want the deprivation for itself, it is still desired, all things considered.

While there may be many different reasons for wanting to be deprived of something, and some of these reasons may preclude describing the activity as punishment, merely showing that the wrongdoer wants to be deprived in a certain way does not itself show that the person is not being punished. What determines whether a deprivation counts as punishment depends on the objective role the desire plays, and how the wrongdoer conceives this role, as a response to the wrongdoing and as an integral part of the wrongdoer's future.

Anytime punishment is designed to achieve the moral restoration of the wrongdoer, the presence of other motives in accepting a deprivation is not determinative of whether that deprivation can serve as punishment. If a person always wanted a Mazzeroti, then it is difficult to see how receiving one can serve as punishment. But if a father's motive in counseling the parents of adolescent suicides is, in part, the *desire* to help other parents avoid the mistakes he made, it is perfectly intelligible to say that the counseling is part of the father's punishment. It still may be punishment even if he finds the counseling gratifying in itself. To know whether this desire rules out punishment one needs to know such things as: how likely it is that he would have volunteered to counsel others independently of this serving as his punishment; whether the counseling helps him better understand his failings as a father; and whether it encourages him to have a renewed sense of himself as an autonomous, caring person. Most activities or deprivations may serve as punishment depending upon the role it has in the wrongdoer's life. In general, whether a deprivation can serve as punishment depends on its objective role as a response to the wrongdoer's conduct and the effect it has in his reclamation.

Summarizing, according to the moral good theory whether a deprivation can serve as punishment in a given case depends on two things. First, what role does the wrongdoer perceive the deprivation to have as a response to her wrongdoing and as the basis of her moral restoration. Second, what role does the deprivation actually have. Although this is a complicated issue, there must be a way to reconcile two different possible conclusions depending on whether we take a subjective or objective approach to this problem. Suffice it to say that the role the wrongdoer perceives the deprivation to have will often be the actual role it has in that person's life. In other words, the belief itself that the deprivation will be efficacious, is often what permits it to be effective. But it would be undesirable to leave the matter like this. We also want the wrongdoer's expectations regarding the probable affect of the deprivation to be objectively grounded.

D. *Punishment and Self-Reflection*

The paternalistic theory of punishment places certain constraints on what forms of punishment are permissible. The wrongdoer's moral good cannot be brought about by "[bypassing] the human capacity for reflection, understanding, and revision of attitude" ⁸⁶ The good of the wrongdoer, the central justification of punishment, is "a good to be achieved but one cannot, logically or morally, be compelled to obtain it. Throughout there must be complete respect for the moral personality of the wrongdoer" ⁸⁷ And this presumably involves a complete respect for the person's autonomy as a moral agent. It is unlikely that the offender can be compelled to become morally restored. These are some of the constraints on any theory of punishment relying on the wrongdoer's autonomy as a central moral value.

It is puzzling, then, why Morris insists that the deprivation involved in punishment must be externally imposed. If the wrongdoer's autonomy is such a conspicuously important feature of moral personality, and if the moral personality of the wrongdoer must be completely respected, do not externally imposed deprivations violate these constraints? Such deprivations are more likely to bypass the wrongdoer's capacity for critically reflecting upon, understanding and revising his attitudes and inclinations than would self-imposed or jointly-imposed deprivations. ⁸⁸

When individuals are committed to the basic underlying norms of society, and these norms respect the autonomy and inherent value of individuals, and when the opportunity to obey these norms is equally open to everyone, some system of self-imposed or jointly-imposed deprivations could be part of a practice of punishment or a counterpart⁸⁹ to such a practice. If a wrongdoer's capacity for self-critical reflection, understanding, and change must be respected in any acceptable system of punishment, then the wrongdoer's autonomy must also

86. *Id.* at 265.

87. *Id.* at 266.

88. It is important to understand the nature of these objections to the paternalistic theory. First, nothing Morris says shows why externally imposed sanctions are required by his theory of punishment. In short, either self-imposed or jointly-imposed deprivations are compatible with Morris' theory.

More ambitiously, the argument asserts that this theory requires self- or jointly-imposed deprivations. This does not mean that externally imposed deprivations are never justified; rather, it insists that whenever externally imposed deprivations are necessary, that means that social institutions are defective and should be reformed. See R. DUFF, *supra* note 83 and accompanying text.

89. By "counterpart" I mean a systematic practice of responding to wrongdoing in a society not having the practice of "punishment."

play a role at every stage of punishment.⁹⁰ In this way an additional benefit of punishment is realized, namely, that all the other benefits are brought about autonomously by the wrongdoer. Hence, the person's own efforts are a major part in moral self-reclamation. If the conditions are right or ideal, the wrongdoer, will, if sincere, engage in the process of punishment freely.⁹¹ An insincere wrongdoer will feign contrition. Hence, externally imposed sanctions are either superfluous or ineffectual.

E. *Externally Imposed Sanctions and Evidence of Contrition*

Morris might very well reply that accepting externally imposed deprivations serves as evidence that the wrongdoer's contrition is real. But if the wrongdoer has no choice in the matter, how is this any evidence at all? More importantly, this approach departs from the ordinary model for ascertaining whether to ascribe beliefs and attitudes to a person. Ordinarily this is achieved by obtaining two kinds of evidence, namely, a person's avowals and behavior. If a person expresses affection for cats, one has some evidence of the affection. If nothing else depends on whether the person likes cats or if there is no reason for lying or self-deception about the matter, then the avowal is usually sufficient. But if you need to know whether to entrust your cat to the person's care while you vacation in Cape Breton, evidence of a different kind is necessary. If you notice that the person kicks cats or becomes apoplectic whenever a cat appears in a television commercial, or laughs with delight to see cats fall victims to automobiles, then you have ample evidence that despite contrary statements, the person does not like cats. Morris needs to tell us why we should depart from this model in determining whether a wrongdoer is contrite.

Generally, a useful test for asserting whether a person is contrite is this. A contrite person claims to be contrite and acts in ways supporting this avowal.⁹² For example, the best way for a car thief to

90. Autonomy of thought and action is required for a person to reflect critically, to understand, and to change the beliefs and attitudes which prompted the wrongdoing.

91. The "right conditions" are those required for an ideal application of a theory, conditions such as relative equality of opportunity and general compliance with at least the central principles of law and morality.

92. Sometimes the offender's behavior is sufficient to show that the offender is contrite. A person might never have an occasion to verbalize contrition because of unrealistic expectations of what contrition involves; or, the person might never admit being contrite to inflict self-punishment. In such cases, it still makes sense to say that the individual is contrite based solely on her non-verbal conduct.

show contrition is to return the stolen car or to replace it with one of equivalent or greater value.⁹³ Conduct of an appropriate kind is always required to determine whether the wrongdoer is contrite.⁹⁴

Most traditional forms of punishment include incarceration and this usually prevents a wrongdoer from engaging in those kinds of activities which may confirm contrition.⁹⁵ Only by remaining in the community, and by critically reflecting, understanding, and correcting one's beliefs and attitudes in the context of continuing relations with others, including the victim, can evidence of the person's contrition be found. This conclusion is not vitiated by the widely held belief that dangerous criminals must be isolated for the justification of the belief is not the autonomy of the wrongdoer.

The paternalist might reply that the wrongdoer's misconduct is evidence that he is no longer willing or able to act responsibly. In essence, the wrongdoer has become separated from the moral community and has cast his lot with society's enemies as a renegade.

Three comments are appropriate. First, the wrongdoer may offend only once, so the offense cannot itself show that the person is a renegade. Second, if the wrongdoer is not able to lead a responsible life, then the individual should be treated medically or psychiatrically, not punished.⁹⁶ Third, and most important, if the person is unwilling to lead a responsible life, restricting freedom cannot be justified in terms of his autonomy.

One possible move open to the paternalist is to say that by acting wrongfully, the offender has relinquished the right to autonomy. According to this view, the right to autonomy is conditional and depends upon the person's conduct.⁹⁷

93. In addition to providing evidence of contrition, restitution may have rehabilitative effects, including helping the offender to accept responsibility for the misconduct. See Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 42, 122-24 (1983); see also *State v. Harris*, 70 N.J. 586, 366 A.2d 32 (1976); *Huggett v. State*, 83 Wis. 2d 790; 266 N.W.2d 403, 407 (1978). For a discussion of a recent decision on the constitutionality of restitution provisions in the Victim and Witness Protection Act, see Note, *Where Offenders Pay for Their Crimes: Victim Restitution and Its Constitutionality*, 59 N.D.L. REV. 685 (1984).

94. For example, engaging in a campaign to reduce crime is appropriate conduct constituting evidence of contrition. Making license plates is not.

95. For interesting alternatives to standard conceptions of incarceration, see C. DODGE, *supra* note 19, at 20-23.

96. See Morris, *supra* note 11.

97. See V. HAKSAR, *EQUALITY, LIBERTY AND PERFECTIONISM* 154 (1979) (arguing that certain types of criminals forfeit their rights to life and liberty); Vlastos, *Justice and Equality*, in *SOCIAL JUSTICE* 48 (R. Brandt ed. 1962); see also Goldman, *Toward a New Theory of Punishment*, 1 LAW & PHIL. 57 (1982) (proposing that the community, as trustee, holds the serious wrongdoer's rights until punishment is completed).

This route may be open to other theories of punishment, but it is not open to Morris. For Morris believes rightly that one can never relinquish this right, even if one wants to.⁹⁸ It is not easy to understand then why Morris' next step is not the endorsement of the view that punishment must be guided by the wrongdoer's autonomous decisions at every stage of the practice. And this applies to what sort of self-imposed deprivation, if any, should take place.

Morris may argue that we respect the wrongdoer's autonomy if the person has the opportunity to *consent* to the basic principles of social organization upon which the system of punishment depends. If offenders were fully rational, they *would* consent to punishment. Hence we respect autonomy even when punishing. As long as wrongdoers have the chance to create, reform, or abolish a particular system of punishment, their autonomy is respected, even when external deprivations are imposed. But this would allow aversive conditioning and other forms of punishment which bypass the individuals' critical capacity for reflection, understanding, and reformation. And this is something which Morris does not allow.

Additionally, the fact that rational individuals *would* consent to punishment does not say very much about what they actually consent to. And how does one take their autonomy seriously by insisting upon what they would want in other circumstances?⁹⁹

F. Closure as a Benefit of Punishment

Morris contends that closure is one of the central benefits of the paternalist theory of punishment. He argues that punishment "rights the wrong" committed by the wrongdoer, and "has, in contrast to blame and disapproval, the character of closure, of matters returning to where they were before, of relationships being restored."¹⁰⁰ At work here is the metaphor that the world contains a balance of good and

98. See Morris, *supra* note 11, at 270 (right to one's status as a moral being, including presumably, one's autonomy, is a "non-waivable, non-forfeitable, non-relinquishable right"). See also Morris, *The Status of Rights*, 92 ETHICS 40, 46 (1981) (an individual's status as a moral being may not be destroyed).

99. See R. DUFF, *supra* note 10, at 221:

But this move from "would will" to "has willed" is deeply disturbing: not only because we may be wrong about what a fully rational being would will; but because if we are to ascribe something to a person as *his* will we must surely show that it *does*, not merely that it *would*, express itself in his actual life and conduct.

But see D. VANDEVEER, PATERNALISTIC INTERVENTION 88 (1986) (conditional consent may justify paternalistic interference).

100. Morris, *supra* note 11, at 267.

evil. Criminal conduct is wrong, because it brings evil into the world. Punishment rights the wrong by making the criminal suffer an evil analogous to the evil the victim suffered. In this way punishment rights the offender's wrong. But this slogan is unilluminating. Can anything ever genuinely right a wrong?

Let us distinguish between a theory of the good and a theory of the right. A theory of the good tells us what acts are good or have value¹⁰¹ while a theory of the right focuses on what counts as a requirement on action, that is, what sorts of acts we are obligated to perform. A theory of the good informs us what states of affairs ought *to be* brought about, while a theory of the right informs us what people ought *to do*.¹⁰²

This distinction should help us understand why it is that a wrong can never be righted, nor should we want it to be. One can, of course, change a bad situation to a good one. Famine is a bad thing. If we feed the starving we change a bad thing to a good thing. Similarly, replacing the car that the offender stole from a victim changes a bad thing to a good thing. Remedying bad situations is certainly a legitimate function of the criminal law. Hence, restitution may be a conspicuously appropriate remedy¹⁰³ according to the moral good theory.¹⁰⁴

It should be clear, however, that a wrongdoer's *doing wrong* can never be changed. That the person autonomously chose to steal another's car, cannot be erased by making the victims lot better than it was before. The wrongdoer's restoration requires that the wrongful act, or the process of reasoning which led up to it, become a permanent part of moral awareness. In this way, the wrongdoer remains aware of her capacity for wrongdoing and the need to keep a constant vigil to avoid doing wrong again. The wrongdoer's awareness of wrongful behavior is a way of reenforcing her self-conception as an autonomous individual concerned with the good interacting with other persons as equally autonomous individuals.

The wrongdoer's autonomy is the source of the capacity to choose whether to value others or only oneself. The choice between these alternatives is always open and is a choice which must be continually made. A person's past transgressions should influence practical deliberations throughout life. Living with the knowledge that one is capable of actual wrongdoing, and interpreting and understanding what this

101. More precisely, the first task for a theory of good is to explain what "good" means.

102. See W. SELLARS, *SCIENCE AND METAPHYSICS* 175-229 *passim* (1968) (pointing out important logical connections between *ought-to-be's* and *ought to do's*).

103. Restitution may be an acceptable remedy in the moral good theory if voluntarily used.

104. See Griseri, *Punishment and Reparation*, 35 *AM. PHIL. Q.* 394 (1972).

capacity entails for oneself and others is to gain the self-knowledge necessary for being an autonomous, responsible moral agent. Wrongs can never be righted, nor should they be. Morris' conception of closure that wrongs can be righted is much too strong a notion.

From the moral point of view, violating important societal norms should have a profound effect on the wrongdoer as well as other members of society. To pick some arbitrary point, such as when incarceration ends, as the time when interactions with others are restored and relations return to where they were before is unrealistic and undesirable. It is unrealistic because the wrongdoer will naturally be uncertain of present relations with others. Other members of the community will be uncertain of whether the wrongdoer is really reformed or can be trusted again as a responsible member of society. The wrongdoer will question whether others trust and forgive him. He will also wonder whether he forgives and trusts himself. Fear, indignation, and resentment will initially be part of the wrongdoer's interactions with others. Punishment *per se* has settled little.

A weaker and more realistic conception of closure is this. What is central to punishment is that it sets a time when everyone, including the wrongdoer, is sincerely ready to establish morally appropriate relations with one another. This means that the person is now prepared *to try* sincerely to resume prior activities and relations with others. There is nothing in this notion of closure that implies complete or even meaningful self-forgiveness or forgiveness by others, nor that the wrong has been rectified. This is a minimal conception of closure to be construed as simply the negation of the view that once a person violates a norm of the community, she can never return to it as a fully participating member.

It is important to see that this is a *very* minimal conception of closure. For once back in the community, a wrongdoer will first test herself and others to determine whether she has excised those inclinations which prompted her to violate the norm in the first place. As a result, a wrongdoer has a very heavy burden to bear. She must live with whatever doubt remains that her inclination to lawlessness is now no greater than those of any other member of the community.

This also places a burden on the other community members. For they must expunge whatever indignation, resentment and anger they feel toward the reformed wrongdoer. Individuals must realize how similar they are to the wrongdoer, and how fortuitous it is that they have avoided committing a crime while the wrongdoer has not. Other members of the community must cultivate the wrongdoer's trust. They must be open and supportive and view the person as part of a community with which they identify. When these responsibilities on the part

of others are not carried out, closure, even in this minimal sense, is impossible.

Of course, this is not to say that closure is undesirable in a narrowly legal sense. Once a person serves time for a crime, the law should not be able to get the individual back in its clutches for the same crime. Nor should it be able to keep the person in its clutches indefinitely. But to understand this feature of closure and punishment in this narrowly legal sense, one must first understand its moral purpose. It is with regard to this moral purpose that closure, in Morris' strong sense, is undesirable.

G. *Punishment and Human Nature*

Any attempt to justify punishment must describe what the goals of punishment are, and the underlying conception of human nature which makes these goals feasible.¹⁰⁵ Morris appears to rely on two different, even incompatible, conceptions of human nature. The first conception characterizes the capacity for autonomy as an essential feature of persons¹⁰⁶ in both a descriptive and normative sense.¹⁰⁷ Providing a theory of autonomy describes a fact about people and helps refine conduct and mold social institutions to achieve greater autonomy for everyone.

Although Morris does not say so explicitly, he seems committed to a conception of a person as having the capacity for respecting and

105. Discussions of human nature are beset with complex conceptual problems. One set of problems is to determine what it means to classify human beings as having a particular nature. Also, if such claims are meaningful, how can we prove such claims true? A second set of problems is what implications does an appeal to human nature have for law, morals, and politics. What forms of argument are appropriate in showing that a particular social practice or institution furthers or is consistent with a certain conception of human nature?

Further, does it make sense to discuss a unity to human personality? For an affirmative answer to this last question, see A. MACINTYRE, *AFTER VIRTUE* 204-05 (2d ed. 1984) (a person's life has a unity); M. MIDGLEY, *BEAST AND MAN: THE ROOTS OF HUMAN NATURE* 190, 262, 280 (1978). Shoeman believes that no such unity exists; nor would the existence of unity be good. F. Shoeman, *Spheres of Lives* (unpublished manuscript 1985). For a provocative sociobiological conception of human nature, see E. WILSON, *ON HUMAN NATURE* (1978).

106. By "an essential feature of persons" I mean that extinction of this feature would destroy the person as an individual of a certain kind. See B. BRODY, *IDENTITY AND ESSENCE* 84 (1980).

107. Descriptively, everyone is autonomous to some degree. Normatively, autonomy represents a goal toward which we aspire. This suggests that autonomy is never completely realized in any one individual's life. Rather, it is a character ideal that one must continuously strive towards. R. YOUNG, *PERSONAL AUTONOMY: BEYOND NEGATIVE AND POSITIVE LIBERTY* 8-9 (1986).

caring for others. One important way a person shows respect and concern for others is by honoring the norms of society, and the shared values underlying these norms. The conception of human nature presupposed here is one which takes other people very seriously, as equally valuable, autonomous beings having inherent value. In this conception, a person's autonomy and inherent value are basic irreducible moral values.¹⁰⁸ Whether Morris would endorse this view is unclear. Nevertheless it appears to be a plausible view¹⁰⁹ and it or something very much like it is required by his theory.¹¹⁰

When Morris turns to the issue of whether a system of punishment can accommodate self-imposed or jointly-imposed deprivations, we discover a second, very different picture of human nature.¹¹¹ Here Morris seems to hold that it is impracticable to have a system of punishment which permits the wrongdoer the option of selecting deprivations. If we had such a practice, the wrongdoer, most certainly, would not take it seriously. Each wrongdoer would try to receive as minimal a deprivation as possible, while urging more severe deprivations on others. People naturally want to come out ahead of others, and will cheat if they think they can get away with it.¹¹²

This second conception of human nature is certainly antithetical to a conception of human beings as equally valuable and autonomous, and as respecting and caring for one another. This view states that there cannot be jointly-imposed deprivations in any viable practice of punishment because people are not trustworthy enough to take such

108. These features of human nature are valuable because they are indispensable to moral personality. See Young, *The Value of Autonomy*, 32 AM. PHIL. Q. 35, 43 (1982) (describing autonomy as "valuable because of its foundational place for moral personhood and self-esteem."). To classify these as irreducible values does not mean interesting relations between them are nonexistent. For instance, we acknowledge peoples' inherent value by respecting their autonomy. The converse, that all individuals having inherent value are autonomous, is less obvious.

109. This view is probably more than merely plausible; however, I will not argue that here.

110. This view is required if the paternalist theory is to be successful. It is a very compelling account of human nature and has important implications for ethics. When properly deployed, this conception shows that we have a *duty of beneficence* toward others and it is only by recognizing and acting on this duty that an individual can achieve full self realization. See Lipkin, *The Theory of Reciprocal Altruism*, 31 PHIL. STUD. (Ireland) 108 (1984) (arguing that beneficence is required by our conception of ourselves as persons).

For an important discussion of the role of altruism and egoism in the law, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). For two critical examinations of Kennedy's thesis, see Bratton, Jr., *Manners, Metaprinciples, Metapolitics, and Kennedy's Form and Substance*, 6 CARDOZO, L. REV. 871 (1985); Shupack, *Rules and Standards in Kennedy's Form and Substance*, 6 CARDOZO L. REV. 947.

111. Morris made this point in conversation.

112. See J. WILSON & R. HERRNSTEIN, *CRIME AND HUMAN NATURE* (1985) (overview of various theories of crime causation and the correlation to punishment).

deprivations seriously. This view is more like a Hobbesian¹¹³ or Spence-rian¹¹⁴ theory of human nature. Such a conception might hold that people are inveterately egoistic, and though they can be persuaded to obey the law, they will do so only when the law threatens them with punishment should they fail to obey it. Hence, the notion of people as autonomous equal beings having respect and concern for others is lost.¹¹⁵

It seems that Morris needs the first conception if he is to establish that punishment should aim at restoring the wrongdoer as an autonomous being concerned with the good. He needs the second conception to show that self-imposed or jointly-imposed deprivations cannot be part of a system of punishment. Hence, Morris must alter his view. Either punishment should not be concerned with the moral¹¹⁶ good of the wrongdoer, or jointly-imposed deprivations are not incompatible with punishment.¹¹⁷ In this case, the paternalistic theory draws much closer to a voluntaristic conception of punishment.¹¹⁸

IV. THE VOLUNTARISTIC FORMULATION OF THE MORAL GOOD THEORY

A. *The Goals of the Voluntaristic Formulation*

According to the voluntaristic¹¹⁹ formulation of the moral good

113. See HOBBS, *supra* note 21, at 129.

114. H. SPENCER, *THE PRINCIPLES OF ETHICS* 465-66 (1904).

115. But perhaps this notion is not lost. This view can be defended by showing that people have a natural tendency in desiring to ease their lots, which sometimes involves trying to get away with something. A good person may try to cut corners if unlikely to be caught. This does not mean that the person is not autonomous or does not respect others. Or does it?

For such "corner cutters" to present a problem for a system of autonomous punishment, their conduct must be rampant. If the conduct is rampant, it is unlikely that the "corner cutters" have retained their moral values, or their concern for making an autonomous system of punishment work. A truly moral person will often refrain from cutting corners precisely because not refraining undermines the existing institutions having moral value.

116. Of course, punishment partially deals with the offender's prudential good. In other words, punishment may be justified on prudential as well as moral grounds.

117. At this stage, all that Morris must concede is that jointly-imposed deprivations are not *incompatible* with punishment. We have not established that jointly-imposed deprivations are the only, or even the best, sort of deprivations required by the moral good theory of punishment.

118. Of course, one might say that a combination of the two views is correct. People at their best are trustworthy; when they are not at their best, they are egoistic. Punishment inexorably brings out the worst in people; hence, punishment must always concern itself with individuals trying to avoid something. But this notion is odd in the egoistic view. If punishment truly benefits the offender, any rational egoist should want to achieve the goals of punishment. Hence, the person will not cut corners. But this applies only to a rational egoist who believes it best to conform to moral practice.

119. I am not happy with the term "voluntaristic." Why not "anarchistic" or "libertarian?" These latter terms carry excess conceptual baggage unassociated with "voluntaristic."

theory, the principal goal of punishment is to restore the offender's identity as a moral being. Punishment seeks to bring the offender back into self-harmony, to restore the individual's respect and concern for others, and to make the individual worthy of respect and concern. In general, this goal involves restructuring the offender's system of beliefs and intentions, or if the offense is not that serious or not indicative of how he ordinarily behaves, of exorcising the specific intentions which prompted the transgression in the first place. Punishment, according to the voluntaristic formulation of the moral good theory, has certain benefits¹²⁰ which help to restore the offender's identity as a moral being. What are these benefits?

First, the wrongdoer must be remorseful¹²¹ and see that her conduct was wrong.¹²² Second, punishment permits the wrongdoer to assume the responsibility for the conduct as the first step in a process of atonement.¹²³ Third, the offender must accept herself as a wrongdoer.¹²⁴ Fourth, the offender must be able to forgive herself for the misconduct

120. Generally, these benefits are claimed for any version of the moral good theory.

121. In sentencing a convicted defendant, courts invariably note whether the defendant is remorseful. See, e.g., *Bergman v. Lefkowitz*, 569 F.2d 705, 713 (2d Cir. 1977); *United States v. King*, 442 F. Supp. 1244 (S.D.N.Y. 1978) (stating neither defendant showed any remorse or contrition).

122. See Teichman, *Punishment and Remorse*, 48 PHIL. 335, 344 (1973) (Remorse is the agent's reaction to wrongful action.). See also P. WINCH, *ETHICS AND ACTIONS* 225 (1972) (In essence, "feeling remorse is a way of seeing the wrongness of one's action.").

In violating a norm of conduct, the wrongdoer autonomously places herself in conflict with and splits off from the appropriate reciprocal interactions with others. Coming to terms with this is painful; but the revelation involved in recognizing a capacity for wrongdoing, and the ability to harm people and to damage values to which the wrongdoer is attached, embodies more than pain or suffering. The revelation embodies the premonition of what it is like to experience a disintegration in one's sense of self.

123. Offenders must recognize the precise character of their conduct as being antithetical to sustaining the appropriate reciprocal relations with others. Wrongdoing exudes a certain arrogance and contempt for the shared values of the community. Wrongdoers must now experience their arrogance as contemptuous of community, and as ultimately inimical to their own well-being. In acting wrongfully, wrongdoers damage something to which they are attached in a special way, namely, other people. Realizing this bond, and experiencing the alienation associated with being separated from others, helps wrongdoers appreciate the value of reciprocally relating to others according to principles of mutual respect and concern.

124. Accepting oneself as a wrongdoer requires that the individual understand the sequence of events which led to the autonomous decision to violate the law. Wrongdoers must also understand their general capacity for wrongdoing. Understanding this general capacity involves understanding the different reasons and motives which prompt people to violate the law. Understanding and accepting themselves as wrongdoers helps them appreciate how others can transgress also; it makes them more sensitive to the unique battles people endure in trying to live a morally good and legally respectable life. It permits them to appreciate the fortuity in other person's failings.

and desire to understand the difficulty others might have in forgiving her.¹²⁵ Finally, the offender must make a recommitment to lawful conduct.

In order to achieve these benefits, the wrongdoer must, typically, interrupt the normal course of life and undertake a process of reformation. After serious lawlessness, an offender must re-examine her life for an appreciation of the moral significance of the crimes and for again taking a place in society. Typically, we conceive of such circumstances as involving some sort of deprivation. By losing something of value, the offender is better able to appreciate what the victim and the community lost as a result of her wrongdoing.

The voluntaristic conception of punishment holds that the central goal of punishment is for the wrongdoer to criticize, understand and correct the beliefs and attitudes which prompted the transgression. The offender must objectify or take an external stance¹²⁶ regarding the situation and inspect her motivational system, including her attitudes towards other people, and her beliefs and desires, in order to correct her inclinations to commit crimes. Doing this is a complex moral and practical activity which requires the offender to be honest about her self-conception and the conception she has of the value of other people. This activity involves talking to other people, counselors, victims, friends, and so forth. Such self-criticism and correction is demanding and requires a significant commitment on the offender's part.

Each stage of the wrongdoer's self-examination must reflect her autonomy as a description of both her activities *and* aspirational goals. What counts as punishment in a given case depends upon the character of the wrongdoer, the nature of the crime, the possibility of compensating the victim, and other facts about the social organization of the community.¹²⁷ The voluntaristic conception of punishment contends

125. This is not to say that other people should withhold forgiveness, only that forgiveness is often difficult. See Downie, *Forgiveness*, 15 AM. PHIL. Q. 128 (1965); Horsbrugh, *Forgiveness*, 4 CAN. J. PHIL. 269 (1974); Twambley, *Mercy and Forgiveness*, 36 ANALYSIS 84 (1975-1976).

126. An individual simultaneously has two self-conceptions. One conception places the individual at the center of the world, more real than anyone else; the other conception views the individual as merely one among many. See R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* 157 (1984). Consciousness is determined, in part, by an integration of these two perspectives. This is not to say, however, that we can be fully conscious of ourselves or take a completely objective view of ourselves. See T. NAGEL, *THE VIEW FROM NOWHERE passim* (1986) (examining the difficulties in objectively viewing one's own situation).

127. The question whether the punishment should fit the crime or the criminal is misplaced. Both factors should be taken into account.

that if jointly-imposed deprivations¹²⁸ are conceptually incompatible with the conception of punishment, as ordinarily conceived, then the concept and practice of punishment should be revised, abandoned, or replaced. The voluntaristic conception of punishment prides itself in taking the offender's autonomy more seriously than the paternalistic formulation of the moral good theory, or any competing conception of punishment. Further, by requiring the offender to have an *equal*, not an absolute, say regarding sentencing, the voluntaristic formulation is not committed to the untenable position that an offender unilaterally chooses the punishment.

B. *The Voluntaristic Formulation Stated*

Punishment, as a social practice, conforms to the voluntaristic formulation of the moral good theory, when it respects the autonomy of the offender at every stage of the punishment. This includes, among other things, the degree and kind of the deprivation, its place and duration. This does not preclude that other members of the community have a right to advise, exhort or remonstrate with the offender over what the choice of deprivation should be. Nor does it exclude the possibility of having a practice in which the offender, as a sign of good faith, consults a psychotherapist or a physician. Further, the state must have an *equal* say in determining the offender's sentence.¹²⁹ But

128. Applied concretely, the deprivations need not be exclusively self-imposed. Instead, the sentence may be negotiated between the offender and a representative of the state, such as a judge. In other words, the voluntaristic formulation of the moral good theory permits *jointly-imposed* sentences! Negotiated settlements may express jointly-imposed sentences. Should the offender be incorrigible and display continued bad faith, traditional forms of punishment can take over. One constraint on the negotiations between the judge and the offender is that in addition to *doing* justice, justice must appear to be done. Only then can others have faith in this system of sentencing. One element of appearing to do justice is for the state to present its reasons for punishing the offender in every case. P. JACKSON, *NATURAL JUSTICE* 94-95 (1979).

Further, alternatives to incarceration may be natural options for a voluntaristic conception of punishment. Examples of options include warnings, unconditioned releases, probation and fines. See A. VON HIRSCH, *DOING JUSTICE* 118-23 (1976). Other options are week-end release and more community involved interactions, including community-based halfway houses. M. LEVIN, *URBAN POLITICS AND THE CRIMINAL COURTS* 189 (1977). Some jurisdictions are experimenting with private corporations requiring the prisoner to pay for staying in a half-way house as an alternative to a jail sentence.

129. The moral good theory can recognize the autonomy of the offender as well as the autonomy of the other members of the community. Taken seriously, the offender and a representative of the community must negotiate and jointly decide the deprivation. In a society recognizing each individual's autonomy as equally important, such a joint decision in the context of punishment is not beyond reach. Some elements of the voluntaristic formulation can be implemented even in contemporary penal institutions.

the state cannot have the final, unilateral say as to the degree, kind, place,¹³⁰ and duration of the punishment without the offender's participation and consent.¹³¹ The voluntaristic formulation of the moral good theory holds that autonomous interactions with others according to principles of mutual respect and concern are a basic, irreducible ethical value. Just as autonomy is a central feature of these interactions when they are working well,¹³² so too must autonomy be a central feature of what happens when these relations need to be repaired.¹³³

Autonomy is not just considered as having intrinsic value, no matter what the consequences. Rather, in this view, autonomy plays a critical role in learning and self-growth, especially in the case of moral learning.¹³⁴ A person never fully develops into a moral being without internalizing the relevant moral values. To do this the individual must autonomously identify with these values, and choose to adopt them.

130. For offenders to reap the benefits of a system of punishment, they sometimes must remain in the community, at least when nonviolent crimes are involved. Alternatives to incarceration are called for. See A. VON HIRSCH, *supra* note 128, at 118-23. Warehousing criminals, as in modern American prisons, is tantamount to exiling them to small islands controlled in complex fashion by prison gangs, sociopaths, and prison officials, some of whom are corrupt or inept. The moral good theory of punishment requires, when feasible, that the offender continue relations with community members during the punishment. See also N. MORRIS, *THE FUTURE OF IMPRISONMENT* 8 (1974) (acknowledging the modern tendency to preserve prisoners' social ties and community influences). In this way positive community influences may help the offender achieve the goals of punishment. For an evaluation of the community service sentence in New York City, see D. McDONALD, *PUNISHMENT WITHOUT WALLS* (1986).

131. This does not grant the offender final veto power. Some sanction must be jointly-imposed through a negotiated settlement between a representative of the state and the offender. To get such a program started it might be necessary to retain certain vestiges of the old system. For example, we might initially impose a deadline for a negotiated agreement concerning the sentence. If the deadline were not met, a sentence would be paternalistically imposed.

132. The argument that autonomy can be abused and therefore the offender's autonomy cannot determine the punishment misses the mark. If autonomy can be abused, it is difficult to see how a theory of punishment valuing autonomy can ever justify punishment. Only if compulsion can bring about autonomy does the paternalistic formulation of the moral good theory have credibility. But compelling "autonomy" without serious negative effects on moral personality generally is implausible.

133. Underlying the argument against the moral desirability of the voluntaristic conception is the belief that there is an asymmetry between the autonomy of non-offenders and the autonomy of offenders. And indeed there is imbalance because a non-offender has not broken the law and need not negotiate with the state to determine the future. But it does not follow that a stronger asymmetry exists, namely, that since an offender has violated the law, autonomy in determining her sentence should be ignored completely.

134. See L. KOHLBERG, *1 THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981); see also J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (M. Gabain trans. 1965) (investigation of how children reach moral judgments).

In short, these values must condition future choices. This empirical hypothesis is associated with a moral ideal, namely, people and social institutions which help to order peoples' lives must incorporate autonomy at each stage of human development and interaction.

If autonomy is a fundamental, irreducible value, we may be able to construct the institution of punishment to respect the offender's autonomy much more than we do now, without abandoning other practical concerns. We could have a system of dealing with wrongdoing where the offender proposes what the deprivation is to be. A judge could then exercise veto power if the proposal were not made in good faith. Alternatively, the prosecution and defense could negotiate sentences permitting the judge to determine whether each party is bargaining in good faith, modeled after contemporary plea bargaining. In this fashion the offender's right to have an equal say in his sentence is realized.

Similarly, we could institute a system of negotiation where the offender and a state official such as a judge, jointly determine the sentence. Both parties would agree that the deprivation chosen must meet the following conditions. First, it must be appropriate to the crime. The proportionality condition clearly applies here.¹³⁵ Second, it must provide a way of determining whether the deprivation will help realize the benefits of punishment. That is, will it encourage the wrongdoer's contrition, remorse, self-acceptance as a wrongdoer, repentance, and renewed self-conception as a responsible moral being.¹³⁶ The negotiations require autonomous interactions between the wrongdoer and the official and nurture the wrongdoer's capacity for autonomous interactions even prior to imposing the sentence. Furthermore, when there is sufficient evidence that the wrongdoer is already repentant, or already has achieved the benefits of punishment, both parties may agree that the deprivation should be minimal.¹³⁷

135. See *supra* note 34 and accompanying text.

136. Even if the voluntaristic conception is not practicable as a general blueprint for a practice of punishment, it might be used successfully with certain kinds of criminals or in punishing certain kinds of crimes.

137. In requiring the offender and the appropriate representative of the community to negotiate the sentence, the voluntaristic conception of punishment cannot be charged with taking seriously the offender's autonomy at the expense of other people. Because the community has an equal say in the sentence, its safety and autonomy are protected. Accordingly, the voluntaristic conception of punishment maintains that it alone takes seriously the autonomy of each member of society, including the offender. If it is a conceptual point that punishment cannot tolerate jointly-imposed deprivations, then the voluntaristic conception of punishment is not a conception of *punishment*. In a society taking autonomy seriously, the voluntaristic conception of punishment would be the counterpart practice to punishment.

C. *Moral Personality and Reciprocity*

What conception of moral personality and human nature supports the voluntaristic conception of punishment? The answer seems to be the first one attributed to Morris. It will be useful to describe such a conception in greater detail.

A person is essentially a social being.¹³⁸ She conceives of herself as a goal-directed, individual interacting with other similar individuals.¹³⁹ What do such interactions require? First, these interactions require that we have respect and concern both for ourselves and others. To do this a person must regard herself and others as having inherent value.¹⁴⁰ Autonomously interacting with others as persons requires that a person recognize others as having inherent value and as a result accords them full moral consideration. To interact with other individuals as persons also requires that they recognize her as having inherent value and as a result accord her full moral consideration. *Reciprocity* is an essential feature of interacting with others as persons and it is the hallmark of moral consciousness.¹⁴¹

This conception of moral personality includes the concepts of equality and community. Most plausible contemporary moral theories regard all people as *moral* equals. This sense of equality is expressed by

In England judges now have a great deal of discretion "both in the range of punitive sentences which may be imposed and in the choice of alternative dispositions." D. THOMAS, *PRINCIPLES OF SENTENCING* 3 (2d ed. 1979). Similarly, American judges enjoy similar discretion. A judge can use her discretion in sentencing to permit jointly-imposed sentences. Of course, the judge must determine whether the offender is negotiating a sentence in good faith. When good faith is lacking, it may be that only paternalistic punishment works. Moreover, the threat of the paternalistic conception itself may provide the offender with an additional, though non-moral, incentive to negotiate in good faith.

138. Interestingly, we are social beings not only in the contexts of ethics, law, or political theory. Our social nature is a structural feature of our ability to reason and learn. Reasoning, knowledge, and truth have meaning in the context of an epistemic community, and this requires special kinds of interactions with others. These "social" interactions with others are what Wittgenstein referred to as "forms of life" and "the natural history of man." See L. WITTGENSTEIN, *REMARKS ON THE FOUNDATIONS OF MATHEMATICS* (G. Anscombe trans. 1965), L. WITTGENSTEIN, *CERTAINTY* (D. Paul & G. Anscombe trans. 1969); L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. Anscombe trans. 1953); L. WITTGENSTEIN, *ZETTEL* (G. Anscombe trans. 1967); see also W. SELLARS, *supra* note 102; S. TOULMIN, *HUMAN UNDERSTANDING* (1972). This social aspect of knowledge involves, in part, the recognition that for there to be principles of reasoning and knowledge at all people must participate in rule-governed activities. Generally, the social aspect denies that idiosyncratic forms of reasoning can exist, or that knowledge is ultimately based on the egocentric perspective.

139. Lipkin, *supra* note 110.

140. *Id.*

141. *Id.*

showing respect and having concern for other people. Interactions which are conditioned on reciprocal respect and concern connect us with others in a very intimate way. These reciprocal interactions are the source of *community*, involving *shared* final goals and a special concern with individuality. Community is not established merely by showing how the independent and antecedent interests and desires of a diverse and competitive collection of individuals can be harmonized. Human beings have a direct and basic need to live with others and to interact autonomously with them according to principles of mutual respect and concern. This mutuality or reciprocity is the centerpiece of morality. What is reciprocally exchanged is not mere toleration of other people, the acknowledgment of certain minimal rights, or just a commitment not to interfere or harm them.¹⁴² What is exchanged is an abiding respect and deep caring for other people as being intimately connected to oneself.¹⁴³

This same reciprocity provides the possibility of wrongdoing, moral indignation, and resentment. Formally, wrongdoing is the violation of a social norm. Substantively, a person acts wrongfully when failing to interact autonomously with others according to principles of reciprocal respect and concern. Consider the benefits and burdens of social life to be equally shared among people. An individual who does not exhibit respect and concern for others acts wrongfully. The person harms the victim by not assuming the same level of benefits and burdens as the victim and others in the society. There is something like a breach of contract here, or even more importantly something like a theft or unjust enrichment. The wrongdoer accepts or takes benefits from the victim and other members of society without bearing

142. Moral philosophers often use the notion of reciprocity in very different ways. See, e.g., L. BECKER, RECIPROCITY 73-144 (1986) (discussing the complex role of reciprocity in moral theory).

143. Feminist writers have emphasized the notions of empathy and connectedness as a paradigm for human moral relations. See C. GILLIGAN, IN A DIFFERENT VOICE (1982); N. NODDINGS, CARING (1984); see also M. MAYEROFF, ON CARING (1972). Connectedness has also been endorsed as a particular way of knowing. M. BELENKY, B. CLINCHY, N. GOLDBERGER, & J. TARULE, WOMEN'S WAYS OF KNOWING 112-13 (1986) (describing connected knowing as an attempt to convey knowledge to another by having that person share the knower's experience). Connectedness with other people structures an authentic sense of community and produces a real sense of "we". Gabel, *Founding Father Knows Best: A Response to Tushnet*, 1 TIKKUN no. 2, 1986, at 41, 43. Gabel states:

A real sense of "we" emerges from the realization of a desire, immanent within each of us as social beings, for mutual recognition and confirmation; it is a feeling-bond that is grounded in the actual connection of those who generate it, and as a result, it has no need of a ground or source outside itself in order to exist.

the appropriate load. The wrongdoer accepts the benefits from others, which is conditioned in part by their expectations that the wrongdoer will act correctly, but fails to reciprocate. In the standard or exemplary case of moral conduct, it is impermissible to accept the benefits bestowed on you by others' lawful conduct and fail to reciprocate.¹⁴⁴

When a person fails to reciprocate in this way, resentment and moral indignation are appropriate. It is important to point out that resentment or moral indignation is not merely disliking what the wrongdoer has done, not even disliking it in the extreme. Nor is it reacting hostilely to the conduct. A person may dislike another's treatment, or react hostilely to what the wrongdoer does, without *resenting* it. Resentment and moral indignation include a moral attitude, namely, the belief that one has been treated unjustifiably. It presupposes shared standards of conduct which can be appealed to by both parties to a conflict. It also involves a disposition to communicate one's condemnation of the wrongful conduct and calls the wrongdoer to account for his conduct. Resentment and moral indignation include a belief that the wrongdoer had no right to act in the offensive manner, and that it not reoccur.¹⁴⁵

Restoring moral personality requires returning to autonomous, reciprocal interactions with others. On the voluntaristic conception of punishment, this is impossible if deprivations are externally imposed. The relationship between the offender and the community cannot be reestablished by force. This means two things. First, the offender cannot forceably reestablish the appropriate reciprocal interactions with others. If others refuse the overtures, he is lost. Similarly, others, including the state, cannot compel a person autonomously to reestab-

144. Persons acting wrongfully disrupt these reciprocal relations. They accept what others accord them, full moral consideration, but do not reciprocate. Their crime is directed toward the victim and society. In the wrongdoers' view, others are less important. Consequently, they do not warrant reciprocal treatment. Their wrongdoing shows that wrongdoers take without giving. They are not autonomously motivated by the reciprocal recognition of inherent value, but only by their own egoistic self-exaggerations. Their loyalty is only to themselves. They are morally isolated and their own victim.

145. Resentment and moral indignation, understood in this way, comprise the basis of punishment as a moral response to wrongdoing. See Beardsley, *Moral Disapproval and Moral Indignation*, 31 *PHIL. & PHENOMENOLOGICAL RES.* 161, 167 (1970-1971) (arguing that moral indignation is a form of anger involving an inclination to perform certain kinds of acts). Resenting how you have been treated, you want the wrongdoer to give an account of herself. You want her to justify her conduct. Punishment is possible only when individuals have the capacity to resent how someone treats them and when they are able to communicate that resentment to the wrongdoer.

lish the appropriate sort of reciprocal interactions. Autonomy must govern the process of reestablishing the appropriate ties with the community. Every stage of the wrongdoer's restoration must include his autonomous participation.

In a society in which people choose, for the most part, to enter into the appropriate reciprocal interactions with others, the practice of "punishment" would include the autonomous participation of the wrongdoer at every stage of the process. For incorrigibles who refuse to participate in this important social practice, no theory of punishment regarding autonomy as a paramount value will work.¹⁴⁶ The history of western penal systems is replete with examples of why moral regeneration cannot be compelled. If an individual autonomously eschews and denigrates interactions with others structured according to the reciprocal recognition of inherent value, then the moral reformation may be impossible. The voluntaristic conception of the moral good theory¹⁴⁷ requires respecting the offender's autonomy by permitting him to have an equal say concerning the sentence.

The voluntarist conception must show how a system or practice of punishment in general can benefit an offender by restoring the person's identity as a moral being. To achieve this goal, according to the vol-

146. The moral regeneration of an incorrigible is impossible. Therefore, the moral good theory cannot justify punishment in that case. This does not mean that no other theory can justify the incorrigible's isolation from others.

147. It is important to distinguish the moral good theory from Nozick's theory of punishment. See R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363-67 (1981). Nozick's theory is essentially a retributivist theory. Nozick distinguishes between what he regards as two kinds of retributivist theory: teleological retributivism and nonteleological retributivism. The former regards retributivism as an instrumental value that brings about the moral reform of the offender. The latter does not concern itself per se with the moral reform, but with connecting the offender with the correct values. Because of the retributive dimension to his theory, Nozick views punishment as justified even when the offender does not benefit by it. *Id.*

It is not clear why Nozick calls "teleological retributivism" a *retributive* theory. The theory that Nozick describes resembles the moral good theory of punishment. Punishing the offender is designed to bring about moral reform. Its retributive character functions merely as the means to the reformative end. Hence, teleological retributivism is no form of retributivism at all.

Nozick fails to explain successfully what his nonteleological retributivism involves. He does say that "[r]etributive punishment effects a link with correct values in those who have flouted them" *Id.* at 395. But what is it to "effect[] a link with correct values"? Does it mean forcefully conditioning the offender to act in accordance with the correct values? Or does it mean merely exposing or communicating the correct values to the offender? Nozick does not answer these questions, but one can glean this. Presumably, by flouting the law, the offender separates himself from the correct values; hence, punishment as a communicative act reconnects offenders through the punisher with these values. Still, Nozick needs to explicate the relationship of "connecting" or "reconnecting" the offender with correct values.

untarist conception, it must be shown that the offender is no longer inclined to violate the relevant social norms,¹⁴⁸ because he values them as reflecting his identity as a moral person.¹⁴⁹ In this view, the morally reformed offender identifies with the social norms, and thinks of them as, in part, an expression of himself as a person. Hence, the individual views acting in accordance with these norms to be in his true interest. Whatever else is included in the concept of an individual's true interests,¹⁵⁰ one's identity as a moral being is necessarily included.¹⁵¹

D. *The Symbolic Nature of Punishment and the Importance of Deprivations*

The moral conception of punishment, or the systematic moral response to wrongdoing, consists of a series of rituals¹⁵² symbolizing¹⁵³ the victim's loss brought about by the offender as well as the offender's attempt to compensate for the loss.¹⁵⁴ Punishment, in its symbolic aspect, functions as a social practice which encourages the members of the community to reflect upon and thereby appreciate more deeply the reciprocal interactions which connect people to one another and which is the basis of a sense of community.¹⁵⁵ Depriving the offender of something of value symbolizes the loss caused by the offender's misconduct to the victim of the crime as well as the community generally. Punishment simultaneously symbolizes the value which the appropriate social interactions have for the continued well-being of the community.

148. Social norms here include both moral and legal norms.

149. This, of course, includes interactions with other persons.

150. I say "true interests" because the concern is not merely with the particular interests of an offender. An offender is not morally reformed if the relevant norms are followed to gain fame or achieve power. Such an individual may be socially reformed and pose no further threat to society, but the person is not morally reformed. Moral reformation necessarily involves having the appropriate reasons or motives for one's change of heart. The morally reformed offender must see the restoration in terms of his identity as a moral being.

151. This view has ancient roots, deriving from Plato.

152. I say "rituals" because they are stylized, formal activities involving people in special roles. See W. MOBERLY, *supra* note 28, at 215.

153. For a useful discussion of the symbolic nature of punishment, see *id.* at 201-25.

154. Perhaps the moral good theory requires compensation or restitution for the victim or innocent bystander's loss. See Fletcher, *Punishment and Compensation*, 14 CREIGHTON L. REV. 691 (1981).

155. In this sense, Hampton is right in describing punishment as moral education; but it functions as true moral education only when its goal is the moral good of the offender and when it operates through a specific process by which the offender can regain his identity as a moral being. Without such an educational process, the moral education theory of punishment is merely a retributive theory with a denunciatory function.

The voluntaristic formulation of the moral good theory of punishment regards the deprivations on the part of the offender to be an essential feature of punishment. The question then is whether the deprivation must be externally imposed, or whether the offender may freely decide what the deprivation should be. A useful way of considering this question is to distinguish three different formulations of the moral good theory of punishment: the paternalistic formulation,¹⁵⁶ the voluntaristic formulation,¹⁵⁷ and a hybrid version, a lexical ordering of the two with priority given to the voluntaristic formulation.

A non-technical mechanism is intended by "lexical ordering." Before one can appeal to the paternalistic version of the theory, one must try to implement the conditions necessary for a realistic deployment of the voluntaristic practice, if there are any. Coercive punishment is never acceptable unless voluntaristic structures are impossible in a given social setting.¹⁵⁸ Further, in this case, though paternalistic punishment might be tolerated, it is never fully justified. This has the practical implication that although the moral good theory permits paternalistic punishment, it does so only in dire circumstances. And, even in such circumstances, the structures are unjustified and unacceptable unless the society is moving in a principled and expeditious manner toward abandoning the paternalistic structures for voluntaristic ones.

Regarding the structure of the moral good theory, if one believes that the deprivation must be imposed by some authority independent of the offender, the moral good theory takes on a paternalistic dimension. If, on the other hand, one believes that it is permissible, or even more strongly, required that the deprivation be jointly-imposed, the moral good theory becomes the voluntaristic conception of punishment, or the voluntaristic counterpart of punishment.¹⁵⁹ If punishment sometimes involves externally imposed deprivations and at other times jointly-imposed deprivations, with a lexical ordering between the two, then the moral good theory is committed to a hybrid formulation.

156. See Morris, *supra* note 11.

157. See *supra* notes 119-37 and accompanying text.

158. Of course, some social systems may be so impoverished that no conceivable institution will satisfy the voluntaristic conception without revolution.

159. If punishment conceptually involves externally imposed deprivations, then "the voluntaristic counterpart of punishment" is the systematic moral response to wrongdoing employed in a society of individuals autonomously interacting according to principles of mutual respect and concern. Such a society would not have a practice of "punishment," but its counterpart practice might be morally superior.

V. THE VOLUNTARISTIC FORMULATION DEFENDED

A. *Objections to the Voluntaristic Formulation of the Moral Good Theory*

1. Guilt and Sentencing

There are many objections to the view that jointly-imposed deprivations are possible, let alone required, in a system of punishment.¹⁶⁰ First, what rational offender would adjudge herself guilty of a crime? The response to this objection is that the voluntaristic formulation of the moral good theory does not contend that the offender must adjudge herself guilty for a sentence to be justified. Even in the context of the voluntaristic formulation, the offender will still stand trial and be convicted or acquitted in the standard way. The trial deals with whether the offender committed the crime and deserves punishment. Punishment has as its goal the offender's moral reformation. Of course, one may confess guilt and that might augur well for ultimate repatriation with the moral good. But the moral good theory does not require the offender's consent to conviction. The point is that once convicted, the offender's autonomy is not respected unless she has a significant say in what the sentence will be. Since the sentence leads to her moral restoration and this includes restructuring her moral personality with autonomy as a regulative goal, autonomy must operate as a significant factor in the process of her restoration. Hence, the process of sentencing must appeal to her autonomy.

2. Autonomy Misused

One might argue that although autonomy is a good thing it can be misused or abused. Hence, not permitting the offender to have an equal say in his punishment is simply a reflection that at this stage there is a great likelihood that the offender will misuse autonomy in order to avoid punishment. If so, it is difficult to see how punishment can be designed to bring about the moral good of the offender where his good includes autonomy. If offenders will inveterately abuse autonomy in this context, then there really is no hope for a justification of punishment in terms of the offender's moral good, where that includes the offender's autonomy. Where the moral restoration of the offender is a process of reflection and restitution, the offender's goodwill must

160. The notion of jointly-imposed deprivations captures both the requirement that the offender have an equal say in the sentence and the requirement that the community be protected. The voluntaristic formulation of the moral good theory, as conceived in this article, is best expressed as requiring jointly-imposed deprivations.

be presumed until proved otherwise or the process is doomed from the start. In that event, punishment cannot be justified in terms of the autonomy of the offender.¹⁶¹

3. Punishment as Restricting Liberty

It could be argued that an externally imposed deprivation need not restrict the offender's autonomy, just the person's liberty.¹⁶² In this view, liberty is the freedom from external control, whereas autonomy refers to a person's capacity for self-direction and authentic decisionmaking.

Two remarks are in order. First, it is difficult to see how a person can be ultimately autonomous when liberty is restricted, that is, when he is not free from external control. Even if liberty and autonomy are conceptually different, liberty, generally, seems to be a necessary condition of autonomy.¹⁶³ To the extent that a person's liberty is restricted, autonomy is also diminished.

Second, even if liberty is not a necessary condition of autonomy, a defender of the voluntaristic formulation of the moral good theory could reply: "Alright, one's liberty is restricted when one falls into the clutches of the state, that is, when one is being considered a candidate for punishment; but the particular deprivation chosen must reflect the autonomous choice of the offender." In other words, the offender's liberty is restricted by the fact that *some* deprivation will be imposed. But the exact nature of the deprivation will depend on the offender alone or in conjunction with a representative of the state. Freedom from deprivation is sacrificed by punishment, but one's autonomy to select deprivation is preserved.

Whether there is an important conceptual distinction between liberty and autonomy, it is difficult to see what relevance it would have for the practice of punishment. Does the offender's identity as a moral being include autonomy, but not liberty?¹⁶⁴ If moral personality in-

161. One might argue that coercive punishment may stimulate the offender to critically reflect on the wickedness of his offense. But then so might aversive therapy. Of course, we need not assume the offender autonomously chooses every part of the process of punishment however trivial. But there must be an initial willingness to be punished as well as consent regarding the significant stages of the process. Consent and cooperation must be part of the process. See W. MOBERLY, *supra* note 28.

162. For a discussion of liberty, see J. FEINBERG, *SOCIAL PHILOSOPHY* (1973).

163. Perhaps a confined person can still retain some degree of autonomy if free to decide most issues arising in the confined state. But insofar as the individual is confined, her autonomy is still severely restricted.

164. It would be extremely curious if it did. One's conception of moral personality would then be compatible with a slave's having a full moral identity, in the sense that there is no

cludes liberty, how can punishment legitimately restrict liberty while preserving autonomy? Moreover, the distinction between liberty and autonomy abounds in practical conundrums. Does aversive therapy¹⁶⁵ restrict liberty but not autonomy? How does one decide this? Does incarceration restrict only liberty, but not autonomy? What is needed here is an account of how the distinction between autonomy and liberty illuminates questions about punishment.

On the voluntaristic formulation of the moral good theory, an offender must consent to punishment and her autonomy must be respected at every stage of punishment. In this formulation, "respected" means that the offender must have at least an equal say¹⁶⁶ as to what the deprivation will be. The voluntaristic conception of punishment maintains that the offender's autonomy must be respected, not that it is absolute or that only the individual's autonomy matters.¹⁶⁷ The offender does not decide that she will be sentenced. But once guilt is established, the person must have an equal say in what the sentence shall be.

But if an offender must have an equal say as to the sentence, why have a trial in the first place? Why not simply ask the offender what the sentence should be? The reason for having a trial is not because we cannot expect people to be objective and impartial in evaluating their own conduct. Living the moral life requires honesty about one-

rightful claim against the slaveowner, because the slave could autonomously decide to pick this piece of cotton over that one. Certainly, what was most wrong about the American enslavement of blacks was that in restricting their liberty, slaves could not fully enjoy their moral status as autonomous, responsible beings. But even in master-slave relations the slave retains some freedom. That a black slave retained some freedom does not prevent the master from exercising total control. See M. TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810-1860*, at 33 (1981) ("When a slaveowner purchases a slave, he or she acquires not the use of the slave's labor power — not, that is, only part of the slave's activities — but the slave's labor — all the activities in which the slave engages.").

165. Aversive theory is a form of behavior modification designed to excise socially undesirable traits by means of pain and other unpleasant experiences.

166. The view that the state and the offender have an equal say in determining the penalty recognizes that each party has an equal right to autonomy. What does one do when the offender and the state cannot agree on the penalty? As a practical matter the time spent in negotiating the penalty should not figure in calculating the duration of the sentence. This is a way of guaranteeing that the offender will negotiate in good faith. If the state unreasonably delays in accepting a reasonable sentence proposed by the offender, a sentence on appeal should be reduced.

167. This is not what is argued for here. Rather, what is desired is a system of punishment that gives equal weight to the autonomy of each member of the community. A representative of the community negotiates with the offender regarding a proper deprivation. In this way everyone's autonomy is fully represented. This article is not proposing an offender's absolute right to autonomy. No one could or should have such a right.

self. Important social institutions and practices need to encourage individuals to evaluate their conduct objectively and honestly. Part of one's moral good is to develop these capacities about one's failings, as well as one's virtues.¹⁶⁸

The reason for having the ritual of a trial, verdict and sentencing is that we need to determine whether the offender is even a proper candidate for punishment. Did the person commit the crime? If so, was there justification for the act? If not, is there an appropriate excuse for the conduct?

Obviously, the offender does not decide whether punishment is to be one of the institutions in the state. Punishment, like any other institution, is created independently of almost everyone's decision, save perhaps the society's founders.¹⁶⁹ It is commonly believed, of course, that these institutions can be justified on the basis of their continuing contribution to individual freedom. Perhaps such institutions are not justifiable, because they circumvent most people's autonomy.¹⁷⁰ Fortunately, we need not decide this issue. Our question is not whether political institutions or the state itself is justifiable. What we want to know is: given that there are political institutions, including the practice of punishment, can this practice tolerate the offender's autonomy at every important stage of punishment? This presupposes that there is a systematic process for determining guilt and sentencing. What is not entailed by this, though may be independently true, is that the offender has no say in what the sentence should be.

168. One must have an honest view of oneself and a sympathetic attitude toward others to avoid a common problem observed by Kierkegaard: "Most men are subjective towards themselves and objective towards all others, frightfully objective sometimes — but the task is precisely to be objective toward oneself and subjective toward all others." 4 SOREN KIERKEGAARD'S JOURNALS AND PAPERS 348 (H. Hong & E. Hong eds. & trans. 1975).

Having an objective view of oneself requires viewing oneself from some more general vantage point. See T. NAGEL, *supra* note 126. This more general perspective is one means of achieving a sympathetic understanding of other people.

Many writers have viewed sympathy as the basis of morality. See M. SCHELER, *THE NATURE OF SYMPATHY* (1954) (providing a phenomenological account of sympathy); D. HUME, *A Enquiry Concerning the Principles of Morals*, in *ENQUIRIES* 272-73 (3d ed. 1975) (characterizing sympathy as the primary moral emotion); Lipkin, *Altruism and Sympathy in Hume's Ethics*, 65 AUSTRALASIAN J. PHIL. 18 (1987) (arguing that Hume's notion of sympathy can be interpreted as a necessary feature of moral motivation).

169. Obviously, this is not itself an endorsement of the myth of the social contract either as a way of understanding the origin of the state or determining presently valid legal principles.

170. One strain of philosophical anarchism holds that an individual's moral autonomy renders obedience to the state unjustifiable because the state circumvents everyone's autonomy. See Wolff, *supra* note 53; see generally 19 NOMOS: ANARCHISM (J. Pennock & J. Chapman eds. 1978) (examining various perspectives on anarchism).

4. Justice and Proportionality

If the offender decides the deprivation even in conjunction with a representative of the state, it is likely that there will be different deprivations for the same crime. Does this not offend an elemental sense of justice that one's punishment must not be arbitrary? If the "punishment should fit the crime," that is, be proportional to the crime, how is it possible for the same crime committed by different offenders to receive different penalties? If Jones and Smith each steal a loaf of bread, they commit the same crime. That Jones stole the loaf to feed a starving family, and Smith stole it to avoid paying for it, though in fact the money was available, is irrelevant to the question of guilt. Both people committed the same crime and should receive the same penalty. The reasons or motives for committing the crime should be irrelevant.

But should the gross conduct, stealing bread, be decisive in determining whether the *same* crime was committed?¹⁷¹ This issue pertains to the appropriate description of the gross conduct. One could argue that what Jones did is properly describable as "saving a starving family by taking another person's bread," while Smith's action is properly describable as "stealing bread." In other words, if our moral intuitions prompt us to see the propriety in Jones' action, we can properly describe the act in such a way as to render it legally innocuous.¹⁷² Of course, this requires a method for determining that no other description of Jones' action is legally more appropriate.

This is an interesting problem, but one whose answer can be postponed. Even in a legal system such as ours, sentences for the "same" crimes are very likely to be different. The judge has discretion, regarding many crimes, to consider the individual's reasons or motives for committing the crime as mitigating circumstances reducing the sentence. Why would a system of jointly-imposed deprivations offend justice any more than the present practice does?

5. Compulsory Restitution of Stolen Goods

If autonomy is a paramount or central moral ideal, then restricting autonomy is presumptively wrong. This does not imply, of course,

171. Some philosophers, specifically post-Wittgensteinians, believe that the intention, motive, or reason for committing an act should be included in the description of the behavior as an act of a certain kind, for example, as an act of stealing. In this view, arguably, stealing bread in order to feed one's starving family and stealing bread simply because one wants to, may not be the same action. See R. PETERS, *THE CONCEPT OF MOTIVATION* (2d ed. 1960); P. WINCH, *THE IDEA OF A SOCIAL SCIENCE* (1958).

172. This is not to suggest that we should take this route just because we can.

that no restrictions are ever justified, but that such restrictions cannot be justified in terms of the autonomy of the person whose autonomy is restricted. Returning stolen goods to the proper owner is not an unjustifiable restriction of the thief's autonomy¹⁷³ since the concern is not with the thief's moral good. Instead, the concern is for the victim. Similarly, a person is justified in repelling an attacker despite the obvious restriction on the attacker's autonomy¹⁷⁴ that this entails. There is no problem here for the voluntaristic formulation since such coercion is not justified because it enhances the attacker's autonomy. Instead, in this situation coercion is justified to protect the victim.¹⁷⁵ Punishment, according to the voluntaristic conception, is concerned with the offender's autonomy. Proponents of the paternalistic formulation of this theory must explain how the restriction of the offender's autonomy can serve to restore the offender as an autonomous person attached to the good.¹⁷⁶ Additionally, it could be argued that not com-

173. Arguably, it is not a restriction on the thief's autonomy to compel the return of the stolen goods since the thief is not entitled to them in the first place. This might suggest that restitution should be compelled. Similarly, self-defense or restricting an attacker's autonomy by resisting might be consistent with valuing her autonomy since the attacker has no right to attack. In short, valuing autonomy does not entail tolerating the attack. A person's autonomy must be respected only when she has a right to act autonomously. Compare this reasoning with the argument that a person is not obligated to reveal to a murderer the whereabouts of an innocent person since the murderer has no right to this information. I. KANT, *On a Supposed Right to Tell Lies from Benevolent Motives*, in KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS 361-65 (T. Abbott trans. 4th ed. 1954) (arguing against Benjamin Constant's view permitting a lie when the recipient of the information has no right to the truth). *But see* Korsgaard, *The Right to Lie: Kant on Dealing With Evil*, 15 PHIL. & PUB. AFF. 325, 339 (1986) (arguing that lying to a murderer at the door is permissible).

174. One could argue that the attacker is not acting autonomously since she is not justified in attacking you. In this view when people act wrongly, they are not expressing themselves autonomously but in some other way. This view has some merit. The trouble with it is that the attacker might be justified in what she does. Suppose someone has a justified but false belief that you are about to attack. In this case, the person probably is justified in attacking you. If you prevent the attack, can it still be true that you value the other individual's autonomy?

175. In other words, the voluntarist conception does not entail that in all interactions everyone's autonomy must always be respected. It only says that when justifying some action or policy on the grounds that it promotes a person's moral good, one must respect that person's autonomy. And this involves giving that person an equal say in what is to happen.

176. Of course, the paternalist might say that it is an empirical fact that the only way to restore the offender's autonomy fully is first to restrict it. But is there persuasive empirical evidence to support this contention?

Additionally, in making autonomous decisions, there is a sense in which a person always restricts the autonomy of others who are affected by the actions. In deciding to play racquetball with Peter at a certain time, I restrict Steve's autonomy to play tennis with me at the same time. In marrying Jane, I restrict Jill's autonomy to marry me, and so forth. This is, however,

selling the return of the victim's goods commits one to the view that the offender's autonomy counts *more* than the victim's, which violates the voluntaristic conception. The voluntaristic conception requires that the offender's autonomy count equally to that of the community's, not that it count more.

6. Society's Commitment to Legal Norms

The symbolic nature of punishment may suggest that it is necessary to have externally imposed deprivations because this is the way society communicates to actual and potential wrongdoers that society is committed to its legal and social norms. The practice of punishment is a kind of beacon, signaling that these norms are to be violated only at one's peril.¹⁷⁷ We are committed to these norms because they define, in part, what kind of individuals we are, and what kind of social unit we have and hope to maintain. This commitment can only be expressed by externally imposing sanctions upon those who flout social norms.¹⁷⁸

Surely this justifies externally imposed deprivations only if it is first decided that being committed to something that one values entails being included or entitled to react with force when what one values is attacked. Though this is not an implausible notion, it is precisely the notion in dispute. After all, one great moral tradition is committed, at least in principle, to turning the other cheek.¹⁷⁹ It is doubtful that

not a morally cognizable restriction of someone's autonomy. It is merely a function of what it is to make an autonomous decision. In making such a decision I restrict the choices that can be made by others as well as myself. Just as I restrict Steve's choice to play tennis with me when I play racquetball with Peter, I also restrict the possibility of my playing tennis with Steve or Peter.

Rather than viewing this as a restriction of autonomy, it is better understood as merely the conceptual consequence of choosing one course of action over another. In making such decisions, I make various selections, I discriminate. And by doing so I restrict everyone else's options. This is simply a conceptual feature of how autonomy functions in a world where there are many autonomous decisionmakers. But even if this were a restriction of a person's autonomy, the restriction could not be justified in terms of that same person's autonomy. Rather, it would be justified in terms of the autonomy of someone else.

177. Note the deterrence element in the paternalist conception of punishment.

178. In Nozick's view, see R. NOZICK, *supra* note 147, punishment connects offenders with the correct values. Nozick employs a Gricean conception of meaning, which is the mechanism by which the punisher connects the offender with the correct values. See *id.* Unfortunately, it is unclear what "connects with the correct values" means other than punishing the offender for violating society's norms. The key expression "connects with correct values" is a significant advance in theory of punishment only if it indicates some *process*, previously undiscovered. In that case, the process needs to be described, which Nozick fails to do.

179. Obviously, I am referring to Christianity.

we can show as a matter of logic that a person who turned the other cheek when personal ideals are attacked is not really committed to those ideals. It is simply a *non sequitur* to insist that a commitment to something valuable entails reacting with force when what one values is attacked.

If reacting with force is required to show that a person values an ideal, then inaction must conclusively show lack of commitment to the ideal; but this is implausible. It may be that such a reaction is a sufficient condition of valuing an ideal. But it does not show that a hostile reaction is a necessary condition of valuing an ideal. A person may be deeply committed to an ideal, yet eschew force due to an equally deep commitment to another ideal, an ideal of nonviolence.

If being committed to an ideal requires the use of force when the ideal is attacked or threatened, then an ideal of nonviolence is impossible as a matter of logic. On the view criticized here it would be incoherent to describe Ghandi or Martin Luther King, Jr., as truly committed to an ideal of nonviolence. But such a conclusion is counterintuitive.¹⁸⁰

It is important not to confuse a hostile reaction, or reacting with force when what one values is threatened or attacked, with resentment and indignation, and the distinctive behavior associated with these emotions. A person may react to an attack with hostility or with force. Whether the act is justified may be irrelevant to his decision. Defending with force is a natural response to being attacked. To say that it is a natural response does not entail that it is morally appropriate. Natural reactions of this sort are not necessarily connected to appropriate moral norms, rights, or obligations. Resentment and moral indignation, on the other hand, though perhaps spontaneous, involve an appraisal of the situation together with the conclusion that one has been wronged. Resentment or moral indignation involves communicating or an inclination to communicate that one believes that one has been wronged. Also involved in this complex emotional reaction is wanting or believing that one has a right to a confession of guilt or an admission of fault and an apology. Hence, a desire for the offender to be deprived of something valuable does not seem to be logically tied to these emotions.

But even if a desire for the offender to be deprived of something valuable were part of these emotions, it does not follow from the

180. The truth behind the view that force is required for one to be committed to an ideal is that one cannot be committed to an ideal without having the disposition to try to reach it. The voluntaristic formulation of the moral good theory, however, does not deny this.

logical structure of these emotions itself that the deprivation must be externally imposed. Resentment and moral indignation typically involve the wounded party's desire for a certain kind of response when confronting the person who has done the wrong. The wounded party may even be morally entitled to some response on the offender's part. But it does not follow that the victim is justifiably entitled or inclined to impose sanctions upon the wrongdoer unilaterally.

7. The Notion of a Limit on Action

A defender of the paternalistic formulation of the moral good theory of punishment may argue that external sanctions are necessary if we are to make sense of the notion of a limit on action. The argument here is that a "limit on action" or "requirement on action" entails physically enforcing the limit or requirement. Consequently, only externally imposed penalties represent limits or requirements on action.

The problem with this argument is that the locutions "limit on action" and "requirement on action" are ambiguous. These phrases may mean that there is a penalty for acting in a certain way. A bully may dare you to cross a line. When you do so, the bully may pummel you. Or the Mafia may make a person an offer that cannot be refused. A requirement or limit on action understood in this way is merely a redeployment of the ancient notion that "might makes right."¹⁸¹ Legal requirements are often understood in this way.¹⁸²

181. See Plato, *Crito*, in R. ALLEN, *SOCRATES AND LEGAL OBLIGATIONS* 115 (1980).

182. Legal requirements inform people how they must behave if they are to avoid certain penalties. Pay your taxes or be fined or imprisoned. Steal property and go to jail. Conceived in this way, legal requirements are independent from moral requirements. Whether you want to or not, or whether you believe the law just or not, you must obey it if you are rationally self interested. This is an individualistic justification or explanation of a legal system. See Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252 (1983). Individualism may be characterized as the political philosophic view that regards self-development, autonomy, and privacy as paramount values. See S. LUKES, *INDIVIDUALISM* 52-72 (1973). A legal requirement thus has the form of a hypothetical imperative: If you want to avoid a penalty, you will do X. Some philosophers believe that moral principles are hypothetical imperatives. See Foot, *Morality as a System of Hypothetical Imperatives*, in P. FOOT, *VIRTUES AND VICES* 157-72 (1981); D. HUME, *supra* note 168. Other philosophers believe that moral principles are categorical imperatives. See also I. KANT, *supra* note 173, at 33.

For persons who do not care about penalties, or who are clever or strong enough to resist the penalty, legal injunctions, understood individualistically, will not have a decisive effect on their practical deliberations. Of course, such individuals might still want to act in accordance with the law for a variety of reasons. They might value following the norms of society because these norms conform to their own personal moral code, or for the sake of order. In some cases,

The trouble with this analysis of a legal requirement is that it is compatible with systems of social organization based solely on fear and intimidation.¹⁸³ Of course, one could say that a legal system is, in part, a system of fear and intimidation. The question that this section poses is whether it must be.

There is an alternative way to understand a legal requirement. At the very core of the meaning of a requirement on action lies the notion of rational justification. What this implies is that for a person to be required to act in a certain manner, he cannot justifiably fail to perform that action.¹⁸⁴ This applies generally to requirements on action whether those requirements be rational, moral, or legal requirements.

A rule expresses a legal requirement if an individual cannot fail to follow it and be legally justified in what one does.¹⁸⁵ A requirement on action reflects the fact that there are no further or higher standards within that system of rules according to which one's conduct is to be evaluated.¹⁸⁶ The concept of a practical requirement has nothing to do with what one in fact wants or what penalties one will incur for failure

such a person might follow legal norms simply to determine what to do when he cannot figure this out for himself. Finally, it could be argued that a requirement on action must condition one's decision independently or in spite of what one wants. The requirement not to kill means that a person must not kill regardless of the desire to do so. This seems unexceptionable. For what could be meant by a "requirement on action" if one could violate the requirement merely because one wanted to. Similarly, it is inaccurate to say that the requirement not to kill means that people may not kill unless after serious deliberation they want to. Requirements on action are made of sterner stuff. See R. BRANDT, *ETHICAL THEORY* (1959).

183. We get closer to the meaning of a practical requirement if we say that the injunction against killing means that a person may not kill unless after serious consideration she concludes that she *should* kill. Here wanting per se, even reflective wants, do not capture what is involved in a legal requirement. A person may not kill unless it is a matter of deepest conviction that she *should* kill. Still people's deepest convictions may differ. Hence, this cannot be what it means to say that something is a requirement on action.

184. This is a formal feature of the notion of a practical requirement. As such it does not specify the substantive conditions telling us when a person is morally or rationally justified in doing an act. But the constraint that a practical requirement needs coercion is also a formal feature. Thus the question of when coercion is justified also arises.

185. In other words, to say that there are practical requirements on action implies that there are non-relativistic and non-subjective principles of practical reasoning. See B. WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 20-27 (1973).

186. It is possible that there is no higher rule within a particular system of rules but that system may not have the last word. It may be that there is another system of rules which is higher than the first. For example, a legal principle may be the highest justification within a system of law. But morality may form a system of rules which is higher than the legal system because the moral rules may be used to criticize the legal rules.

to act appropriately.¹⁸⁷ A requirement on action, a practical limit on what one may do, refers to practical reasons and the process by which they are generated to motivate action. If something is genuinely a requirement on action, then it yields reasons which one cannot fail to acknowledge *and* be morally, rationally, or legally justified.

Surely, the paternalist would contend, in order to have a limit on action, one must be able to make the limit effective. One must be able to enforce it even, or especially, when people are not convinced that they should conform their conduct in the appropriate way. But this is no longer a conceptual point about the nature of moral or legal limits. Rather it is a claim that moral or practical requirements are insufficient, given human nature, to bring about conforming conduct.

It might still be argued that the law requires the clout to guarantee that whether people are dedicated to abiding by moral or legal norms they will obey the law for whatever reasons if they are rationally self-interested, that is, if they fear punishment. This, however, is a claim about the way people are, not the way they must be.¹⁸⁸ And unless we tie legal theory permanently to contemporary social reality, we must not analyze the notion of a legal requirement by tying it to a contingent feature of human conduct that can change and has changed over the centuries.¹⁸⁹ Additionally, if this is the argument, the paternalist has abandoned the conception of moral personality employed by the moral good theory.

a. Fingarette's Conception of Law

Failing to attend to the above ambiguity can lead us astray. For example, Fingarette contends that the imperative "conform or in consequence be constrained" is a formal principle which elucidates the conception of a "requirement upon our will, as opposed to mere requests or appeals."¹⁹⁰ On the contrary, this is not a *formal* principle,

187. It is a conceptual point that physical penalties are not necessary to practical requirements. For if one's reason to act was based on fear of a physical penalty, then one would not be acting on principle, that is, one's motivation would not be the fact that the act was morally permissible or required.

188. According to the traditional conception of law, this feature of human nature is probably considered fixed.

189. The argument here takes no stand on, and therefore does not refute, the claim that force must accompany present legal requirements. What it does say is that force is not required as part of the logic or meaning of a practical requirement. Further, it presupposes that human nature is malleable and that we can have a society in which people conform to laws not because they fear punishment but as a response to the moral and rational justification of the laws. See N. MACCORMICK, *LEGAL RIGHT AND SOCIAL DEMOCRACY* 232-46 (1982).

190. Fingarette, *Punishing and Suffering*, 50 *PROC. & ADDRESSES AMER. PHIL. A.* 499 (1977).

a principle required of every legal system past, present, and future. Rather it is a principle based on two elements. First, a desire for enforcing legal requirements and second, an empirical generalization about what is most likely to motivate most people to conform their behavior to the law. Whether or not true, this generalization is not a formal feature of law.¹⁹¹ Instead, it is an empirical claim about how people behave.¹⁹²

Keep in mind the ambiguity of the locution "requirement on the will." The normative sense, *X* is a practical requirement, implies that one ought to do *X*, or that it is the rational or proper or right thing to do. The non-normative sense implies that one will suffer a penalty if one does not act in a certain way. On this latter interpretation, the Mafia issues practical requirements on action. A legal system containing non-normative requirements has the muscle to back up its rules. These rules may embody practical wisdom or be barbaric, but either way they have the clout to compel people to act in accordance with them.¹⁹³ What Fingarette must show is that simply because a legal system includes normative rules, and that these rules are worthy of respect, it is entitled to compel compliance. And this is precisely what is being called into question.¹⁹⁴

191. Although coercive sanctions are presently a feature of most or all systems of criminal law, this does not imply that they are necessary features of such systems. See N. MACCORMICK, *supra* note 189, at 242 (coercive sanctions are not a logical feature of a system of criminal law). If there is such necessity, it is not logical necessity. *Id.* at 244.

Further, Fingarette is talking, for the most part, about the power or force associated with legal limits. But in separating law's power from its authority, it is difficult to see how the former embodies a requirement on action. Many things that have power over a person do not represent requirements on the person's practical reasoning. Of course, if the concern is only with power, then Fingarette is right that legal rules, as ordinarily understood, must have the capability of compelling compliance. But this is trivially true and does not advance the understanding of the nature of legal requirements.

192. To describe this claim as an empirical claim is not to denigrate its importance. Rather, it is merely to show that since it is not necessarily true, it can be falsified by changing empirical conditions.

193. One reason for compelling people to obey the law, even when the law represents a normative ideal, is based, in part, on the free-rider problem. By not complying themselves, people often exploit other people's inclinations to comply with the laws; hence, the state must have a way to deal with this. This explanation cannot defeat the voluntaristic conception of the moral good theory because force used against free-riders is not designed to protect the autonomy of the free-riders. Rather, it is to protect others. If the paternalistic formulation of the moral good theory uses this sort of justification, the moral good of the offender is no longer involved in the justification.

194. Making coercive sanctions definitionally part of the notion of law or criminal law closes important questions before possible answers are explored. For example, the possibility that rewards can operate a legal system just as well or better than punishments is foreclosed. See N. MACCORMICK, *supra* note 189, at 244-45.

Fingarette might reply that a legal requirement surely must include the capacity to compel compliance. Even if it is not what it means to talk about practical requirements in general, a legal requirement must include the use of force to compel conformity. Given human nature legal requirements must involve the possibility of compelling compliance. How would a system be a legal system if it did not include this possibility?¹⁹⁵ If human nature were different, and people conformed their conduct to the appropriate social norms because they understood the rationality behind them, there would be no need for force or for a legal system.¹⁹⁶ Fingarette may be wrong about compulsion as a formal principle of any legal system, but he is surely right that given human nature and the organization of human society, the possibility of force must be behind any legal requirement.¹⁹⁷

This is, however, a very different contention, one that rests on just those assumptions about human nature and the need for the state that are put in question by the voluntaristic formulation of the moral good theory.¹⁹⁸ First, questions about human nature are very difficult

195. The notion of a legal system that determines guilt and condemns the guilty without incarcerating them is conceptually intelligible. Consider Duff's words on this issue:

A system of law which made no provision for punishment to follow conviction would not lack an intelligible purpose. The law would promulgate obligatory standards of conduct for the citizens to accept and obey. The trial would express our concern for the law's demands, by bringing the citizen to answer for her allegedly wrongful conduct, and by condemning her if she is proved guilty; it could modify the offender's future conduct — not, if it is to respect her autonomy, simply by deterring her from future crimes, but by persuading her of the wrongfulness of the conduct which the law and her conviction condemn.

R. DUFF, *supra* note 10, at 146.

In such circumstances, there might be other reasons for refraining from crime. For example, one might want to be moral or lawful because it is right. A person might want to maintain a good reputation for moral, personal, or financial reasons.

One could argue that this article confuses moral and legal requirements. Perhaps a moral requirement need not be defined in terms of compelled compliance. But that is one of the salient differences between a moral and a legal requirement. The former needs no compulsion, while the latter does. My response is that this begs the question. Just because legal requirements, ordinarily understood, require compelled compliance does not entail that there is no better conception of a legal system. See N. MACCORMICK, *supra* note 189.

196. This, of course, is correct only if we define a legal system as necessarily including coercive practices. But what are the alternatives? At least in the context of punishment, possible alternatives to coercive punishment include informal sanctions against violating law, rewarding compliance with law, and educating people to persuade them to obey the law. E. PINCOFFS, *THE RATIONALE OF LEGAL PUNISHMENT* 125 (1966). Incidentally, it should be noted that there are cultures which do not have legal punishment. *Id.* at 115-16.

197. See N. MACCORMICK, *supra* note 189, at 244.

198. Human nature is not determined once and for all. Moral and social capacities evolve and are capable of becoming refined and improved. This evolution may permit the construction

to evaluate. The conservative has one view of human nature, the liberal a second, and the radical a third.¹⁹⁹ If one regards the conception of moral personality sketched earlier as both a moral ideal, something toward which people must strive, and a description of certain capacities people have, it does not seem that Fingarette's underlying assumption, that people must have a forceful limit set if they are to conform to social norms, is obviously correct.²⁰⁰

b. Practical Language and Coercion

Fingarette believes that there are two dichotomous categories of practical persuasion. On the one hand, there are requirements on action which involve the threat of force, and on the other hand there are "mere requests and appeals." Requests and appeals are relevant to practical reasoning, but without the force associated with practical requirements. For Fingarette this classification seems to exhaust the possible kinds of practical language.

of a social system that conflicts with human nature as it is presently defined. The full implementation of this new social system may itself help us refine and improve human nature.

199. Typically, conservatism and liberalism look at people as essentially individualistic. The radical emphasizes the social dimension of human nature.

200. Instead, let me point out that whatever one's substantive conception of human nature, it is important to realize that the natural and moral character of people continues to evolve. Would Abraham readily recognize us as the very same kind of moral or social being that he was? Would Plato? Would Christ? Arguably, they would not. Although it is difficult to state just how people from different epochs differ morally, contemplating the moral revolutions of the past ten thousand years should strike one with the awesome and humbling realization that the particular substantive moral values of a given epoch may not be a fixed part of human nature. This, of course, does not suppose that our civilization or morality is superior to that of our ancestors. Before we can know whether their morality is better, we must determine what their morality was. Presumably, the way to do this is to examine their own pronouncements on morality. But how do we know what they meant by those pronouncements? For a discussion of the problems involved in this task, see R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 266-73 (1979).

Additionally, it seems natural for people to want to believe that their nature is fixed. And it seems to be equally true that the natural and moral dimensions of human beings and society change. Hence, it is unwise to insist that even if it is true in the present epoch of human evolution that the threat of force is required for people to obey the law, that it must always be this way. Instead, we should determine what social conditions obviate the necessity of force as a principal method of social control. But first we must decide whether this is desirable.

Moral revolutions, revolutions in what is thought possible regarding human nature and society, may occur in the way that some scientific revolutions occur. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1982); *PARADIGMS AND REVOLUTIONS* (G. Gutting ed. 1980). Changes occur when one moral paradigm replaces another. It may not be possible to rationally plan such replacement or change. Even so, a change from paradigm A to paradigm B may be impossible unless some people are imagining and writing about paradigm B.

The problem with this dichotomy is that it oversimplifies the nature of practical language and persuasion. It overemphasizes the strength of requirements and underestimates the strength of requests. Requests may have significant practical force. Whether they have such force depends on the circumstances, the person making the request, and the requestee's disposition. A person might change plans to take a job in a certain part of the country because a spouse does not wish to relocate.²⁰¹ A person may answer an appeal to give a very large gift to famine relief. In practical interactions it is easy to overemphasize coercion without realizing that many of our intimate and public interactions are structured by non-coercive requests and appeals. The language of practical suasion includes requests, appeals, and sometimes even incantations.

More importantly, practical language and reasoning are not exhaustively characterized by Fingarette's dichotomy. The language of moral persuasion employs requirements, exhortations, directives, imperatives, pleas, requests, and appeals. It distorts the true picture of practical language and reasoning to divide all practical judgments neatly into Fingarette's two categories.²⁰²

The varieties of practical discourse and persuasion do have something in common. Practical persuasion is designed to appeal to something central to the individual's self-conception. Individuals have conceptions or theories of themselves and moral persuasion appeals to these conceptions. Practical language persuades a person that to conform to her theory of herself a certain act ought to be performed. In persuading one to donate to charity, a requester will use language that in one way or another appeals to the requestee's self-conception. The person then is confronted by this choice: refrain from acting and as a consequence be forced to revise or abandon one's theory of oneself. There is a natural and well-entrenched tendency to want to make as few revisions in this theory as possible. Whether the language which appeals to this is a requirement, request or appeal is irrelevant. It is a language which forms part of the structure of moral and practical suasion.²⁰³

201. It begs the question to insist that this is really a command because it is dispositive in my practical deliberations.

202. Dworkin seems to believe that a legal system must include coercion. R. DWORKIN, *LAW'S EMPIRE* 96 (1986). It would be interesting to see whether coercion is necessary to Dworkin's interpretivist conception of law as integrity. I believe it is not.

203. Coercion is usually external to an individual's theory. Consequently, its persuasive force is external to the individual.

A legal system can employ this language and function as a model according to which people should conform their behavior if they want to believe truly that they are a certain kind of person. In such a society law may be extremely important, despite not having the capacity for compelling compliance. It may inform people how to behave in complex situations. It may have a generally educative effect. People may be inclined to act appropriately but they may need the legal system to inform them or prompt them to reflect upon what appropriate conduct is in a given situation. A legal system functioning in this way as a model for people to emulate may play a great role in their lives. It may order and structure social relations and institutions. To say that this is not a legal system because it lacks the capacity to force compliance is simply question begging.

Consequently, Fingarette's conception of law does not show that punishment conceived as coercive is necessary to a system of criminal law.²⁰⁴ Such a system may have other purposes, namely, informing and teaching both actual and possible offenders why it proscribes certain conduct. Criminal law can have an educative purpose.²⁰⁵ It can explain and hope to convince offenders and others of the moral reasons behind the law. At least, such a supposition regarding punishment is intelligible.²⁰⁶ If it is intelligible to describe law in this way, coercion is not a formal feature of legal systems.

Moreover, even if Fingarette is right that the possibility of forcing compliance is a necessary condition of a legal system, it does not follow that the legal system must exercise that power.²⁰⁷ Even in contempo-

204. No doubt the coercive force of the law is the reason many people obey the law. But emphasizing this overlooks the many other reasons why people obey the law. Among these reasons is that obeying the law "is convenient, wise, beneficial, admirable, propinquious, desirable, just for the common good or even out of a sense of obligation." Shuman, *Responsibility and Punishment: Why Criminal Law*, 15 AM. J. JURISPRUDENCE 25, 60 (1970). How many ordinary, reasonable people refrain from murder or mayhem just because it is against the law?

205. See Hampton, *supra* note 9.

206. See *supra* note 145.

207. Consider the theory that the crime explosion is in part due to the political and economic structure itself. Tucker writes:

[Our prisons] are filled with criminals which our virtuous State has made what they are by its iniquitous laws, its grinding monopolies, and the horrible social conditions that result from them. We enact many laws that manufacture criminals, and then a few that punish them. Is it too much to expect that the new social conditions which must follow the abolition of all interference with the production and distribution of wealth will in the end so change the habits and propensities of men that our jails and prisons, our policemen and our soldiers, — in a word, our whole machinery and outfit of defense, — will be superfluous?

Tucker, *Relation of the State to the Individual*, in NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY 118 (S. Lynd ed. 1966). Well, maybe not superfluous. But perhaps, only then

rary legal systems an offender may be pardoned or forgiven for her transgression. In such a system, the power to compel remains intact, but it need not be exercised. So even if one grants that a legal system must have the power to compel compliance, one could still argue that the voluntaristic formulation of the moral good theory is conceptually possible and morally desirable. For though the legal system has the power to unilaterally impose sanctions on offenders it should choose, systematically choose, not to do so. A legal system structured in this way regarding the criminal law is compatible with the voluntaristic formulation of the moral good theory of punishment.²⁰⁸ The system does not exercise the power to compel compliance because it sees value in a system of punishment that is based on self or jointly-imposed deprivations.²⁰⁹

B. *Equality-Based Versus Authority-Based Moral Perspectives*

What presuppositions support the paternalistic formulation of the moral good theory? There are two kinds of moral perspectives: an

will the conditions required for morally justifiable forms of punishment exist. See W. GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE 36 (1949) ("[T]he period that shall put an end to the system of coercion and punishment, is intimately connected with the circumstances of property's being placed on an equitable basis."); see also J. CLARK, THE PHILOSOPHICAL ANARCHISM OF WILLIAM GODWIN 223-47 (1977). For a contemporary challenge to the justifiability of punishment, see A. SKILLEN, RULING ILLUSIONS 109-21 (1978).

208. The voluntaristic formulation of the moral good theory need not apply across the board to all kinds of offenders. It may be useful with only a certain class of offenders. This article's objective is not to prove that the voluntaristic formulation of the moral good theory is the only possible theory of punishment, just that it is one of several possible theories.

209. Even if one could show that self-imposed or jointly-imposed sanctions are conceptually dependent upon externally imposed sanctions, this does not in itself show that the voluntaristic conception of punishment is *morally* inferior to the other conceptions. For even if self-imposed or jointly-imposed deprivation is a derivative concept, it still may have moral primacy. The question of which formulation of the moral good theory is a better expression of the central features of the theory is not an issue that can be decided merely by demonstrating that one conception of punishment is fundamental. As long as it is intelligible to speak about punishment, or some counterpart practice, in terms of the voluntaristic conception, the choice of which formulation is better depends on a moral argument and can be settled only in moral terms. Although empirical information is needed, we can pre-suppose the following. Moral reformation ultimately involves the wrongdoer working through her attitudes and intentions to understand why she transgressed. Self-examination of this sort must be autonomous. Even in a system of externally imposed deprivations, a time must come when the offender autonomously internalizes the correct values. It is quixotic to think that a system of externally imposed deprivations can achieve these goals without the offender's having meaningful autonomous input into the nature of the punishment. Recognition that the offender can achieve moral reformation only by self-examination will place the responsibility for moral reformation where it belongs, with the offender. It will also encourage people to take a long, hard look at themselves and their interactions.

authority-based moral perspective and an equality-based moral perspective. An authority-based morality employs the parent-child model to explain the relationship between the wrongdoer and the norm violated. An equality-based morality uses the model of friendship to explicate this relationship.

The authority-based model regards the process by which people learn moral concepts as the model for understanding what these concepts mean. A person learns to act in accordance with the appropriate norms from her parents. The parents set the appropriate standards for the child's conduct and the concepts of duty, wrongdoing, and punishment are acquired through interactions with her parents. A child *must* do what the parents require. These standards are norms to which the parents are devoted. Wrongdoing is acting in defiance of these norms, and punishment is the parents' reaction to the defiance. Punishment is something that ensues independent of the child's wishes.

An equality-based morality regards wrongdoing and punishment in terms of the way peers, friends, and lovers interact with one another. When a friend treats another badly, the other usually, except perhaps in the most serious cases, forgives the friend, no questions asked. If the friend persists in acting badly, the mistreated person will make his displeasure known. The mistreated person may remonstrate with the wrongdoer, try to explain why the behavior is unreasonable or try to show how the behavior transgresses the limits of the friendship. These activities may strain the relationship, but only so much. In some cases they may effect a deeper, more lasting friendship. But if things become worse the very existence of the relationship is jeopardized. The final choice, something a parent usually does not have, is to break off the relationship. If the wrongdoer finally recognizes his deficiencies after the relationship has ended, often a better relationship can be restored. But the wrongdoer will have to demonstrate an understanding of the harm inflicted. Moreover the mistreated person will watch the wrongdoer's behavior to see whether he has reformed. Punishment, as the paternalist understands it, is usually anathema to this sort of relationship.

The paternalist explains this by indicating that punishment functions institutionally and impersonally, hence it cannot be modeled in terms of friendship. This is not, however, the correct explanation. The reason paternalistic punishment is anathema to the restoration of friendships is because these relationships are essentially between *equals*. When a friend recognizes the need to restore a damaged relationship, he does so autonomously. A friend may even autonomously undertake self-deprivation. A person will permit skepticism on the part of the wounded friend, and may even endure observation and

examination, recognizing that the relationship, one to which the friend is committed, has been damaged. In doing so the friend has harmed himself, since it is the relationship between the two with which the person identifies and values.

Punishment, or the systematic *moral* response to wrongdoing, should be based on the friendship model.²¹⁰ It is the model of friendship which explains the interactions between moral equals. There is no independent normative authority among moral equals except the relations between them, and the norms which reflect and encourage these relations. The need to respond appropriately to one's own wrongdoing must rest on autonomous choices. Externally imposed sanctions can be imposed on a wrongdoer only by force. The legitimacy of such force can never be explicated in terms of the moral good of the wrongdoer, where a central feature of that good is autonomy. Moral authority in restoring damaged relationships can only derive from the offender's recognition that autonomously interacting with others according to principles of mutual respect and concern constitutes his good as well as the good of the community.

C. *Taking Ourselves Seriously*

Let me close the discussion of the voluntaristic conception of punishment by responding to the objection that the voluntarist conception of punishment requires us to take ourselves too seriously.²¹¹ Consequently, this conception of punishment may turn out to be more severe than the worst of retributivist theories. If the voluntarist conception requires that we continually engage in self-examination, that offenders never finish paying for their crimes, that others will remain suspicious of them, that they should have self-doubts about their resolve to obey the law, that their awareness of committing a crime should inform their self-consciousness always, and that punishment settles nothing, then offenders are forever prisoners of their own crimes. Instead of being more forgiving, a more tolerant response to wrongful behavior, the voluntaristic conception turns out to be a suf-

210. See ARISTOTLE, *supra* note 22, at 1059-93 (presenting a classical theory of friendship); see also Shoeman, *Aristotle on the Good of Friendship*, 63 AUSTRALASIAN J. PHIL. 269, 280-81 (1985) (describing Aristotle's theory of friendship in terms of connectedness); cf. L. BLUM, *FRIENDSHIP, ALTRUISM, AND MORALITY* (1980) (describing the moral importance of altruism, sympathy, and friendship).

211. The objection here is that the voluntaristic formulation of the moral good theory requires us to take ourselves more seriously than is either desirable or possible.

focusing, rigidly moralistic reiteration that "once a criminal always a criminal." What sort of reply can be made on behalf of the voluntaristic conception?

First, there is both truth and error in this objection. Moral good theories endorsing paternalism and coercion have a tendency to be oppressively moralistic. Moral good theories of this sort should be resisted. But there is no evidence to suggest that this must be true of non-paternalistic non-coercive moral good theories. Second, the objections error consists in its retributivist interpretation of the remarks on closure, that a wrongdoer must keep a constant vigil on inclinations to lawlessness. This does not mean that wrongdoers continually castigate themselves for one transgression; that they deprive themselves of meaningful interactions with others due to moral depravity; or that they judge themselves damned in the eyes of God. Instead, the voluntaristic conception merely points to the obvious truth that it is only by understanding and coming to terms with our transgressions that we become morally better people. In a society where people engage in the appropriate sort of reciprocal interactions with one another, such self-knowledge is required by the concept of civic virtue.

It is true that there is a moralistic dimension to the voluntaristic conception of punishment which requires us to take ourselves and others more seriously than we usually do. But is this really a failing? Trying to live a moral life is tough business; no one should ever have thought otherwise. The voluntaristic conception maintains that we have a great responsibility for our own moral personality. That we have these obligations is, according to the moral good theory, an implication of our autonomously interacting with one another according to the reciprocal recognition of inherent value. The benefits of such interactions, including a sense of community with others, makes the difficulty worthwhile.

VI. CONCLUSION

In ideal circumstances,²¹² the moral good theory entails the voluntaristic formulation. The voluntaristic formulation paradigmatically applies in circumstances where people are able and willing to autonomously interact with one another according to principles of mutual respect and concern. In non-ideal circumstances,²¹³ the moral good theory may be forced to accept some degree of paternalism in a system of

212. See *supra* note 91.

213. See *id.*

punishment. But where possible it must prefer the implementation of voluntaristic systems of punishment.

The difference between the paternalistic and voluntaristic formulations of the moral good theory is that while the former sees nothing wrong with coercion in punishment,²¹⁴ the lexical ordering of the voluntarist formulation permits paternalism in punishment only when it is impossible to implement the voluntaristic formulation. In doing so, the lexical ordering of the two formulations insists that every opportunity be taken to honor and respect the autonomy of the offender. Thus, the moral good theory is different from a purely paternalistic theory of punishment even when the former must permit paternalistic punishment.²¹⁵

In emphasizing voluntarism in punishment, the moral good theory represents a moral ideal toward which we should strive. Voluntarism in a system of punishment may require voluntarism in other political structures and a revision of contemporary social institutions generally.²¹⁶ If so, the voluntaristic conception of the moral good theory of punishment may be tied to more far reaching legal and moral change.

214. Indeed, some paternalists believe that coercion is an essential and thoroughly wholesome feature of punishment.

215. It should be noted that autonomy, privacy, and self-interest are also prudential values. It is, therefore, possible to recast the paternalist formulation of the moral theory as a prudential theory of punishment. Punishment is designed to teach people that any society of rationally self-interested individuals is committed to certain important values. When everyone, or almost everyone, observes certain rules, society benefits. These rules are necessary to the existence of any society. Strawson, *Social Morality and Individual Ideal*, 36 PHIL. 1, 5 (1961). One can call this a minimal conception of morality or the core set of prudential rules. Either way, the "minimal conception of morality" or the "core set of prudential rules" is concerned with rational self-interest in the context of justification. No loftier notion of morality, for example, a concern and respect for others, is required.

In this view, a person is punished in order to teach that wrongdoing is contrary to one's own self-interest. There are two reasons for this result. First, freedom will be lost if the person transgresses. Second, violating the law, if generalized by others similarly situated, would tend to undermine stability and order causing suffering in the long run.

In the prudential theory of punishment, the state may be justified in threatening individuals with penalties for not acting in accordance with the law and their own self-interest. See Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 328 (1985). By participating in social practices a person consents to its penalties. See Alexander, *Consent, Punishment and Proportionality*, 15 PHIL. & PUB. AFF. 178 (1986); Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFF. 289 (1983). But then there is nothing new or interesting about this theory of punishment; it is merely the wine of old deterrence theories in new bottles.

216. Usually, poverty prevents individuals from developing the sort of autonomy required for an ideal application of the moral good theory of punishment. Additionally, it has often been argued that the capitalistic distribution of wealth is the primary cause of crime. In fact, the attempt has been made to apply formal Marxist concepts to the etiology of crime. See W.

BONGER, CRIMINALITY AND ECONOMIC CONDITIONS (1922). It is not certain that this attempt has been successful. I. TAYLOR, P. WALTON, & J. YOUNG, *THE NEW CRIMINOLOGY* 222-36 (1973). To be sure capitalism as it exists in the United States has produced a radical disparity in wealth. For example, recently it was reported that half of 1% of the population has 35% of the nation's wealth. CNN television broadcast, July 25, 1986. Hence, for punishment to be justified it may require a more equal distribution of wealth and opportunity. In turn, this may require broadening the base of democracy. M. CARNOY, *THE STATE AND POLITICAL THEORY* 170-71 (1984).