

A Jurisprudence for Punishing Attempts Asymmetrically

Theodore Y. Blumoff†

Working in the long shadows of Jeremy Bentham and informed by the brilliance of Kant, Herbert Hart analogized the original principles of Anglo-American criminal law to a marketing program in which players can (more or less) balance the benefits associated with proposed (mis)conduct against potential burdens (here, not least, the deprivation of personal liberty).¹ “Consider the law not as a system of stimuli,” he asserted, but as “what might be termed a *choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways.”² The idea of law as dependent upon choosing clearly wasn’t new a generation ago; it had served as a necessary stipulation (if not a construction³) of the

† Professor of Law, Mercer University School of Law, Macon, Georgia. Special thanks to a number of friends and colleagues who have offered helpful comments. They include the faculty research workshop at Washington University School of Law and Mercer University Law School, Robert Audi, Sanford Kadish, Harold Lewis, Stephen Morse and Jack Sammons. Mercer University Law School provided financial support for my work, and Barbara Blackburn furnished excellent assistance.

1. 1 Jeremy Bentham, Introduction to the Principles and Morals of Legislation, in *The Works of Jeremy Bentham*, at 1, ch. XV, § 1, 83 (John Bowring ed., 1843). Happiness, on this view, is not purely hedonic. See, e.g., John Rawls, Two Concepts of Rules, 64 *Phil. Rev.* 3 (1955) (amending the utility principle to make clear that it’s not solely hedonic, thus providing utilitarian theory with a rationale that prevents punishing the innocent).

2. H.L.A. Hart, Legal Responsibility and Excuses, in *Punishment and Responsibility* 28, 44 (1968).

3. Hume was apparently among (if not the first to understand that finding a basis for promises was as much a cultural construction as was the social compact which purported to rest on a priori contract grounds. “Those rules, by which property, right, and obligation are determin’d, have in them no marks of a natural origin . . . [and] are changeable by human laws” David Hume, *A Treatise of Human Nature* 528 (L.A. Selby-Bigge & P.H. Nidditch eds., 2d ed. 1978). See Annette Baier, Hume’s Account of Social Artifice—Its Origins and Originality, 98 *Ethics* 757, 762 (1988); J.B. Schneewind, The Misfortunes of Virtue, 101 *Ethics* 42, 57 (1990) (noting that the facts “automatically carry moral weight because, for Hume, there is no principle in us wholly independent of those facts which might point us in other directions”).

social compact that had embodied “choice” as one of its cornerstones.⁴ The “market” idea was unfortunately overstated, insofar as it purported to be normative.

As to its pedigree, the two eighteenth century philosophers supplied the cornerstones for a somewhat unlikely podium for Hart’s position. Bentham had reasoned (a priori of course)⁵ that all laws should promote that which most primitively motivates individuals, namely, *pleasure*—defined as aggregate net social gain and the avoidance of *pain*.⁶ Punishment, he reasoned, doesn’t itself promote gain. Consequently, he insisted that laws requiring punishment for their effectiveness should be enforced if, but only if, doing so *otherwise* promotes happiness, that is, when a measured penalty produces a net social gain.⁷ On this notion, one proposes (or follows) the law (or not) when “he conceives it to . . . augment or to diminish the happiness of the [community]”⁸

Moving from the same epistemological foundation (and at roughly the same time), Kant reached a morally conflicting and seductively appealing explanation for the

4. Rousseau earlier had argued that “laws are properly but the conditions of civil association” in a social compact. Jean-Jacques Rousseau, *The Social Contract* 34 (Charles Frankel ed., 1947). Locke viewed virtue, by whatever standard it is framed, as an “agreement with those patterns prescribed by some law.” John Locke, *Essay Concerning Human Understanding* 358 (Peter H. Niddiitch, ed. 1979).

5. “Is [the principle of utility] susceptible of any direct proof? It should seem not: for that which is used to prove every thing else, cannot itself be proved: a chain of proofs must have their commencement somewhere. To give such proof is as impossible as it is needless.” Bentham, *supra* note 1, ch. I, ¶XI, at 2.

6. “*Pain and pleasure*,” Bentham wrote, “govern us in all we do, in all we say, in all we think . . . [and] [i]t is vain to talk of the interest of the community, without first understanding what is the interest of the individual.” Bentham, *supra* note 1, at 1, 2.

7. On the issue of how much to punish, Kant and Bentham landed at the same effective point. Cf. Immanuel Kant, *The Science of Right*, in *The Philosophy of Law* (W. Hastie trans., 1974) (stating that just punishment conforms to the “Principle of Equality, by which the pointer of the Scale of Justice is made to incline no more to the one side than the other”). See Bentham, *supra* note 1, ch. XV, §1, at 83 (same conclusion but based on utility).

8. Bentham, *supra* note 1, ch. I, §§I, IV, at 1. I recognize that I have collapsed rule and act theories of utility here, but this distinction is unimportant for present purposes.

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metaphor of “choice”—that is, of the indispensable need for and reality of a human system that creates the capacity for self-conscious, responsibility-engendered grounds according to which an actor can select among genuine options; such a foundation would serve as the ineliminable predicate to a worthy system of morality and thus ultimately law.⁹ Kant had argued further, in fact, that empirical reality couldn’t even affect the will, the metaphoric locus of choice, because the will *is* good: “A good will is not good because of what it effects or accomplishes—because of its fitness for attaining some proposed end” No, he said, “it is good through its willing alone—that is, good in itself.”¹⁰ This perfect will, on which an “objective”¹¹ moral foundation rests, can only choose good, and so our formal standards for acceptable conduct are very high!

Kant’s description of the will as “good” was a conclusion which, like Bentham’s principle of utility, was revealed a priori, via his own contingent intuitive Gestalt.¹² But “will” *is* reflected empirically in our intentions—in our internal mental life as actors—and how *that* life interacts with the rest of our world: our desires, beliefs, hopes, wishes, and so on.¹³ The numerous unanswerable

9. See, e.g., Kant, *supra* note 7, at 195 (warranting, for example, a desert-based punishment regime premised on the first categorical imperative: “For one man ought never to be dealt with merely as a means subservient to the purpose of another.”).

10. Immanuel Kant, *Groundwork of the Metaphysic of Morals* 60 (H. J. Paton, trans., 1964) [hereinafter Kant, *Groundwork*].

11. By “objective” I mean those ontological precepts, like the categorical imperative, by which one credits morality with an authority independent of the agent’s wishes and desires. See, e.g., J.D. Goldsworthy, *God or Mackie? The Dilemma of Secular Moral Philosophy*, 30 *Am. J. Juris.* 43, 45 (1985). On what “objective” means in practice, see J.L. Mackie, *Morality and the Retributive Emotions*, *Crim. Just. Ethics*, Winter/Spring 1982, at 3, discussed in the text *infra* accompanying notes 170-72 [hereinafter Mackie, *Morality*]. Mackie’s full thesis is outlined in his earlier work, *Ethics: Inventing Right and Wrong* esp. ch. 1 (1977) [hereinafter Mackie, *Ethics*].

12. Kant never doubted that it was possible to construct a “pure” moral philosophy based upon “pure thinking . . . [altogether] a priori . . . for a metaphysics of morals has to investigate the Idea and principles of a possible *pure* will, and not the activities and conditions of human willing as such” Kant, *Groundwork*, *supra* note 10, at 58.

13. On the nature of intentions, see e.g., John R. Searle, *Mind, Language, and*

questions embedded in this simple fact of daily existence indicate that the connection between “will” as current desiderata, and a conception of “will” as rational perfection, will always be open to question if not criticism.¹⁴ When the vitality of a concept is inferred intuitively from a wholly formal version of autonomy that determines the self-constructed will’s categorical goodness, it must produce a particular and unreal conception of humans as moral

Society: Philosophy in the Real World ch. 4 (1998).

14. John Rawls, certainly the leading post-War neo-Kantian political philosopher, explained the “weakness” of Kant’s abstraction of the foundations of a “moral law” as recognizing “only two possibilities: either the moral law is founded on an object given to it,” like Hume’s conception of the “passions,” or “as pure practical reason determines . . . its own object out of itself.” John Rawls, *Lectures on the History of Moral Philosophy* 235 (Barbara Herman ed., 2000) [hereinafter Rawls, *Lectures*].

Wittgenstein was himself unable to solve the puzzle of the “will,” but he seems to come down on the side of its having some empirical reality. He began by asking if the will is “an attitude towards the world” and notes that “[w]e cannot imagine, e.g., having carried out an act of will without having detected that we have carried it out.” Ludwig Wittgenstein, *Notebooks, 1914-1916*, at 86 (G.H. von Wright & G.E.M. Anscombe ed., G.E.M. Anscombe trans., 2d ed. 1979). Thus, he concludes, “we need a foothold for the will in the world.” *Id.* at 87. We need such a foothold because “[t]he will is an attitude of the subject to the world,” that is to say, that the agent is “the willing subject.” *Id.* The proof of this for Wittgenstein came in a thought experiment in which he stands in front of a mirror and draws a square in the morning’s foggy mirror. One actually draws the square, he states, not by visualizing a square but by using one’s muscles to draw the picture. “So here after all there are two quite different acts of the will in question. The one relates to the visual part of the world, the other to the muscular-feeling part.” The conclusion is not that his actions simply accompany his will. *Id.*

I think that the will and the action are, as Wittgenstein asserts, the same in that neither could or would exist without the other. One’s muscle-feeling does not (which is to say, cannot) lose contact with the visualization that accompanies and is the desire to draw a square. In this sense, to will an event is to perform it, however imperfectly. To exercise bad will, whatever that means in the context, seems to entail intending and effecting, to some extent, the evil which results. The question then is of what consequence is the difference between willing and those occurrences, conditions, and events that precede the will?

[H]ow can I predict—as in some sense I surely can—that I shall raise my arm in five minutes’ time? That I shall will this? This is clear: it is impossible to will without already performing the act of the will. The act of the will is not the cause of the action but is the action itself. One cannot will without acting. If the will has to have an object in the world, the object can be the intended action itself. And the will does have to have an object.

Id. I am pursuing this issue in great detail in a work titled *Competency, Neuroscience and Law* (in progress).

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beings. The worth of the Kantian conception is that it “provide[s] a shelter against luck, one realm of value (indeed, of *supreme* value) that is defended against contingency.”¹⁵ Therein lies the problem: This treasured ontological feature, which is inured to luck and (ultimately) closed to justification, cannot serve as the only basis of justice.¹⁶

Why? Because as an empirical matter, it’s obvious to each of us that our lives don’t proceed without luck—good and bad. We know from common everyday experiences, from good common sense¹⁷ and ordinary language¹⁸ that fortune affects us every minute of every day in every single facet of our existence. A more pragmatic approach recognizes that sometimes the best we can do is something just better than what we’re now doing.¹⁹ Notwithstanding these empirical grounds, our criminal jurisprudence is wedded to a Kantian (like) ideal, at least implicitly;²⁰ it too assumes a priori that decision making is ours to accomplish in full, responsibility-engendering fashion, excepting genuinely extraordinary *circumstances* which would

15. Bernard Williams, *Moral Luck: A Postscript*, in *Making Sense of Humanity and other Philosophical Papers, 1982-1993*, at 241, 241 (1995) (emphasis added).

16. See Susan K. Houser, *Metaethics and the Overlapping Consensus*, 54 *Ohio St. L.J.* 1139, 1147 (1993) (noting that intuitionism entails circularity precisely because it purports to justify itself—that is, it insulates itself from external justification). For an accessible discussion of the nature of a priori propositions, see Robert Audi, *Belief, Justification, and Knowledge* 52-56 (1988).

17. As an epistemological matter, by “common sense,” I mean the common sense composed of what ordinarily reasonable people take for granted in this locale at this time. Searle, *supra* note 13, at 11-12. Suzanna Sherry notes, more familiarly, that reasoned argument invites a response based on a “commonly shared perception of reality.” Suzanna Sherry, *The Sleep of Reason*, 84 *Geo. L.J.* 453, 456 (1996). Both understandings embrace the notion of “common sense” I am elaborating.

18. J.L. Austin, *A Plea for Excuses*, 57 *Proc. Aristotelian Soc’y* 1, 11 (1956). See *infra* text accompanying note 174.

19. Cf. Hume, *Treatise*, *supra* note 3, at 489 (declaring that one “cannot . . . [do] better” than to “consult” rational interests, where “better” does not entail the best conceivable). See generally Rawls, *Lectures*, *supra* note 14, at 60.

20. For a survey of various theories of criminal responsibility, most of which share “voluntariness” as (at least) a necessary condition, see J. Ralph Lindgren, *Criminal Responsibility Reconsidered*, 6 *Law & Phil.* 89, 92-102 (1987).

overcome the resolve of reasonable people.²¹ As a consequence thereof, we can judge rationally the criminality/morality of actions based entirely on the agent's intentions, combined with some evidence of a minimal act that verifies wicked intent.²² The criminal chose wrongdoing—all appearances and realities to the contrary notwithstanding. What then is the foundation for a will—envisioned not a priori and impervious to affect, but of intent and effect and all that such descriptions inspire—which forms the moral foundation for the norms of criminal law? How much choice do we have?

This settled view too completely disregards these questions and so dismisses prematurely the basic ways in which our choices are *not*—or are not *entirely*—our own. Viewed pragmatically, and thus from below—and with some acknowledgment of the limits of rationality and our control over rational discourse—we surely know that many actions for which we are held responsible include a good deal of conduct for which we really *aren't* wholly responsible. We know, for example, that conditions, occurrences and events which precede and accompany our births compose the effects of fortune—good and bad—and not only restrain our willful conduct, but are recurrently beyond our control.²³ Insofar as *these* phenomena affect the

21. On the requirement of reasonableness, see, e.g., Michael S. Moore, *The Moral and Metaphysical Sources of the Criminal Law*, in *Nomos XXVII: Criminal Justice* 11, 15-16 (J. Roland Pennock & John W. Chapman eds., 1985); Sanford H. Kadish, *Moral Excess in the Law*, 32 *McGeorge L. Rev.* 63, 74-5 (2000).

I understand that determining the “circumstances” in which decision making occurs, extraordinary or not, is an inevitable part of any jurisprudence. It is only when those circumstances become defined wholly by the “settled moral doctrine” that cause for concern arises. Those concerns animate this essay, because “settled” doctrine often has a way of becoming stale doctrine when one forsakes a willingness to question and revisit anew the circumstances in which choosing occurs.

22. See, e.g., Model Penal Code § 2.01(1) (Proposed Official Draft 1962) (requiring a “voluntary act or . . . omission to perform an act”); Model Penal Code § 2.01, cmt. at 214 (Official Draft and Revised Comments 1985) (noting that the act requirement also avoids punishing thoughts alone and implements a preventative rationale).

23. In this context, it is worth mentioning the ground-breaking work of Benjamin Libet of the University of California (San Francisco) Medical School.

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outcome of our conduct, they undermine ascriptions of genuine individual responsibility in some significant way. The criminal law ought to account for this reality in a rational punishment regime—concerned with both how²⁴ and how long.

One form of luck shows itself plainly in the law of attempt, which I discuss as illustrative of a pervasive problem in criminal law, namely, how to account for those conditions, events and occurrences over which actors *in fact* have no control.²⁵ To the extent that contemporary commentary speaks to these issues, it mostly challenges the propriety of imposing different punishments based on the post-act fortuity of failing to achieve or completing the substantive crime. The actors' "intent" being otherwise equal—where intent speaks to the level of culpability

Libet's well-replicated work indicates that the neuronal processes which react "intentionally" to external stimuli begin to fire before we are conscious of those intentions. That is to say, our brains begin to fashion what we will call a deliberate response about a third of a second before a "conscious" response can occur. See, e.g., Benjamin Libet, Unconscious Cerebral Initiative and the Role of Conscious Will in Voluntary Action, 8 *Behav. & Brain Sci.* 529 (1985); The Timing of a Subjective Experience, 12 *Behav. & Brain Sci.* 183 (1989). Libet's research process is described and his work is summarized by the distinguished cognitive neuroscientists Gerald M. Edelman & Giulio Tononi, A Universe of Consciousness: How Matter Becomes Imagination 67-70 (2000); Michael S. Gazzaniga, The Mind's Past ch. 3 (1998); Gilberto Gomes, Volition and the Readiness Potential, in *The Volitional Brain: Towards a Neuroscience of Free Will* 59 (Benjamin Libet et al. eds., 1999). See also Andrew E. Lelling, Comment, Eliminative Materialism, Neuroscience and the Criminal Law, 141 *U. Pa. L. Rev.* 1471, 1520-25 (1993). Many of the replicating and related studies are discussed and cited in Patrick Haggard et al., On the Perceived Time of Voluntary Actions, 90 *Brit. J. Psychol.* 291 (1999).

24. For preliminary suggestions on the "how," see Theodore Y. Blumoff, Justifying Punishment, 14 *Can. J.L. & Juris.* 161 (2001).

25. As others have pointed out, the general issue of moral luck, and the harm principle which it implicates, plays out in related areas, including felony murder, negligent and reckless misconduct, accomplice and conspiracy liability, and several justification and excuse doctrines. See, e.g., Sanford H. Kadish, Forward: The Criminal Law and the Luck of the Draw, 84 *J. Crim. L. & Criminology* 679 (1994) [hereinafter Luck]; Richard Parker, Blame, Punishment, and the Role of Result, 21 *Am. Phil. Q.* 269 (1984); Alan Norrie, Freewill, Determinism and Criminal Justice, 3 *Legal Stud.* 60 (1983). For a recent work that overlooks the possibility that evil actors may, through no fault of their own, lack control over a central feature that disposes them to evil, see Michael J. Zimmerman, Taking Luck Seriously, 99 *J. Phil.* 553 (2002).

susceptible of proof—the argument is that it is both illogical and offensive to basic conceptions of morality to punish the two actors differently.²⁶ In contrast to this view, I hope to show that sentencing distinctions should be maintained (or rolled back). *Pace* Kant, wills are good *and* bad, depending in significant part upon just that fortune whose actual influences Kant hoped to dismiss. Sentencing distinctions should be understood as reflecting a deeply-held, intuitive moral understanding focused on the irremediable place actual harm occupies in our lives; and so, with respect to our lives as lived, these distinctions implicate both pre- and post-event instantiations of moral luck. My view sanctions the traditional practice which imposes lesser sentences for attempts than for completed crimes. I rest this conclusion on three inferences from the fact of moral luck. The first is that lighter sentences for attempts respond to the full measure of causative factors over which actors exert little or no control, and which often reflect themselves in the simple fact that *because* criminals often have suffered from bad luck which we can hardly imagine, it's hard for those of us who are not on the front lines to comprehend the extent to which they are significantly damaged individuals in need of help.²⁷ The second, related inference comprehends that lesser penalties for attempted crimes act as a counter-weight to the uncertainty of evaluation that attends all of human

26. See, e.g., Lawrence C. Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 *Phil. & Pub. Aff.* 262 (1974); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 *Ariz. L. Rev.* 117 (1995); James J. Gobert, *The Fortuity of Consequence*, 4 *Crim. L.F.* 1 (1993); Kadish, *Luck*, *supra* note 25; Yoram Shachar, *The Fortuitous Gap in Law and Morality*, *Crim. Just. Ethics*, Summer/Fall 1987, at 12; Steven Sverdlik, *Crime and Moral Luck*, 25 *Am. Phil. Q.* 79 (1988).

27. See, e.g., Richard Posner, *Let Them Talk*, *New Republic*, August 21, 2000, at 34 (reviewing Peter Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* (2000) (characterizing criminal defendants who confess to crimes as “almost always of low IQ, uneducated, unsophisticated, and mentally unbalanced”), whom we have, as a matter of social policy, largely thrown to the dogs. For a useful statement of the very real dangers wrought by the formal conception which comes mostly from outside the context of criminal law, I commend Martha C. Nussbaum, *Disabled Lives: Who Cares?*, in *N.Y. Rev. Books*, Jan. 11, 2001, at 34 (book review).

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conduct. In every case we assess, our knowledge of causation is incomplete: the chasm between legally relevant antecedent events and *all* causative antecedent events is necessarily contingent (and incomplete from the viewer's perspective for that reason). The final judgment rests on an historical base. With Thomas Nagel and others, I understand that "our basic moral attitudes toward ourselves and others"—including criminals—"are determined by what is actual,"²⁸ and (at least usually) not on what could or should have been.²⁹ What is actual is our universal unmediated perception that harm matters. In this regard, the imposition of different sentences recognizes the distinction between moral philosophy and law, and between the victims' view of the world and how we think about and treat adjudicated wrongdoers.

This work proceeds as follows. Section I sets out the paradigmatic case of the "completed" attempt.³⁰ In section II, I outline the Kantian presuppositions as they apply to our criminal law, and briefly review the compatibilist jurisprudence it has spawned. I then counsel against the uncompromising commitment to "choice" in criminal jurisprudence insofar as the emerging subjectivist³¹ view ignores basic ways in which our choices are either *not*—or are not *fully*—our own. Section III sets out the arguments for retaining the historic sentencing distinctions between attempted and completed crimes. Section IV anticipates

28. Thomas Nagel, *Moral Luck*, in *Mortal Questions* 24, 38 (1979) [hereinafter *Moral Luck*] (originally published in 50 *Proc. Arist. Soc'y* (Supp. 1976)).

29. This last observation contrasts markedly with traditional tort law, which exacts financial penalties for failing to do what the actor should have done. See, e.g., *Blyth v. Birmingham Waterworks Co.*, 156 *Eng. Rep.* 1047 (Ex. Ch. 1856); 3 *Fowler V. Harper et al.*, *The Law of Torts* § 16.2, at 389-90 (2d ed. 1986).

30. Viewed by some as the most egregious form of attempt, the "complete" or "completed" attempt describes the situation where the actor has done everything possible to commit a crime, but owing to luck the bullet goes astray, the arson igniter fails, the bank robbers are busted on the spot, and so on. See, e.g., Michael D. Bayles, *Punishment for Attempts*, 8 *Soc. Theory* 19, 22 (1982); Sverdlik, *supra* note 26, at 80.

31. By "subjectivism," I mean simply that punishment is based solely on the actor's subjective intent. See, e.g., Joshua Dressler, *Understanding Criminal Law* § 27.03 (2d ed. 1995) (distinguishing between "subjectivist" and "objectivist" approaches to attempts).

several objections to the views I am asserting. Finally, in Section V, I introduce a theological argument for compassion and education in sentencing.

I. CONCEPTUALIZING ATTEMPTS

The paradigmatic case for punishing equally those convicted of attempted and completed crimes focuses exclusively on culpability, narrowly conceived in terms of the actor's level of subjective intentionality measured at the time of the verifying act, *t*. At that instant we ask how deeply committed to this particular harm *was* the wrongdoer, where harm is measured (in part) by a level of intention? The past tense is emphasized as an important reminder, because everything we know about the defendant at *t* is part of a (necessarily) reconstructed and thus incomplete past; we determine causative intent not only without the subject's assistance, but ordinarily (and at least pre-plea) parried by his or her (legally) purposeful obstruction. Everything we know about the actual case, much less the hypothesized worst case, is constructed.

The factually impossible illustrative case often begins with a description of one of the most vicious, homicidal scenarios. For example, we are asked to imagine two putative murderers, Ms. X and Mr. Y. They act entirely alone, are completely unaware of each other and so wholly independent; accordingly, each forms the same purpose of shooting and killing a victim, V, at precisely the same moment. After purchasing identical, high-powered sharp-shooting weapons, and with perfect synchrony, X and Y spot the victim, Mr. V, raise their weapons, take perfect aim and fire. X's weapon discharges, strikes V (between the eyes, I guess), and kills him instantly. Y's weapon, however, fails to discharge; unbeknownst to him, there is a latent defect in the triggering mechanism. Both X and Y formed identical intentions, according to this scenario; both attempted the same last act necessary to fulfill those intentions, and V is dead. Both appear to pose the same risks of future harm to the community; both purport to

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reflect the same moral culpability at time *t*, and both, accordingly, are equally in need of restraint and reformation, if the latter was available, feasible and productive. In most jurisdictions, however, X will spend substantially more time in prison than Y, assuming X's crime is not death-eligible. Is there a meaningful explanation? Can different treatment be warranted?

I have chosen the most difficult pattern to defend in part because it is often put forward as the least defensible,³² but also because, even here I think, we usually can justify unequal sentencing. The first point to note is that the hypothetical case is just that—*entirely* hypothetical. Real cases involve different defendants, who are impelled by different intentions, come from different backgrounds, and pose different threats. Consequently, they are (at least potentially) susceptible to different reformatory measures. The hypothetical case, in other words, doesn't exist—now or ever. It is wholly counterfactual.

But beyond this fact, I think we can justify different sentences generally while stipulating that focusing only on deterrent rationales and intent-based retributive justifications for the institution of punishment doesn't provide a "rational" account for traditional grading distinctions between completed attempts and completed crimes.³³ There is a small group of scholars who concede the point, but still defend the need for unequal treatment for attempt and crimes based primarily on legal as opposed to moral theories.³⁴ Thus, if we concentrate only on the

32. See, e.g., Gerald Dworkin & David Blumenfeld, Punishment for Intentions, 75 *Mind* 396, 399 (1966); Feinberg, *supra* note 26, at 118; Mark Perlman, Punishing Acts and Counting Consequences, 37 *Ariz. L. Rev.* 227, 227-28 (1995); Sverdlik, *supra*, note 26; Peter Winch, Trying and Attempting, 45 *Proc. Arist. Soc'y.* 209, 222-23 (Supp. 1971).

33. See, e.g., Andrew Ashworth, Criminal Attempts and the Role of Resulting Harm under the Code, and in Common Law, 19 *Rutgers L.J.* 725, 735-38 (1988); Bayles, *supra* note 30, at 19; Becker, *supra* note 26, at 266-67; Hart, Intention and Punishment, in *Punishment and Responsibility*, *supra* note 2, at 113, 129-31; Kadish, Luck, *supra* note 25, at 684-95; Parker, *supra* note 25; Shachar, *supra* note 26; Sverdlik, *supra* note 26.

34. See, e.g., Bruce Chapman, Agency and Contingency: The Case of Criminal

actor's intent at *t*, without concern for any of the less direct mediators in rationality's current account of cause and effect, "no apparent reason exists to punish attempts differently from completed crimes."³⁵ Why, then, should we punish X and Y unequally? I will present several related rationales for doing so, by suggesting the existence of a contingent relationship between consequential and antecedent luck that cannot be dismissed as irrelevant; by challenging a formal commitment to rationality and autonomy that fails to distinguish between the duties of morality and law in important ways; by taking cognizance of the relationship between harm and the aesthetic it destroys, which matters greatly to many of us, and which should soften our extreme connection to a narrow conception of rationality in punishment; and by noting that how we view and how we treat the attempter *after* the attempt matters greatly and must be managed. This last point implicates all forms of luck and diverse realms of criminal law and implicates a theological viewpoint.

II. THE LAW'S COMMITMENT TO RATIONALITY/AUTONOMY

Criminal jurisprudence is wedded to a thin, compatibilist account of rationality according to which an actor's ability to effect a practical syllogism reveals rational capacity.³⁶ The problem with this settled view is that it disregards the pervasive influence of luck, both before and after wrongdoing. I will briefly discuss the origins of this commitment in moral philosophy, which will provide a foundation for explaining and critiquing the current subjectivist commitment. I will then rehearse one of the most fully articulated statements of the compatibilist argument within criminal jurisprudence, H.L.A. Hart's, who conceived of the mental conditions of individual

Attempts, 38 U. Toronto L.J. 355, 359 (1988); Dworkin & Blumenfeld, *supra* note 32, at 396.

35. Bayles, *supra* note 30, at 19.

36. See, e.g., Moore, *supra* note 21, at 16-23. I have critiqued this view in a related context in *Justifying Punishment*, *supra* note 24, at 175-77.

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responsibility as the gist of the Anglo-American criminal justice system.³⁷

A. *Kant's Groundwork*

The contemporary depiction of the role of rationality and autonomy in our moral deliberations, as with much else in moral theory, traces its modern origins to Kant.³⁸ The commitment to rationality in contemporary normative ethics, and the nature of the reasoning it employs, begin with the *Groundwork Principles of the Metaphysics of Morals*, where Kant articulates the problem:

Do we not think it a matter of the utmost necessity to work out for once a pure moral philosophy completely cleansed of everything that can only be empirical and appropriate to anthropology? That there must be such a philosophy is already obvious from the common Idea of duty and from the laws of morality. Every one must admit that a law has to carry with it absolute necessity if it is to be valid morally—valid, that is, as a ground of obligation³⁹

That it is possible to construct a pure moral philosophy based upon “pure thinking” altogether a priori was deemed incontrovertible.⁴⁰ Kant contended (Hume notwithstanding)

37. Hart, *supra* note 2, at 44. On the extent to which Hart's views still pervade criminal law, see, e.g., Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* 536 (7th ed. 2001) (discussing the assumption of free will and rejection of determinism).

38. Certainly our commitment to the dominance of reason and rationality goes back to the Greeks and early Hebrews. See, e.g., Plato, *Crito*, in *Great Dialogues of Plato* 447, 450 (W.H.D. Rouse trans., 1984) (“My way is and always has been to obey no one and nothing, except the reasoning which seems to me best when I draw my conclusions.”). For a critical analysis of this form of reasoning, see A.D. Woozley, *Law and Obedience: The Arguments of Plato's Crito* 22-27 (1979). See also Hermann Cohen, *Religion of Reason: Out of the Sources of Judaism* 408 (Simon Kaplan trans., 1972). Maimonides reconciled the Aristotelian tradition with Judaism in *Moses Maimonides, The Guide for the Perplexed* (M. Friedländer trans., 2d ed. 1956); see generally Kenneth Seeskin, *Jewish Philosophy in a Secular Age* 38-40 (1990).

39. Kant, *Groundwork*, *supra* note 10, at 57. Among the most valuable exegeses of Kant's text is Rawls, *Lectures*, *supra* note 14, at 148-289.

40. See *infra* note 41.

that “matters of morality [derived from and productive of an epistemologically a priori synthetic proposition⁴¹ can] easily be brought to a high degree of accuracy and precision even in the most ordinary intelligence.”⁴² For present purposes, it is sufficient to appreciate that Kant’s commitment to rationality and autonomy as a basis for morally approved conduct is wholly formal;⁴³ and how individuals conduct themselves in fact is, literally, beside the point. The descriptive/normative division is complete.

Kant’s formalism unites this conception of rationality with autonomy such that the two qualities become indistinguishable. The reasoning moves along these lines: The first statement of the categorical imperative demands that a rule be “universalizable”; that is to say, the rule or maxim must apply at all times to all rational persons: “I ought never to act except in such a way *that I can also will that my maxim should become a universal law*.”⁴⁴ At the same time, to be autonomous means that one participates in moral reflection by prescribing universal laws and is, therefore, “free in respect of all laws of nature, and obeying *only* those which he makes himself.”⁴⁵ If the maxim is itself a universal requirement derived from rational intuition, and if to qualify as a law means it must “hold, not merely

41. Kant, *Groundwork*, supra note 10, at 55 (“Logic can have no empirical part Otherwise it would not be . . . a canon for understanding and reason, valid for all thinking and capable of demonstration”). Cf. Audi, supra note 16, at 56 (observing that “rationalists virtually always assert or imply that . . . there is synthetic a priori knowledge,” that is, a free standing, non-derivative principle). See also George Edward Moore, *Principia Ethica* 143 (1966) (attributing the term “synthetic” to Kant, and defining it as a proposition that “is not an inference from some proposition other than *itself*”). See Rawls, *Lectures*, supra note 14, at 236 (discussing Kant’s reaction to rational intuitionism as a preface to his moral constructivism).

42. Kant, *Groundwork*, supra note 10, at 57.

43. See *id.* at 57 (“the ground of obligation must be looked for, not in the nature of man nor in the circumstances of the world in which he is placed, but solely a priori in the concepts of pure reason . . .”). For an accessible discussion of the nature of a priori propositions, see Audi, supra note 16, at 52-56.

44. Kant, *Groundwork*, supra note 10, at 70; see, e.g., *id.* at 99 (noting that “the *principle* that every human will is a *will which by all its maxims enacts universal law . . .*”).

45. *Id.* at 97 (emphasis added).

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for men, but for all *rational beings as such*—not merely subject to contingent conditions and exceptions, but *with absolute necessity*,⁴⁶ then the distinction between rules that govern others and rules that govern oneself collapses. All rational individuals are not only autonomous but, by definition, can legislate rationally only identical universal rules. In this way, rationality and autonomy, in the end, come to the same thing: prescribing and (in theory) living by the only formally conceivable universal laws.

Absolute and *only* in the preceding paragraph are decisive limitations. Kant proposed that moral laws apply *absolutely* and *only* if they are conceived irrespective of our culture, however unreachable the norm may actually be. In this way, Kant reified our understanding of morality. Notwithstanding this stance, Kant did not conceal his sensitivity to the restrictions nature in fact imposes on human freedom. Kant defends freedom normatively in the face of physical necessity: “[T]o argue freedom away is as impossible for the most abstruse philosophy as it is for the most ordinary human reason. Reason must therefore *suppose* that no genuine contradiction is to be found between the freedom and the natural necessity”⁴⁷ The important point here is that Kant does not claim that freedom cannot (at least appear to) run afoul of the inexplicable limitations imposed by nature; he recognizes as much. Rather, he urges philosophy to *suppose* or *assume* no conflict. The prohibition on *supposing* no contradiction, however, cannot compel overlooking the contradiction; to the contrary, Kant famously attempted to reconcile the antinomy created by freedom and the law of nature “in the same subject” without losing either. He labored to do so by distinguishing “a *thing as an appearance* (as belonging to the sensible world) . . . [and] a *thing* or being *in itself*”

46. Id. at 76.

47. Kant, Groundwork, *supra* note 10, at 123-24 (emphasis added). For a useful elucidation of the point, see Donald Davidson, Mental Events, in *Essays on Actions and Events* 207 (1980).

(standing apart from the world of sense).⁴⁸ His account thus becomes one of enormous imaginative normativity.

Kant's commitment to a wholly formal version of rationality mandated his adoption of the profoundly unempirical conclusion that luck could have no impact on the will:

A good will is not good because of what it effects or accomplishes—because of its fitness for attaining some proposed end: it is good through its willing alone—that is, good in itself. . . . Even if, by some special disfavor of destiny or the niggardly endowment of step-motherly nature, this will is entirely lacking in power to carry out its intentions[,] . . . even then it would still shine like a jewel for its own sake as something which has its full value in itself. Its usefulness or fruitlessness can neither add to, nor subtract from, this value.⁴⁹

When the categorical goodness of will represents reason's and autonomy's *raison d'être*, and thus exists independent of the world, it produces a view of morality that's impervious to ordinary causative laws.⁵⁰

Kant's heroically rational *Groundwork* is so descriptively innocent in the context of criminal law that its usefulness must be qualified in light of facts as they exist on the ground. Events, conditions and occurrences over which we actors have no control in fact affect *everything* we do *every time* we act. Hume recognized this point when, in a discussion of "Sceptical Philosophy," he noted that "[n]ature will always maintain her rights, and prevail in the end over any abstract reasoning whatsoever."⁵¹ Consider the ordinary incidents of birth to

48. Kant, *Groundwork*, supra note 10, at 125. Kant embraced the antinomy of practical reason which, famously, he reconciled through the fiction of an inaccessible "thing . . . in itself." *Id.* See also Immanuel Kant, *Critique of Practical Reason* 138-45 (T.K. Abbott trans., 1996).

49. Kant, *Groundwork*, supra note 10, at 62.

50. Williams, supra note 15.

51. David Hume, *An Enquiry Concerning Human Understanding* 42 (1988). In what reads like a direct challenge to Kant, (but was probably directed at Samuel Clarke, see Rawls, *Lectures* supra note 14, at 70-73), Hume disputes the

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understand the point: Our genetic make-up, our initial socio-economic circumstances (at least), our access to, and use of, prenatal and perinatal care, introduction (or not) to moral and religious values, and substantial components of our personality—all are determined once and for all times at the moment of birth.⁵² We do not choose our biological parentage. Only the most unrepentant libertarian would deny the objective reality that such incidents play in the subsequent conduct of one's life, and such a view is, as Stephen Morse finely puts it, "preposterous."⁵³ The impact of such phenomena on one's penchant for crime seems too undeniable to disguise under any settled view.

B. Hart's "Choosing System"

Hart's commitment to the law as a "*choosing system*" was articulated in his famous critique of determinism, itself a reaction to the apparently ill-conceived argument that the law excuses certain criminal defendants because, under certain circumstances, deterrence is impossible and, thus, foregoing deterrence in these circumstances serves the frugality principle.⁵⁴ Hart attacked the argument as a

distinction between reasoning and experience, arguing that the former gives form to the latter. Reasoning is the process of making sense of our experience and not the "result of our intellectual faculties, which, by considering *a priori* the nature of things . . . [somehow] examin[es] the effects, that must follow from their operation . . ." Hume, *supra* at 44-45 n.1.

52. See, e.g., Gerald M. Edelman, *Bright Air, Brilliant Fire: On the Matter of the Mind* 174 (1992) (noting that human organisms arrive more or less adapted to our environment in a process that occurs even when the environment springs surprises on us); Nagel, *Moral Luck*, *supra* note 28, at 25-26.

53. See Stephen J. Morse, *The Moral Metaphysics of Causation and Results*, 88 Cal. L. Rev. 879, 883-86 (2000). To assert that determinism has an objective reality, moreover, is not to say that we can precisely measure its effect. To the contrary, we cannot and for a number of reasons, not least the absence of individual historical records, the immaturity of genetics as a science, our inability to describe mental states objectively, the inexactness of our understanding of personality theory and the like. See Thomas Nagel, *The View from Nowhere* 43 (1986).

54. Both Kant and Bentham subscribed to the basic notion that punishment should not exceed what is necessary. Kant stated the principle as a measure of justice, abstractly defined; Bentham viewed it as an instantiation of marginal utility. Compare Kant, *supra* note 7, at 196, with Bentham, *supra* note 1, ch.VII,

non-sequitur: We excuse individuals, he insisted, because doing so “*protects* the individual against the claims of the rest of society,”⁵⁵ and not for the failure of a preventative rationale. More is at stake than just protecting the rest of society, he argues; we would excuse certain conduct even if doing so produced a net decrease in deterrence. The law, in his view, is a “*choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways.”⁵⁶

The conception of choice implicates directly the compatibilist view of the will spawned (if not endorsed) by Kant.⁵⁷ Hart’s analysis began by noting that individuals make choices routinely and predict future events as “a matter of empirical fact, and no form of ‘determinism,’ of course, can *show* this to be false or illusory.”⁵⁸ The determinist claim, in this view, might consist of two moves: First, it posits that human behavior is “subject to certain types of law (although this has not been shown to be true).”⁵⁹ Second, if determinism could be *shown* to be the case, then the distinction the law draws between acting or not acting under excusing conditions evaporates as “unimportant, if not absurd.”⁶⁰

Hart adverts to the planning of a testamentary devise to illustrate his position. When a testator makes a will and the estate is administered thereunder after death, the

§ IV, at 404.

55. Hart, *supra* note 2, at 44. Whether Bentham’s argument, which he shared with Lord Coke, was a non-sequitur or not continues to be debated. See, e.g., Lindgren, *supra* note 20, at 102-03 (suggesting that both Bentham and Coke had simply omitted a major premise: that punishing non-deterrable individuals would exact more costs in terms of “insecurity, terror, and uncertainty” than the benefits it might bring in general deterrence).

56. Hart, *supra* note 2, at 44. Accord Hart, *Legal Responsibility and Excuses*, in *Punishment and Responsibility*, *supra* note 2, at 44; see *id.* at 22-23 (The “price [is] justly extracted” “because within this framework each individual is given a *fair* opportunity to choose between keeping the law required for society’s protection or paying the penalty.”).

57. Rawls, *Lectures*, *supra* note 14, at 277-90.

58. Hart, *Legal Responsibility and Excuses*, *supra* note 2, at 46 (emphasis added).

59. *Id.*

60. *Id.* at 29.

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testator has, according to Hart, in a real sense “caused the outcome of the distribution made.”⁶¹ Hart acknowledges that choices made in the creation of the devise emerge as part of a “complex set of conditions, of which all other members were as necessary for the production of the outcome as his choice.”⁶² He also allows that (1) the set of conditions that led to the choice is composed of conditions the full scope of which we may never know, and (2) the testator’s choice itself was the product of “some set of sufficient conditions”⁶³ of which we are ignorant. Even assuming (1) and (2) are correct, however, Hart insists that these factors neither falsify the testator’s knowledge that he can make a choice to determine the distribution, nor undermine the pleasure the testator receives from making the choices. If determinism cannot show this last statement to be false or illusory, Hart concludes, “I for one do not understand how it would affect the wisdom, justice, rationality, or morality of the system we are considering.”⁶⁴

Hart’s view reflects a variation on *as-if* utilitarian thinking; that is, he concedes the premise—that determinism exists as a “set of sufficient [causal] conditions,” the full panoply of which we cannot explicate—but argues for proceeding *as if* it did not.⁶⁵ This “soft” version of determinism accepts that all events have antecedent causes all the way down, but holds that in an important, inexplicable manner agents control their own mental states, even though those states are themselves causally determined.⁶⁶ In an important practical sense I

61. Id.

62. Id. at 46.

63. Id.

64. Id.

65. Norrie, *supra* note 25, at 62; John L. Hill, Note, Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis, 76 *Geo. L.J.* 2045, 2056 (1988). Cf. Michael S. Moore, Causation and the Excuses, 73 *Cal. L. Rev.* 1091, 1092 (1985) (acknowledging the pressure of determinist forces but arguing that “moral responsibility for an action should be ascribed to an actor even when that action was caused by factors over which he had no control”).

66. Hill, *supra* note 65, at 2052 n.27. Hill also attributes to soft determinists the notion that free action is absent only if an agent is caused to act against his

will not here challenge Hart's position (in part because discussion of the full topic is beyond the scope of this work, and because there are no viable alternatives other than some version of compatibilism and practical reasoning to which most of us can turn). Nevertheless, several observations which condition Hart's view are in order. First, one can question whether Hart posed the right question. Alan Norrie has argued that the important question Hart asks is not whether or not human behavior is subject to scientific laws, but "whether or not . . . [it] can be *seen* as caused by conditions external to the will of the actor,"⁶⁷ a premise Hart concedes. In this sense, Hart simply asked one of many valid (sometimes) oppositional questions, namely whether "determinism can[] show" that the testator's beliefs about his choices and their outcome are false. In contrast to his burden-shifting question, one can reply that not only can events be *seen* as caused by conditions external to the will, events *are* effected by external causes. Thus if it is conceded that under some description (for example, theoretical reasoning) there are conditions external to the individual which determine conduct in some important way, then Hart's critique, like those of almost everyone else, suffers some question-begging.

A similar example of question-begging comes from Norvin Richards, who inveighed against the recognition of moral luck, stating that he would subscribe to it only "if one's character is *to no extent* one's own artefact."⁶⁸ But why "to *no extent*"? Note that this assertion, like Hart's

will. *Id.* at 2052 n.28; accord Norrie, *supra* note 25, at 66 (describing freedom, in Hart's scheme, as "the ability to follow one's desires no matter what their causes might be. To be unfree is to be unable to follow one's desires.").

67. Norrie, *supra* note 25, at 61.

68. Norvin Richards, *Luck and Desert*, 95 *Mind* 198, 202 (1986) (ascribing only epistemological importance to luck in the consequences of one's actions, and suggesting that a more permanent part of one's make-up conduces to genuine responsibility-entailing choices). See generally Richard B. Brandt, *A Utilitarian Theory of Excuses*, 78 *Phil. Rev.* 337, 354 (1969) (arguing that "an objectively wrong action (or an action in some way out of order) is excused [only] if it *does not manifest some defect of character*").

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question, is easily turned around: How does one know *which* features of, and *to what extent*, one's character—one's intentions, motives and actions—are "one's own artefact?" And if *to some extent* they are *not* our own artifacts, why not? And with what impact? And if we cannot answer these questions, how should we proceed? *As-if* all decisions are governed by free will? Some? And if some, which ones? And why those? By what criteria? And, most importantly from a normative viewpoint, why *none* for purposes of criminal law? Reflecting Hart's understanding, contemporary jurisprudence begs the libertarian's insight: How do we know that our ability to step back and reflect on a testamentary disposition, for example, is not itself causally determined?

III. RETAINING SENTENCING DISTINCTION

This section begins with a critique of the Kantian position which accepts the compatibilist critique of free will unhesitatingly. It then outlines the causal chain involved in "choosing" crime. Thereafter, it disentangles the offices of morality and law, suggesting ways in which the reigning paradigm of choice confuses separate domains. Finally, I introduce aesthetic concerns which, reflecting deeply-held moral intuitions, counsel in favor of retaining the traditional sentencing distinctions between attempted and completed crimes.

A. *Critique of the Reigning Jurisprudential View*

Hart's choosing view of law asks the notion of voluntariness to do a great deal of heavy lifting. For example, Professor Michael Moore offers the following qualities of voluntariness:

"Voluntary" . . . [in the context of] intervening causation doctrine. . . . includes principally: (1) voluntariness of action in the law's more usual sense, (2) accompanied by an intention to bring about the harm or, sometimes, foresight or even negligence, (3) which intention is formed in the

absence of coercive pressure making the choice difficult, (4) by one sufficiently possessed of his faculties as to be a generally responsible agent.⁶⁹

Each element of voluntariness in Moore's description is supported by the unstated assumption that moral responsibility exists in Hart's sense whenever an individual has "a fair opportunity to exercise normal mental and physical powers . . . without pressure from others."⁷⁰ This provides a second and related observation: Hart's position retains Kant's uncompromising commitment to rational choice. "A crucial assumption of the freewill model is that in order for actions to be free, they must be undertaken by a rational actor, that is, by one whose reason controls and directs his actions."⁷¹ This premise, which impels Hart's account, is considerably truncated, failing to distinguish between practical and theoretical reasoning,⁷² and failing

69. Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 Cal. L. Rev. 827, 839 (2000). The work of Libet, *supra* note 23, raises profound questions about the folk psychology of which law rests.

70. Moore, *supra* note 69, at 842 (quoting H.L.A. Hart & Tony Honoré, *Causation in the Law* 138 (2d ed. 1985)).

71. Norrie, *supra* note 25, at 63.

72. Although this topic continues to occupy a great deal of intellectual energy, it is well beyond the scope of this project. Suffice it to say that for the compatibilist, we act freely whenever we can pause (however briefly), reflect on our choices, and make a decision, regardless of the truth or falsity of determinist forces. For the libertarian, this answer is inadequate. If there are mechanist forces that cause us to choose one path rather than another, the fact that we can stop and deliberate begs a deeper question about the nature of freedom. We are free, on this view, only when our actions are not determined by forces external to ourselves. From this perspective, that we can reflect leaves unanswered the question of whether or not we act freely when we act based on our choices. Are stepping back and reflecting themselves manifestations of determined conduct?

The question of freedom, then, can be approached from two directions, depending upon the questions we ask: Does acting freely obtain whenever we can do what we really (seem to) want—the compatibilist view? Or does it obtain only when our actions are not determined by anything outside ourselves—the libertarian view? An affirmative answer to the first question satisfies compatibilists but seems to leave the question of genuine moral responsibility unanswered; an affirmative answer to the second question satisfies the libertarian by cutting to the heart of the debate about, and providing the necessary conditions for, genuine ascriptions of moral responsibility, but seems to deny causation its due. For a helpful discussion of this conundrum to which I am much indebted, see Hilary Bok, *Freedom and Responsibility* esp. ch. 1 (1998)

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even to attempt to determine how the two standpoints interact with one another in the same person.⁷³

It is also fair to note that Hart's illustrative case—the sober circumstances and position of wealth (at least sufficient to prepare for the distribution thereof after death) that conduce to the creation of a testamentary devise—is a far cry from the circumstances existing around the lives of those who most often commit crimes. Put bluntly, most criminals come from “rotten social backgrounds”⁷⁴: they are individuals whose conduct has been “profoundly disadvantaged by unjust social institutions.”⁷⁵ One has good reason, therefore, to question the deliberative faculties of the crack cocaine dealer, the rapist, the child abuser, the serial killer, the arsonist- or murderer-for-hire, and so on. In just those cases, that is, where the effects of antecedent and constitutive circumstances are the worst they could be, and where the capacity for reasoned decision making is probably lacking, Hart adverts to the testator's “will.” The compatibilist critique, on these terms, too often asks us to disregard distinctions in antecedent circumstances and embrace a model of free will drawn from settings a substantial number of criminals cannot imagine. What Hart's critique disallows is the fact that rotten social backgrounds “may undermine the very formation of the practical reasoning”

(setting out the opposing views).

73. See *infra* text accompanying notes 158-62 for a brief discussion of this issue.

74. The phrase originated with Richard Delgado, “Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 *Law & Inequality* 9 (1985).

75. Jami L. Anderson, Annulment Retributivism: A Hegelian Theory of Punishment, 5 *Legal Theory* 363, 363 (1999) (acknowledging rotten social background, but arguing reluctantly that we ought to ignore it). Cf. Jeremy Horder, *Criminal Law: Between Determinism, Liberalism, and Criminal Justice*, 49 *Current Legal Probs.* 163 (1996) (defending the Hart position and maintaining—without so much as a nod in the direction of empirical support—that rotten social background “has nothing to do either with expediency or with arguments about the relevance of determinism”).

process necessary to make those reasoned decisions which embody the traditional stuff of moral autonomy.⁷⁶

In the end, Hart's position can be justified only by two-fold references to utility: (a) That the testator had "knowledge" that he was making a choice for the benefit of others and (b) that he derived "pleasure" from the undertaking; together, (a) and (b) are taken to be sufficiently forceful to undermine the determinist's claim. Hart never asks the deeper question of whether the testator genuinely acted freely when he invoked his choices; rather, he invokes the compatibilist assumption that making choices simpliciter comprises acting freely.⁷⁷ The implicit and undoubtedly efficacious point seems to be that there are certain people we simply must constrain, and we will do so by treating free will *as if* it exists in sufficient quantity and quality to warrant the normative assumption of just, responsibility-engendered punishment.⁷⁸ This requires that certain conduct be excused, but even the excuses obtain only when autonomy can be *seen* or *viewed* formally as immediately compromised.⁷⁹ To effectuate the status quo,

76. Hill, *supra* note 62, at 2059. See also John Martin Fischer & Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* 208-10 (1998) (summarizing the basic outlines of moral education for a child beginning with a certain kind of moral discipline requiring opportunity, repetitive efforts at teaching and learning moral indignation, including learning the idea of individual agency (the self as a source of effect on the world), learning praise and blame, and learning what it means to be "held" responsible).

77. The Hart legacy is ably carried forward by, among others, Sanford H. Kadish. See Kadish, *supra* note 21; Kadish, Luck, *supra* note 25; Kadish, *The Decline of Innocence*, 26 *Cambridge L.J.* 273 (1968).

78. Absent efforts to join issue over the actor's mental capacity, the common law traditionally assumes minimum rationality at the time of the crime and at trial, and often places the burden on the defense to put the issue of mental capacity into play, if not to bear fully the risk of nonpersuasion. See *Medina v. California*, 505 U.S. 437 (1992) (surveying the variety of state procedural requirements and approving the requirement that the defendant bear the burden of proof). Finally, under contemporary practice an incompetent person—one who is unable to "understand the proceedings against him"—may not be "tried, convicted or sentenced . . . so long as such incapacity endures." Model Penal Code § 4.04 (Proposed Official Draft 1962).

79. As Norrie correctly notes, of the five standard excuses Hart discusses—mistake, accident, provocation, insanity, and duress—only duress implicates the "assumption of determinism." Norrie, *supra* note 25, at 62-63. Norrie notes that

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Hart has placed the burden of proof on the determinists and asked them to undermine the facts, whether illusory or not, that make having choices worthwhile. That seems fair enough if one were committed to preserving the status quo. It becomes somewhat ironic, however, given the concessions the compatibilist must make: that determinist forces do, to some unknown extent, affect all of our choices.

Preserving the status quo, apart from being untenable, is also unnecessary: untenable because our increasing pool of knowledge demands changes,⁸⁰ and unnecessary because we do not face an either-or proposition. Indeterminism is as fatal to free will, rationally conceived, as is determinism. Again, we ask our notion of voluntariness to hoist too much weight. Thomas Nagel takes up the argument by asking, first, what consequences would follow if determinism were not true—a proposition which suggests that until the moment the actor chose crime, *c*, he *could have chosen* non-crime, *non-c*. Does this “choice” express free will? Note that we conceive that we determine what we do by *doing* it, that is, neither *c* nor *non-c* were determined in advance,

Hart's own account does not support the defense of duress, because in such circumstances there is both intention and reason, necessary conditions in Hart's view for the just imposition of punishment. See Hart, *Legal Responsibility and Excuses*, supra note 2. Norrie points out that “it is precisely the ability to understand the nature of the threats made that makes the duress efficacious, and brings the defence into operation.” Norrie, supra at 63. The choice the actor makes “may be an excruciatingly difficult one, but it remains a choice open to an individual capable of rational intention and action.” *Id.*; see generally Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *Stan. L. Rev.* 591, 643 (1981) (noting that the duress defense is tightly confined because it presents “a severe threat to ordinary criminal law discourse . . .”).

With respect to mistake and accident, there is no intention to break the law, and thus no exercise of free will. Provocation and insanity involve a “precipitating condition”—the supposed sudden loss of control or the existence of a disease or defect of reason. In neither case do autonomy issues arise. Norrie, supra at 63.

80. On the increase in our knowledge about the development of personality, see Martha C. Nussbaum, *Brave Good World*, *New Republic*, Dec. 4, 2000, at 38 (reviewing Allen Buchanan et al., *From Chance to Choice: Genetics and Justice* (2000)). For a survey of some of the inroads made in the neurosciences concerning volition and consciousness, see, e.g., Susan Blackmore, *The Meme Machine* (1999); Antonio R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* 19 (1994); Edelman, supra note 52; Gazzaniga, supra note 23.

but neither did *c* or *non-c* just happen. We did it, and we often tell ourselves—assuming implicitly—that we could have done otherwise, ala Kant. But this chain of thoughts presents a puzzle: If choosing *c* wasn't determined by the criminal's intent and character, etc., how did choice *c* rather than *non-c* get made? Did *c* just happen? And if it did "just happen," was it even the actor's choice? So we are left with the question: What does it mean to make a "voluntary" choice—to "act freely"?⁸¹

The assumption to this point—and it is implicit in Hart's analysis—is that determinism is a threat to free will and moral responsibility; on closer examination, though, we find that it isn't! For now it seems that even if our choices are not predetermined, we must still wonder how it is that we *could have* done what we did not do. If we cannot explain how the actor chose to effect crime *c*, we face the possibility that there is no responsibility whether determinism is true or false: If it's true, then antecedent and constitutive circumstances account for choice. If it's false, however, it may have just happened and we cannot explain it anyway.⁸² Professor Morse summarizes the dilemma concisely: "No one is a prime mover unmoved . . ." ⁸³ To put it otherwise, for freedom of choice to exist without impediments, the choice must be the agent's own: The argument is nicely summarized by Galen Strawson:

[T]o be truly deserving of praise and blame for our actions, . . . we must be truly responsible for how we are mentally [for our intentions]. . . . We must be genuine

81. Thomas Nagel, *What Does It All Mean?* 55-56 (1987).

82. *Id.* at 56-57. Accord Bok, *supra* note 72, at 201 ("The supposition that we were caused to choose as we did by something other than ourselves implies that we are not free. The supposition that we caused them to occur simply pushes the problem back . . ."); Hill, *supra* note 62, at 2051 (noting that indeterminism posits the occurrence of certain events that are not causally determined, that is, conduct emerging without causal antecedents; but positing an event without causal antecedents hypothesizes an event without human antecedents and, without human antecedents, moral responsibility disappears).

83. Morse, *supra* note 53, at 881. Accord Bok, *supra* note 72, at 200 (noting that there is no "self behind the self").

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“originators” of ourselves But the attempt to describe how we could possibly be true originators of ourselves . . . leads self-defeatingly to infinite regress . . . for even if one could somehow choose how to be, . . . one would . . . already have to have existed prior to that choice, with a certain set of preferences about how to be But then the question would arise: where did these preferences come from? Or were they just there, unchosen preferences for which one was not responsible? And so on.⁸⁴

There is no clear way out of this paradox, at least not in light of the law’s continued reliance on formal rationality and the tools now available to it. One must try to defend the notion that the chooser “chose[] his choice,” that is, that the actual option the agent selected was his to choose. “He must have been able to ‘choose otherwise than he did.’”⁸⁵ But that option is not fully and unambiguously explicable.⁸⁶ Even Hilary Bok’s carefully reasoned position that free will exists from the standpoint of practical reasoning leaves many questions unanswered.⁸⁷

84. Galen Strawson, *Consciousness, Free Will, and the Unimportance of Determinism*, 32 *Inquiry* 3, 10 (1989). The term intention here refers broadly to issues concerning the actor’s internal mental life as it interacts with the rest of the world—his or her desires, beliefs, hopes, wishes, desiderata, etc. See e.g., Searle, *supra* note 13, ch. 4.

85. Norrie, *supra* note 25, at 67 (quoting A. Kenny, *Freewill and Responsibility* 25-26 (1978)).

86. In a frontal attack on Norrie launched in the context of the rationale for excuse doctrines, Jeremy Horder argues that choice is irrelevant to criminality, because “in a civilized legal system, only those who have the intellectual and moral capacity to understand the significance of their conduct will fall to be judged under its rules of criminal responsibility.” Horder, *supra* note 75, at 167. Horder’s assault, however, flies under the target for at least three reasons. First, Horder assumes the very question at issue: What composes sufficient intellectual and moral capacity. Second, he fails to ask what the purpose is for requiring intellectual and moral capacity if not for the attendant capacity and ability to choose, to be autonomous and rational in the Kantian scheme of things. Finally, he misses the target on its own terms with respect to duress; she who operates under duress must possess both intellectual and moral capacity in full measure to make the rational choice, however undesirable it may be, when the gun-pointing criminal declares: “Her money or your life!”

87. Generally, those who approach free will on the basis of alternative standpoints take one of two approaches to avoid the conclusion that free will and determinism violate the law of non-contradiction, according to which believing p

B. Framing the Causal Chain

Generally overlooked in discussions about unequal treatment are the respective roles of moral philosophy and criminal law, and the nature of the two domains' respective interests. Professor Larry Alexander, for example, notes that law is generally impervious to the fate of the wrongdoer who intentionally kills his victim to inherit the victim's land when it turns out later that the victim's agri-businesses were producing deadly toxins that were, unbeknownst to the defendant, leaching through the soil and endangering an entire neighborhood. The killing, future scientists determine, *prevented* hundreds of deaths. Alexander applauds this result because, as he sees it, "criminal desert is impervious to how things actually turn out."⁸⁸ Alexander rightly supports the law's unwillingness to employ a jurisprudential crystal ball, but I think the issue implicates more than a commitment to moral culpability so imagined.

A conventional approach to the complexity of the chain of causal events involved in the paradigmatic case, as in any other, is outlined by Michael Moore. Although never predictable, we know that both before Ms. X decides to shoot V, and between the time she formed the intent to shoot and the instant she pulls the trigger releasing the bullet that strikes him, any number of "causal fortuities" could arise which might affect X's intent and undermine the act intended to bring about the misdeed. None is considered relevant today in the determination of culpability, if it is defined primarily as the existence of a particular mental state at *t*.

and not-p concurrently defines irrationality. See David Wiggins, *Towards a Reasonable Libertarianism*, in *Essays on Freedom of Action* 31, 48 (Ted Honderich ed., 1973) (quoted in Bok, *supra* note 72, at 69). One group follows Kant and justifies free will by dividing subjects (roughly) into noumenal and phenomenal accounts, while others, e.g., Nagel, distinguish free will and determinism on the basis of different aspects of a single account, for example, objective and subjective aspects. See Dana K. Nelkin, *Two Standpoints and the Belief in Freedom*, 97 *J. Phil.* 564 (2000).

88. Larry Alexander, *Crime and Culpability*, 5 *J. Contemp. Legal Issues* 1, 12-13 (1994).

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- (i) The volition or willing to move the finger;
- (ii) The intention, plan, or choice (to kill the victim) that is executed by the more specific volition;
- (iii) The set of beliefs and desires, the content of which form a valid practical syllogism, that are executed by one's intentions;
- (iv) The more general traits of character which cause one to have the beliefs and desires that motivate one on particular occasions.⁸⁹

89. Michael Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. Contemp. Legal Issues 237, 272 (1994). As Professor Bok notes in the context of a directly related analogy, we ordinarily do not (and should not) take such other causes into account when we ascribe responsibility, but "any genuine causal chain must take account of them." Bok, *supra* note 72, at 32. Note again, that I am not suggesting that the actor's conduct does not "cause[] what his actions cause." Davidson, *Agency*, in *Essays on Actions and Events* *supra* note 47, at 43, 53. I am suggesting, however, that who the person is and how she came to be that person at t ought in fairness to be taken into account when we dole out punishment, because much of what she has become was due to causes outside her control.

I reach this conclusion for reasons of jurisprudence and good science. (I pursue the latter in *Competency, Neuroscience, and Law* (in progress). Although listed in reverse order, the implicit factual assumptions in Moore's paradigm run along these lines. The act of shooting begins when the actor thinks about and decides to pull the trigger; next these thoughts stimulate the motor center which begins a neural transmission to the appropriate musculature; finally, the muscles act in response to the volition. Folk psychology to the contrary notwithstanding, the process simply doesn't operate in that manner. See, e.g., Susan Blackmore, *Meme, Myself, I*, *New Scientist*, March 13, 1999, at 40; Jonathan Bricklin, *A Variety of Religious Experience: William James and the Non-Reality of Free Will*, in Libet et al., *The Volitional Brain*, *supra* note 23, at 77, 78; Bruce Hinrichs, *Brain Research and Folk Psychology*, *Humanist*, March/April 1997, at 26; Libet, *Unconscious Cerebral Initiative*, *supra* note 23; Libet, *Timing*, *supra* note 23.

A brief explanation: In 1964, a pair of German neurologists discovered that an electrical change in the scalp precedes the performance of "self-paced" voluntary acts" by up to one full second. Hans H. Kornhuber & Lüder Deecke, *Hirnpotentialänderungen bei Willkürbewegungen und Passiven Bewegungen des Menschen: Bereitschaftspotential und Reafferente Potentiale*, 284 *Pflügers Archiv Gesamte Physiologie Menschen Tiere* 1 (1965). The American neurologist Benjamin Libet, in a series of observations and experiments that began before their work and continues today, asked his subjects to flex their wrists whenever they felt the urge. He surmised that the brain began volitional activity before the muscles actually moved and wanted to know: "when does the *conscious* wish or intention (to perform the act) appear?" Noting that according to the conventional view of free will, conscious will precedes the command to the brain to perform an intended act, if he found that conscious will followed the onset of this electrical charge—"Readiness Potential" or "RP"—he would have to reevaluate his

Even after the intention is “set,” a host of additional influences may diminish her capacity or undermine her opportunity for the hit, including prevailing weather, a sudden change of heart influenced by any number of fortuitous events, including excitation that destroys her ability to aim straight, her inability to find V, and so on.⁹⁰ Each event in the string of events needed to “cause” a crime was itself the product of causal antecedents. As noted earlier, each of these antecedent causes formed the criminal and put limits on what she became. As Hart and Honoré note, however, the causes of causes are usually ignored.⁹¹

fundamental beliefs about free will. Benjamin Libet, *Do We Have Free Will?*, in Libet et al., *The Volitional Brain*, supra note 23, at 47, 49.

In 1983, Libet asked subjects to report the time they first became aware of the urge to act. Libet, et al., *Time of Conscious Intention to Act in Relation Onset of Cerebral Activity (Readiness Potential)*, 106 *Brain* 623 (1983). He used a clock whose dial was divided into 40 msec units. For each group of subjects put through 40 trials, the onset of cerebral activity preceded “voluntary” muscle movement by an average of 550 msec. The subjects first became *aware* of the wish to move their wrists about 350 msec later (about 1/3 second), and 200 msec before muscle movement. (These figure remained consistent even when the subjects reported some preplanning before the muscle movement.) Correcting for timing biases, the results indicated that the subjects’ brain processing, RP, began approximately 400 msec before the appearance of a conscious will to move, and 150 msec between RP and awareness. Libet, *Do We Have Free Will?*, supra, at 50-51. As Libet notes, the actual pre-awareness processing probably begins earlier in an unknown area that activates the supplementary motor area of the cerebral cortex. *Id.* at 51. In sum, the standard, folk-psychological model Moore describes—and whose accuracy we all tend to take for granted—is simply wrong!

90. Moore, supra note 89, at 272-73. Apart from the power of fortuity to undermine the intentions of the criminal are cases in which criminality itself cannot be determined until after history or a contingent historical judgment is made. Slobadan Milosovic and Argentina’s Pinochet were, by the norms of much of the human history, despicable strongmen, but not criminals. The Taliban of Afghanistan once operated with the blessings of the United States. Pankaj Mishra, *The Making of Afghanistan*, N.Y. Rev. Books, November 15, 2001, at 18, 20, 20 n.8. Only changes in the political culture and communications following World War II and its aftermath—or after the events of September 11, 2001—brought about the criminalization of their misdeeds. In this way, the fortuity of political events have created criminality where none existed before. Cf. Williams, supra note 15.

91. Hart & Honoré, supra note 70, write the following: “It is to be noted that, despite what is commonly said by philosophers, causal relationships are not always ‘transitive’: a cause of a cause is not always treated as the cause of the ‘effect,’ even when the cause of the cause is something more naturally thought of as a cause than a man’s motive is.” *Id.* at 38.

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The standard canon of jurisprudence, according to Professor Kadish, dismisses these issues as contrary to “settled moral understanding, focusing, instead, exclusively on the agent’s intentions.”⁹² I wish to take up the challenge implicit in this assertion that attending to harm within the prescribed measure of punishment is “rationally indefensible.”⁹³

C. The Separate Offices of Morality and Law

Desert, including a component of desert composed of harm, is not only present as a variable in the punishment of most attempts; it also reveals our moral intuitions. Within many courts and among many commentators, the harm-based component of desert is either unacknowledged or dismissed as rationally unimportant.⁹⁴ An exclusive focus on intentions, however, involves conflating the domains of moral philosophy and law, and overlooks the fact that the latter begins only when the former ends. In law, the decision to acknowledge fortune is *not* binary. That some of us have the apparent capacity to make choices hardly obviates the influence of nature. That the will to harm may reflect some capacity to choose (at least some of the time and by some wrongdoers) doesn’t demand the conclusion that an actor’s choices are uninfluenced by events, conditions, and occurrences outside her control, or

92. See Kadish, Luck, *supra* note 25, at 690.

93. *Id.* at 680.

94. Why criminal law ignores those uncontrolled forces which conduce to criminal conduct, that is, to how an individual becomes a criminal, probably implicates matters of habit, practicality (including limited resources and perceived limitations on epistemology), fear, and the desire of some for revenge. Cf. Kelman, *supra* note 79, at 663 (opining that our commitment to intentionality reflects fear of criminal law being “swallowed up” if determinist premises are permitted to influence our deliberations on culpability). Moore, *supra* note 65, at 1094, argues that to accept the causal theory leads to an “unfortunate cynicism about the moral basis of the criminal law. If one accepts the determinist thesis that all events, including all human behavior, are caused, and if one believes that causation excuses, then one must believe that moral responsibility is an illusion on which liability to criminal punishment cannot be built.”

that the law should ignore such influences as judgment is rendered on the conduct of other human beings.⁹⁵

The argument that the law should ignore fortune results from our commitment to a wholly formal conception of the will. It is *that* “settled” moral conception that needs to be revised, for it rests in part on a failure to distinguish between moral philosophy and the office of law. Recall Kant’s famous dictum: Even under the worst social conditions, the will would “still shine like a jewel for its own sake as something which has its full value in itself.” Purely moral judgments, however, are intensely intimate. When we blame someone, we are saying something deeply personal about that person as he or she subsists, and we have an intuitively appropriate sensibility that moral assessments are undermined by causal factors beyond the actor’s control. Those factors may be internal to the actor—for example, instantiations of native intellect or psychological or genetic deficits—or external, for example—acts of God or of another person or coercion or forces beyond one’s control.⁹⁶

Those judgments should be, and in oblique ways are, addressed when we impose criminal liability. A generation ago, Mark Kelman documented thoroughly the various interpretive techniques used—both consciously and at times automatically—in routine applications that often disguise a relentless *sub rosa* conflict between intentionalist and determinist premises.⁹⁷ But insofar as these judgments are rooted too firmly and exclusively in our formal commitment to a discourse of subjective culpability (the will), they are under-analyzed and reflect a particular, unforgiving vision of the interface between moral philosophy and jurisprudence. What matters with respect to the Kantian will is the agent’s intention, not its

95. I think such a conclusion would, among other things, doom our commitment to human rights. Cf. Desmond M. Tutu, Preface to *Religious Human Rights in Global Perspective IX* (John Witte, Jr. & Johan D. van der Vyver eds., 1996).

96. See Nagel, *Moral Luck*, *supra* note 28, at 25.

97. Kelman, *supra* note 79, *passim*.

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effect on the outside world.⁹⁸ Thus for Kant, freedom (morality) is not contingent but wholly internal; its existence is impervious to the imposition of outside forces. For example, if one is forced to help another, or donates money to charities only to obtain a tax benefit, the act is deemed “un-free”—a function of contingent desire; the brilliant sparkle of will is unaffected by such mundane motives.⁹⁹ Moral conduct cannot be coerced.

In contrast, the office of criminal law, with its heavy reliance on deterrence, exists not to protect freedom or morality; by hypothesis that simply cannot be done. Rather, it protects the *possibility* of freedom.¹⁰⁰ Justice mediates between autonomous individuals, having “regard only to the external and practical relation of one Person to another, . . . [to the] relation of [one person’s] free action to the freedom of *action* of the other . . . , [and] in this reciprocal relation of voluntary action”¹⁰¹ In this context, “relation” governs and presupposes individual free wills acting in conjunction with one another such that “only the *form* of the transaction is taken into account”¹⁰² Whereas morality and a totally subjectivist view of culpability looks to motivation alone, a legal theory must examine the external relationship—the consequences—of

98. Chapman, *supra*, note 34, at 363. As Chapman notes, on this view, it is difficult to see why the law requires an act at all; its evidentiary value is not sufficient to explain its requirement because other evidence which evinces only intent (finding a diary, for example) is itself insufficient. Traditional justificatory theories cannot explain the act requirement either: Retribution looks to intent for assessing the morality of conduct; and rehabilitation looks to remove dangerous people, raising the question, why wait for an act? With respect to deterrence, the key is early intervention, which could be met with “merely preparatory” acts short of traditional attempts requirements. *Id.* at 362-64.

99. Kant, *Groundwork*, *supra* note 10, at 60. See also Susan Wolf, *Asymmetrical Freedom*, in *Moral Responsibility* 225, *passim* (John Martin Fischer ed., 1986). Schneewind, *supra* note 3, at 49, traces this view to Grotius’ conception of “imperfect duties,” those which, unlike property rights, evade exact specificity: “To give in order to be rewarded for so doing is to take away an essential element of imperfect duties.” *Id.*

100. Chapman, *supra* note 34, at 364.

101. Kant, *Introduction to the Science of Right*, in *The Philosophy of Law*, *supra* note 7, at 43, 44-45.

102. *Id.* at 45.

one's action on another's freedom and, especially, on whether one's actions actually interfere with the freedom of another.¹⁰³

This distinction has important implications for the law of attempt, because it speaks plainly to the proper role of harm within the criminal law. Professor Chapman explains:

It is incoherent to attach legal significance, as the criminal law prosecution does, to the risk or possibility of harmful intrusion . . . without attaching some significance to that risk when it actually materializes. After all, the risk in question is the risk *of* something in particular; it is not just risk in the abstract that is the focus of concern. . . . The equal punishment of attempts with completed crimes would signify attending to the potential harm while ignoring what it is a potential *of*; but an empty potential is no potential at all.¹⁰⁴

Michael Bayles makes a coordinate point when he distinguishes between first- and second-order interests within the regime of punishment. On his view, completed crimes violate a first-order interest: The harm violates one's primary interest in life, liberty, or property. Attempts, in contrast, violate second-order interests, that is, our security—our freedom from fear of losing a first-order interest. Clearly, everyone values first-order interests, but people differ substantially with respect to the risks they are willing to take: They value their security—their second-order interests—in varying measures. Moreover, virtually everyone *tends* to value first-order interests more than second; they value their life more than they fear increased risks to their life. If this analysis is correct, then the harm produced by attempts is, in the aggregate at least, correspondingly less than the harm actually caused by completed offenses.¹⁰⁵ Punishment should reflect harm caused as well as potential harm.

103. Chapman, *supra* note 34, at 365.

104. *Id.* at 367.

105. Bayles, *supra*, note 30, at 23.

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Does Y, whose errant weapon fails to discharge, in fact do less harm? Many older, founding progenitors of western jurisprudence thought so. Blackstone allowed that “a design to transgress is not so flagrant an enormity, as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking”¹⁰⁶ Adam Smith, recurring to the “irregularity” of our sentiments, noted prominently that “[o]ur resentment against the person who only attempted to do a mischief, is seldom so strong as to bear us out in inflicting the same punishment upon him, which we should have thought due if he had actually done it.”¹⁰⁷ Thus, he concluded, “[t]he *humanity* of a civilized people disposes them either to dispense with, or to mitigate punishments wherever their *natural* indignation is not goaded on by the consequences of the crime.”¹⁰⁸ And Stephen, conceding the rational argument for equal punishment, maintained nonetheless that “it gratifies a *natural* public feeling to choose out for punishment the one who actually has caused great harm”¹⁰⁹ What accounts for the fact that these sentiments, identified centuries ago, still remain?

D. The Aesthetic of Harm

References to our “*humanity*” and our “*natural* feelings” are not unrelated; they hint at an additional explanation for this sensibility which is suggested in a collection of lecture notes edited after Wittgenstein’s death. Wittgenstein spoke to a group of students and colleagues

106. 4 William Blackstone, Commentaries on the Laws of England: Of Public Wrongs 15 (1769).

107. Adam Smith, The Theory of Moral Sentiments 146 (2000). I address Smith’s theory at length in Some Observations on the Aesthetics of Retribution, 17 Can J.L. Juris. (forthcoming).

108. Id.

109. 3 James Fitzjames Stephen, 3 A History of the Criminal Law of England 311 (1883) (emphasis added). For a thoroughly intent based view that dismisses Stephen and the unequal punishment regime but seems to omit discussion of the essential question of what constitutes choice, see Parker, *supra* note 25, at 274-75.

about the ineffability of capturing the bases of aesthetics and religion.¹¹⁰ Here I am using the term “aesthetic” as Wittgenstein did, in its primary sense: “pertaining to . . . things perceptible by the senses.”¹¹¹ The sense of aesthetic discomfort is often expressed as an interjection, an ejaculatory (natural) utterance expressing an emotion—the guttural “Ugh!” of a distressing spectacle or, contrarily, the purred “Ahh!” of delight.¹¹²

Perhaps the most important thing in connection with aesthetics is what may be called aesthetic reactions, e.g. discontent, disgust, discomfort. The expression of discontent is not the same as the expression of discomfort. The expression of discontent says: “Make it higher . . . too low! . . . do something to this.” . . .

There is a “Why?” to aesthetic discomfort not a “cause” to it. The expression of discomfort takes the form of a criticism and not “My mind is not at rest” or something. It might take the form of looking at a picture and saying: “What’s wrong with it?”¹¹³

Wittgenstein’s description has the sound and feel of a state of mind we might label *emotional cognition*, in which the distinction collapses between what we understand, on the one (formal) hand, as *cognition*, and, on the other, as *emotion*, which we tend to dispatch to a separate cerebral compartment. Wittgenstein appropriately resisted locating a purely cognitive home for this sensibility. Instead, we find an appeal to our aesthetic capacity. Note that this aesthetic category is (arguably) *not* simply analogical, although analogies are useful. What Wittgenstein describes is a state we cannot fully articulate in ways that would permit us categorically to agree or disagree with the

110. Ludwig Wittgenstein, *Lectures and Conversations on Aesthetics, Psychology and Religious Belief* 1-40 (1966).

111. I Oxford English Dictionary 206 (2d ed. 1989) (offering the quote in text as the first definition).

112. See Wittgenstein, *supra* note 110, at 2-3. The definition of “interjection” in the text is from the VII Oxford English Dictionary 1107 (2d ed. 1989).

113. Wittgenstein, *supra* note 110, at 13, 14-15.

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sentiments expressed. Nor can we delineate precisely the parameters of the category to which he appeals. Perhaps it's just a newly found name for mystery, God, Buddha, etc.

Although it is impossible fully to escape the difficulties with analogies when one speaks about aesthetics, it is equally impossible to do without them, as imperfect and potentially distracting as they are. Aesthetic explanations, Wittgenstein notes, are not causal in the sense that one can corroborate an aesthetic impression in a lab or through field experiments. Our tools for capturing aesthetic reality are necessarily inadequate and ordinarily contingent. The notion of a "picture" or of a "frame" that gives a certain predictable constraint to our world view may serve as a helpful analogue, because aesthetic judgments seem to express an attitude envisioned as a picture towards which we experience a peculiar, almost naturally determined attraction or repulsion.¹¹⁴

In the same series of lectures, Wittgenstein imagined a model for a kind of aesthetic framework in the context of religious belief.

Suppose you had two people, and one of them, when he had to decide which course to take, thought of retribution, and the other did not. One person might, for instance, be inclined to take everything that happened to him as a reward or punishment, and another person doesn't think of this at all.

If he is ill, he may think: "What have I done to deserve this?" This is one way of thinking of retribution. Another way is, he thinks in a general way whenever he is ashamed of himself: "This will be punished."

Take two people, one of whom talks of his behaviour and of what happens to him in terms of retribution, the other one does not. These people think entirely differently. Yet, so far, you can't say they believe different things.¹¹⁵

114. Id. at 26.

115. Wittgenstein, *supra* note 110, at 54-55. For a valuable discussion of Wittgenstein's ideas in this regard, see Hilary Putnam, *Renewing Philosophy* ch. 7 (1992).

To those who frame their world around a particular picture of how things are or need to be to achieve or maintain some peace of mind, destroying that picture sets them adrift. Something restorative must be done when that picture loses focus, or when the frame embracing it breaks and the picture crashes, or when its many layers of paint peel, or when its varnish cracks and shatters in a splintered glass-like array. Our view is not right.

Analogies give only a hint of the reality shaken by the loss attendant to actual harm, but I want to suggest that when actual non-trivial harm occurs, the varnish cracks in its splintered fashion, and the framework around the picture is damaged in a way that doesn't occur when, for whatever reason, the attempted crime fails—even the attempted cold-blooded murder. In the circumstance of attempt, canvasses may waver, but over time a certain calmness and ordinariness returns.¹¹⁶ No harm has been done to the picture itself. To concentrate solely on the rationality of prevention, and thereby equalize punishment, ignores this damage and, I think, dismisses the damage done when the attempt passes over to a completed harm. The effect of this omission, in the end, denigrates an inherent quality of human personality.

We are all familiar, for example, with the refrains that almost always follow the exercise of capital punishment. Survivors who support the practice often are heard to say: "Now, we have closure!" "Now I can sleep at night!" "Now I can start to get my life back together!" The future action of these aggrieved parties depends upon satisfying a deep-seated, primitive, emotional intuition, which I am likening to an aesthetic consciousness, and this emotion seems to drive the appeals for closure. This aesthetic emotion compels the victim and the survivors of the criminal's victim to restore the aesthetic framework and moral

116. It is true that some attempts have profound consequences for social instability. See Becker, *supra* note 26, at 282. But this is true for only some attempts. Routine attempts, because they do not impinge first order interests, see *supra* text accompanying note 105, do not destroy the aesthetic sensibility I am outlining. See Bayles, *supra* note 30, at 21.

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balance ripped apart by the explosiveness of her crime. Perhaps it is a desire to reestablish order, to reconstruct the damaged portrait of their lives in the face of the irresistible force of criminal entropy. I cannot say; I have not felt it: "These people think entirely differently," Wittgenstein notes, "[y]et, so far, you can't say they believe different things."¹¹⁷ The criminal law's adoption of unequal punishment confesses the profound and pervasive disorganization that occurs mostly, if not only, when an actual injury to a first-order interest in life, liberty or property occurs. That one cannot always bridge the gap between a victim's aesthetic need for closure and our own actual or anticipated reaction in similar circumstances suggests, as it did to Wittgenstein in the context of religion, that we "have different pictures."¹¹⁸

If the need to acknowledge an aesthetic harm were all that was at stake, one might reasonably prefer equal punishment and a regime of incapacitation and prevention. Such a conclusion is seductive, especially in light of the primitive feel of this emotion, which often sounds as if it was a reverberation of retributive vengeance.¹¹⁹ But acknowledging this *cognitive emotion* does not reflect all that's at stake. I would add, moreover, that if our only option were binary—Are we or aren't we choosers?—and we incarcerated only those who are, by their nature, condemned to a lifetime of poor, predetermined criminal choices, equalizing punishment might be compelling. My premise, however, uncovers my belief: Reasoned choices do exist for most of us most of the time, although the extent to

117. Wittgenstein, *supra* note 110, at 55.

118. *Id.*

119. This point should make clear that I am not arguing in favor of capital punishment, which I oppose (although I find this commitment sorely tested post-September 11). Rather, it seeks to explain a widespread phenomenon. As I suggest in a future work, I think an appeal of the approach offered here is its recognition of an asymmetry created by antecedent and constitutive conditions: It commands compassion for all victims—the immediate sufferer and the long term victim who, although clearly a candidate for (sometimes severe) punishment, is also a candidate for reformation, when possible; it rejects the equalization of punishment reflected in felony murder, attenuated accomplice or conspiracy liability, and so on.

which any one of our choices is our own is heavily influenced by the antecedent, constitutive, and testing circumstances that compose our lives.¹²⁰

On this view, the determinism/free will debate is important only as a preface to a different, more compassionate approach to punishment. It seems certain that at least some learning—that which occurs by modes other than incidental (if pervasive) conditioning—must entail some amount of choice. (If early instruction in moral and ethical values within a culture must fail to prepare some individuals to make choices based on those learned values, the need for such teaching disappears.¹²¹) Insofar as it *seems* clear to most of us that we *do* possess some capacity for choice, we establish prima facie that there must *be* some capacity for choice, at least for some of us most of the time.¹²² That we cannot conceptualize the boundaries between choice and nature using the ordinary language within which it is discussed does not necessitate the conclusion that there is no choice, although it may guarantee constraints on our comprehension. We act routinely (perhaps always) on beliefs we cannot fully, rationally articulate.¹²³ But acknowledging emotional

120. As Jon Elster makes plain, we are not dealing with scientific predictability; rather, we are dealing with a mechanism whose exact contours appear, often in the form of competing aphorisms, in retrospect. Jon Elster, *Alchemies of the Mind: Rationality and the Emotions* esp. ch. 1 (1999). I pursue this thesis at length in a nearly completed work titled *Blaming Angry Men: The Paradox of Evil and the Limits of Contemporary Jurisprudence*.

121. On that need, see Fischer and Ravizza, *supra* note 76.

122. Libet, *Do We Have Free Will?*, *supra* note 89, at 56.

123. Kant apparently understood these points. The section in the *Groundwork* in which Kant discusses the need to suppose no contradictions is titled “The Extreme Limit of Practical Philosophy.” He begins the section by acknowledging that “freedom is only an *Idea*[!] of reason whose objective reality is in itself questionable, nature is a *concept of the understanding*, which proves . . . its reality in examples from experience.” *Id.* at 123. This ideal of freedom owes its existence to a “dialectic of reason,” *id.*, which is itself “independent of purely subjective determination by causes which collectively make up all that belongs to sensation . . .” *Id.* at 125. Rather, as a conception of human intelligence, the will creates its own distinct causality and thus “man puts himself into another order of things.” *Id.*

Kant understands reason as a characteristic of human intelligence independent of the world of senses and authoring its own causal occurrences. It

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intuitions and choices—that which is determined and that which is influenced by determinist premises—suggests that how we label and how we treat the respective criminals—attempter and completer—makes a difference as well. We are ourselves, after all, the products of such fortunes.

Consider how ordinary language reveals two different relatively unmediated reactions depending upon whether an intentional homicide was completed or attempted.¹²⁴ If one were asked, “What crime did the defendant commit?” one response is: “He killed someone.” A second is: “He tried to kill someone.” Our reaction to the first indicates a sense of danger; our heads pull back instinctively and sit tautly against our shoulders, and our facial expressions draw in upon themselves; a great sense of caution and forbearance is unavoidable. Our reaction to the latter is not much less anxious, but it is also accompanied by the thought: “He’s lucky he missed (or he—we—would really be in trouble.)” In both cases, our sense of trust is blunted, but our reactions involve very different concepts and reflect different emotions; they also evoke different responses and possibilities.¹²⁵ The difference is most clearly implicated in

seems clear that the power of reason is itself independent of the world. We cannot purchase it at any emporium, and it does in this way separate us from other sensate beings. It is not clear, however, that one should set the will apart from sensations in its operations—“as independent of sensuous impressions in his use of reason . . .” Id. On this view, the will “does not impute to itself anything appertaining merely to his desires and inclinations . . .” Id. It is this radical severing of will/mind from body/passions, I think, that leads Kant to accord the will the status of “jewel” apart from intentionality of any sort. See *infra* text accompanying note 49. This conception of will is, I think, as close as one can imagine to a pure rational faith. Cf. Donald H. Regan, *The Value of Rational Nature*, 112 *Ethics* 267 (2002) (arguing that Kant’s own conception of the nature of rationality in the *Groundwork* cannot account for its value). The domain of law must, *at least to some extent*, reject this conception of will, because in law the senses alone (our intentions) inform practical reason—the only reason that counts in terms of creating crimes, although not the only form of reason for understanding mechanist forces. It is thus in the broad ground covered by “*to some extent*” that the battles must be fought.

124. Winch, *supra* note 32, at 218-220.

125. As Bayles points out, the mundane difference in language itself demonstrates the distinction between injuries to first- and second-order interests: the convicted killer has impinged upon first-order interests in a far more intrusive way than the attempter. Bayles, *supra* note 30, at 25.

how we *in fact* treat such people and how we treat such people depends, in part, on how we label them.

Peter Winch approaches the labeling issue from two perspectives—that of the viewer and that of the viewed. Murder, viewed by a third party, is a particularly horrible human act. From the actor's perspective, murder is *his* act; and it is a shocking and alarming act that should change a moral being's self-assessment forever. Attempting murder is also deplorable and evil but such characterizations apply to the attempted murderer only derivatively; that is to say, they apply only "because [of] *what* is attempted—the murder The wickedness is . . . reflected on to the attempt from what it was an attempt to *do*."¹²⁶ From the viewpoint of the third party viewing an attempt, it is difficult to separate the actor from the intended act because there is no ultimate harm produced, and the acts preceding the evil may, in themselves, be harmlessly unexceptionable.¹²⁷ Thus to harm someone (by inflicting a wound or invading a sanctuary) and to frighten someone are distinct acts, and not only is the victim far more likely to recover fully from the latter than the former, but so should the wrongdoer.

These differences can be decisive in how we view the actor and what we say about him, especially as we think about punishment and its aftermath. The fact that Ms. X missed the target "weighs less heavily than it would had the attempt succeeded;"¹²⁸ for that reason, expiation ought to be an easier—though by no means an easy—task. In contrast, most successes, especially if they entail physical harm, simply cannot be undone. The attempt, once it crosses the preparation boundary, cannot be undone either, but "its failure [gives the agent] a second chance in relation to the evil which . . . actual injury would involve"¹²⁹ Granted, this point lacks a certain hardness with respect to hired killers and career criminals. With respect to

126. Winch, *supra* note 32, at 218-19, 220.

127. *Id.* at 220.

128. R.A. Duff, Auctions, Lotteries, and the Punishment of Attempts, 9 *Law & Phil.* 1, 34 (1990).

129. *Id.*

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youthful and non-career offenders (and especially drug-addicted, non-violent actors), however, it should make a greater difference in the long run: the condemnation communicated by conviction aims in part to “arouse such a repentant understanding”¹³⁰ in the wrongdoer. If we punished both equally, we would be communicating the idea that we don’t care whether you succeeded or failed in your criminal effort; it’s all just the same, you’re going to jail for n amount of time in either case.¹³¹ Under such circumstances, we remove some quantum of incentive to seek genuine expiation.¹³²

The practical consequences of equalizing punishment include the potential to learn new evil practices in jail and the disabilities that follow from becoming “the killer” rather than the attempter. How much jail time and how we treat the wrongdoers figure heavily in who and what the criminal becomes. The issue has at least two dimensions. On the one hand, how we react to the relative positions of the defendant and the victim clearly affects how we punish.¹³³ As a practical matter, we affect who the person of the defendant becomes by our willingness to forgive. Telling the defendant that it makes no difference whether or not he completed the crime communicates a message devoid of compassion for all involved. It also sends a message at odds with our nature: It matters

130. *Id.* at 36.

131. *Id.* The actor who completes his crime also can repent and give effect to penitence by avoiding future wrongdoing. The difference, then, is in (a) the comparative likelihood of successful repentance for the attempt versus completion; and (b) the fact that actual harm cannot (usually, at least) be undone. Cf. Winch, *supra* note 32, at 223-23 (noting that the person who attempts but fails to commit murder has some chance to thank God for her failure that the murderer lacks).

132. Note that this point also undermines the general argument that, for instance, as between two drunks shooting at a street lamp, one of whom hurts another person and one who does not, there is “no *morally* relevant difference” between the two. Parker, *supra* note 25, at 270. At time t , this point may be arguable; at $t+$, it clearly is arguable.

133. Cf. Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 *Yale L.J.* 315 (1984) (noting that the historic practice of blaming the rape victim effected the distribution of punishment to the rapist).

greatly to me whether I am frightened or hurt, whether the reckless driver does or does not crash into me. To make matters worse, insofar as incarceration sharpens the actor's wrongdoing skills, we exacerbate a situation that is already humanly and morally tragic. Unless we are willing to lock the jailhouse doors and throw away the keys, we are condemning both the wrongdoer and ourselves to the increased risk of future wrongdoing. Our jails should not be training grounds for future criminality; they should serve as training grounds for an improved citizenry.¹³⁴

In terms of what the two actors become—one's ability to live with oneself in the future—there is a potentially substantial moral difference: "[M]y ability to live with myself is certainly not independent of what is open to me with respect to my relations with others."¹³⁵ Again, antecedent events and occurrences affect the judgments I later make about who I am, and in turn the judgments others make about me. That is the case because "[i]n *doing* something evil one *becomes* something evil What one thus becomes is inseparable from the complex network of relations one enters into with other people which imposes limits on what can and what cannot be intelligibly said of one's subsequent life by way of moral assessment."¹³⁶ Precisely *because* the attempter fails, and thus because of what he has *not* become, the possibilities of moral evaluation, his own about himself and others about him, are different.¹³⁷ Those possibilities should not be sacrificed in the rush to impose equal sentences on both, especially when the moral basis for such a policy is questionably limited to what can be gleaned based on a snapshot taken at a moment in time.

134. Bayles, *supra* note 30, at 20.

135. Winch, *supra* note 32, at 224-25.

136. *Id.* at 226-27 (emphasis in the original).

137. *Id.* at 227.

IV. TWO OBJECTIONS

There are two fairly obvious objections to the position I have taken; the first is practical, the second theoretical. The first acknowledges some force to my argument, but limits it to the first chance—after one strike, you're out. The second is that because we cannot escape determinism, there is no reason to make any substantial changes. In effect, it says, we're doing the best we can with a pervasive phenomenon. I want to set out the objections and then reply to both, before responding more fully—and from a theological perspective—to the second objection.

A. *Limiting Differential Sentencing to First Attempts*

Many commentators have acknowledged that premising lesser sentences for attempts on the possibility of expiation has some (intuitive?) appeal, but that such an appeal is exhausted after the first attempt at crime is partially exonerated at the sentencing stage. When the wrongdoer attempts a second crime, the argument goes, he has shown himself to be impervious to moral education, penitence and a second chance; and, given societal needs for specific deterrence, thereafter the actor should be sentenced to a term of confinement equal to that which is imposed on the wrongdoer who completes the same crime.¹³⁸ Because it rests on a logic of intent and deterrence, this prescription cannot be gainsaid wholesale. The will to do evil, regardless of the causes that compose that will, must be controlled and—to the extent consistent with that part of our better nature which trusts the potential for improvement—harnessed. Such a concession

138. See, e.g., Chapman, *supra* note 34, at 360 n.17 (noting that some argue that lesser penalties for attempts would present an incentive to forego further criminal activity but only for the first unsuccessful attempt; the next unsuccessful attempt should be punished more severely on this theory); Parker, *supra* note 25, at 274 (stating that, with respect to specific deterrence, unequal punishment accomplishes nothing; “a lighter penalty for an attempt or nonharmful result could hardly discourage the offender from repeating his conduct”).

seems to rest on good common sense. Nevertheless, the first attempt limitation is not obviously correct on its own terms, nor does it speak at all to the terms of confinement, defined by either its length or conditions.

The objection and the prescription it invokes raise several significant questions. First, that we must incapacitate certain individuals (sometimes forever) to protect the rest of society leaves undiscussed how we deal with other (especially nonviolent) wrongdoers after apprehension and conviction, including the important question of who needs to be incarcerated. If our penal institutions actually undertook a social commitment to moral education, with the many and varied costs that such a commitment entails, including adequate diagnostic tools, treatment availability, and follow-up supervision, then limiting lesser punishment to the first or second attempt would garner my support. The goals of reform and rehabilitation, however, do not automatically require equal punishment.¹³⁹ Second, it ought to be noted once again that, with respect to specific deterrence, “certainty and swiftness of punishment” trump the amount of punishment.¹⁴⁰

Nor is it clear that an actor’s capacity for improvement is exhausted with the first attempt. How often is it the case for the vast majority of us (who are *not* criminals) that we don’t quite learn a lesson provided for us the first or second or even third time it is set out? Consider your experiences educating children! (“How many times have I told you . . . ?”) It bears emphasizing once more that we are still talking about attempters: When concrete first-order

139. In November 2000, Californians overwhelmingly approved passage of Proposition 36, The Substance Abuse and Crime Prevention Act of 2000, which mandates probation and treatment for all first and second convictions of nonviolent drug users. On the third conviction, the offender’s incarceration is limited to a maximum of 30 days, followed by conditional probation. See Workplace Substance Abuse Advisor, November 30, 2000. This type of treatment could serve as a partial model for the type of commitment I refer to in the text. An impressive argument for the goals of expiation in punishment is contained in Stephen P. Garvey, Punishment as Atonement, 46 UCLA L. Rev. 1801 (1999).

140. Bayles, *supra* note 30, at 27.

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harm in fact occurs, the wrongdoer's potential dangerousness is no longer relevant to these arguments. Narrow sentencing ranges are prescribed almost everywhere for all similarly situated actors, and while one may certainly argue about the proper punishment for the harm caused, the differential issue disappears. Those who repeatedly fail to complete the crimes they attempt just might not be as dangerous as those who repeatedly complete the crimes they set out to achieve, and may be more in need of appropriate treatment.

This last observation fuels a return to the theme that identifiable, non-trivial harm to a first-order interest is an important consideration in punishment. Degrees of dangerousness vary; some homicides—and attempted homicides or even threats of injury, for example¹⁴¹—are more dangerous than others. This obvious and unexceptionable point necessarily implies that degree of dangerousness—or risk presented—alone cannot serve as *the* criterion for determining culpability, which in turn informs and determines the length of incarceration.¹⁴² I do not mean thereby to impeach a strawperson; in some (shrinking number of) jurisdictions, judges do retain substantial sentencing discretion. More and more, however, jurisdictions are stripping their judiciary of such discretion, in which case the primary determinant of incarceration is the crime itself; issues like potential for reformation are disappearing. Moreover, non-penal substitutes for punishment, like drug treatment, are notoriously under-funded.¹⁴³ Simply to recommend that we

141. Becker, *supra* note 26, at 276, begins by noting that “some attempts,” such as assassinations of public leaders, engender great social harm and instability and, so, should be penalized equally with completed offenses. In fact, a mere threat to the President of the United States will, if proved, beget a substantial penalty. See, e.g., 18 U.S.C. § 871 (2003) (prescribing a five year sentence for making threats to the physical well-being of the President). Becker subsequently drops the unexceptionable “some” limitation and asserts repeatedly (and needlessly in my view) that we should treat all attempts similarly—a conclusion that his initial, well-advised social harm premise does not support.

142. Bayles, *supra* note 30, at 24.

143. See, e.g., The Office of National Drug Control Policy's Fiscal Year 2001 Budget, Hearing Before the Senate Comm. on Appropriations Sub-Comm. on

lock up more people for longer periods of time and eliminate the opportunity for judges to make judgments about reform potential and nothing else is to ignore a grave moral issue in punishment.¹⁴⁴

B. Determinism Does Not Obviate Responsibility

“Even if mechanism is true, the law’s concepts of moral responsibility and deserved blame and punishment are rationally defensible on [a compatibilist] view.”¹⁴⁵ Subscribing to the reasoning of Hilary Bok and others,¹⁴⁶ Professor Morse extols the virtues of compatibilism as holding out the hope of genuine responsibility for one’s actions; and, for that reason, he concludes that harm is not relevant to desert. This understanding roughly reflects the majority position. What makes this position particularly challenging is that Morse subscribes fully to the idea of determinism. It thus requires a brief summary, an analysis, and a response.

Stated simply, the argument moves along these lines: That a causal explanation exists for all phenomena, including (especially) intentional human conduct, is an inescapable condition of existence. Nevertheless, because agents possess the power of practical reasoning, and

Treasury and General Government, 106th Cong. (2000) (statement of Barry R. McCaffrey, Director, Office of National Drug Control Policy); Steven Belenko, *The Challenges of Integrating Drug Treatment Into the Criminal Justice Process*, 63 *Alb. L. Rev.* 833, 856-57 (2000); Deena Whitfield, *Treatment Has Its Upside*, *The Boston Herald*, October 28, 2000, at O11.

144. The morality of equal punishment in the absence of significant harm to a first-order interest plays out most notably in the context of the death penalty. For example, I would like to parse a statement setting out the criteria that justify capital punishment for an attempted murder which occurs under conditions that would warrant death but for the fact that the bullet missed or the victim survived. True, one can avoid the issue by opposing capital punishment in its entirety. But absent that move, the idea of death to a defendant without ultimate first-order harm is anathema, treason excepted; the sense of disproportionality is conspicuous. If one has a visceral reaction to this notion, one experiences substantial support for an aesthetic of punishment. See my *Some Observations on the Aesthetics of Retribution*, *supra* note 107.

145. Morse, *supra* note 53, at 886.

146. *Id.* at 885.

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because they are “generally capable of grasping and of being guided by reason”¹⁴⁷ when agents act intentionally, they deserve our praise or blame insofar as those acts are guided by reasons. “For the compatibilist, moral responsibility is dependent primarily on the agent’s general capacity to grasp and be guided by reason, because it is reasonable and fair to hold an agent responsible only if the agent possesses this capacity.”¹⁴⁸ According to this view, attributing true responsibility to intentional conduct is thus justified for three reasons: first, because reason cannot affect what I have described here generally as antecedent causal conditions, including one’s testing opportunities; second, because there is very little one can do (by means of effecting reasoning processes) to “modify our characters or desires”,¹⁴⁹ and, third, because much that occurs *after* agents form and act upon intentions is affected by fortune. In the end, then, Morse concludes that agents are culpable “only for action because only action is guided by reason, not because only action is free of the causal processes of the universe.”¹⁵⁰

On this view, the consequences resulting from reason-guided conduct are irrelevant, in part, precisely *because* of the role of fortune. The argument proceeds this way: No one is entitled to, nor can the law insure the existence of, a risk-free environment. The most anyone can hope for “is that none of us should intentionally place fellow citizens unreasonably at risk of harm.”¹⁵¹ At the moment *t*, when the wrongdoer intentionally commits an act that creates a risk of harm, the legal duty to forebear creating the risk of harm is complete: “no further wrong, no further violation”¹⁵² is necessary once the risk of harm is set in motion. The reality of harmful consequences might serve epistemic concerns, but the existence of harm is not

147. *Id.* at 886.

148. *Id.*

149. *Id.*

150. *Id.* at 887.

151. *Id.* at 888.

152. *Id.*

relevant to wrongdoing.¹⁵³ One should be held responsible only—but entirely—for what one can control, and not for the fortuity of consequences. “[R]esults should not matter to desert, and therefore causation should not either.”¹⁵⁴

This argument is premised on the seamlessness of causation: Once one begins to examine the causal antecedents of an action, one is compelled by logic to travel back in time to the Big Bang, because “there are no gaps or sharp breaks in causation.”¹⁵⁵ The bottom line is that the very endeavor of examining causation beyond the crabbed way in which the law now acknowledges it necessitates entering into “a web of infinite complexity.”¹⁵⁶ Thus harm is philosophically irrelevant to criminal law at both causal ends—that is, both *ex ante* and *ex post*.¹⁵⁷ Frankly,

153. *Id.* In a far more complete statement of the thesis, Professor Morse pulls back a bit from endorsing an appropriate epistemic function of harm. He logically predicts that “hindsight bias,” the willingness of fact-finders to infer culpable intent from harmful effect, presents the greatest potential for producing an erroneous, inappropriate outcome (where an “appropriate” outcome conforms to the values underlying the reasonable doubt norm of *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring)). In those cases, the actor’s intent to do harm is low, but harm nonetheless is produced. Hindsight bias may also produce the same incidence of inappropriate outcomes where the actor’s intent to do harm is high, but no harm is produced. Stephen Morse, *Guiding Goodness*, Ill. L. Rev. (forthcoming).

The practical question Professor Morse raises is whether or not the problem of hindsight bias genuinely requires the choice he prescribes (prima facie excluding evidence of harm) or, stated more carefully, whether it is a choice we need to be much concerned with. First, the theory’s predictive value applies only to cases that go to trial, and it is at least an empirical question whether the actor with whose fate we should be most concerned often goes to trial if he has, by hypothesis, a “real” mens rea defense. Second, as to those cases that do go to trial, the results the theory predicts must hold constant at least three crucial sources of information: what we know and can prove about the defendant’s intent, the quality of the defendant’s representation, and the defendant’s background (his rap sheet). I suspect that the emotional incentive provided to the jury to reason backwards from harm caused to intent/risk creation is influenced far more heavily by these factors—and especially the last—than by the presence or absence of harm. As Morse points out, one doesn’t even need a dead body to convict for homicide if the proof of a death is otherwise sufficient.

154. Morse, *supra* note 53, at 889.

155. *Id.* at 889.

156. *Id.* at 890. Morse acknowledges that it is possible to identify “stopping points based on common sense or social and legal purposes . . .” *Id.*

157. On some of the ways in which this thesis might prove “politically”

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although I too count myself a thorough-going (but compromising) determinist, I do not understand on either theoretical or practical bases the conclusions he draws from a description of reality with which I essentially agree. Theoretically, one might challenge the argument by noting that even physicists have not yet produced Einstein's dream of a unified field theory, and quantum physics suggests that our conventional understanding of causation disappears at subatomic levels. Practically, it is simply not true that causation is, or must be, a seamless web in a *moral* or *legal* context, a conclusion that (ironically) Professor Morse acknowledges.

If full, responsibility-occasioning free will exists such that misconduct is attributable solely to an agent's intentional conduct, it exists only from a *practical* standpoint, whatever that means.¹⁵⁸ If that is correct, and Morse cites Bok and others for this conclusion, Morse is in danger of committing, if he has not already committed, a category error or, at the least, of reaching a conclusion vulnerable to deep skepticism. It is a custom going back modernly at least as far as Kant¹⁵⁹ to distinguish between theoretical and practical standpoints, the former seeking something like third-person, objective knowledge of the world, and the latter abstracting from such information to deliberate prescriptively on practical questions at time *t*.¹⁶⁰ As one might suspect, the pathway between the two standpoints, and the move from objective/deterministic to subjective/free agential, are articulated in terms that are

embarrassing, see Perlman, *supra* note 32, at 232-40 (noting that omitting the relevance of consequences would affect our approach to crimes of omission, "bad Samaritan laws," and negligence liability, among others).

158. On the varieties of ways in it might be understood as an elaboration of Kant's assumption of compatibility, see Nelkin, *supra* note 87, at 570-75 (distinguishing among "interests," "justification," and "function" criteria used by different standpoint theorists).

159. For an excellent discussion of this distinction in Kant, see Rawls, *Lectures*, *supra* note 14, at 146-49.

160. Bok, *supra* note 72, at 73-75 (asserting that practical reasoning supervenes on theoretical reasoning such that the former cannot contradict the latter, and in this way avoids violating the law of non-contradiction).

fairly described as incomplete or hazy.¹⁶¹ The category error, if it is such, is reflected in Morse's use of theoretical reasoning—what the law counts as morally appropriate considerations for attributing responsibility—to declare the absence of a practical basis for creating a non-arbitrary stopping point for attributing wrongdoing to antecedent causal factors. Practical reasoning—what the agent should do at a point in time—is informed by theoretical reasoning—an “objective” description of the world.¹⁶² That description leads to the conclusion that we are products of mechanism. But Morse seems to be relying on information obtained from a theoretical, third-person perspective to assert that we cannot move backwards in time practically—that is, to a first-person perspective—to find a non-arbitrary resting point to make decisions predicated on that theoretical reasoning. For example, the question of how we should treat those who come from bad genes or a rotten social backgrounds doesn't depend upon the seamlessness of causation. We know the practical origins of their bad luck. Why we should disregard this fact, given

161. For example, Bok writes that scientific and psychological reasoning, which are instantiations of theoretical reasoning, “threaten our freedom and moral responsibility.” Bok, *supra* note 72, at 58. Similarly, in her elaboration of the distinctions between practical and theoretical reasoning, she contends that the latter “includes not only physical explanations of events (including human actions) but explanations of actions that refer to the agent's beliefs, goals, and desires, or that employ other psychological terms.” *Id.* at 63. In other words, explanation alone, so long as it is not directed at what should be done at a moment in time—that is, at practical reasoning—conduces to a determinist outlook. But how can it be that explanations of one's psychological states produce determinist conclusions, while the actual instantiations of those states in pursuit of practical outcomes are free? Her conclusion is that the two standpoints *qua* standpoints account for this result.

The problem with this conclusion—its haziness—is precisely the problem that Kant faced when he allowed that “the Idea of freedom can never admit of full comprehension . . .” Kant, *Groundwork*, *supra* note 10, at 127. We are left, in effect, with a faith that the lacuna between the objective reality of nature and the presupposition of free will holds a non-determinist occupant that we can neither unlock nor fully elaborate. Perhaps it does, but the ineliminable doubt implicit in this admission means that we can never know, and have good reason to suppose that, for some at least, practical reasoning skills, owing to bad fortune, are substantially compromised.

162. See Bok, *supra* note 72, ch. 3.

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that law is a practical, relational discipline, is unclear; it is the function of the practical standpoint—what to do in the many *nows* the law confronts—to create just such standards for evaluation, the theoretical standpoint. At best, the distinction between standpoints is blurred.

For example, the most obvious non-arbitrary, practical, causal stopping (or starting) point is birth. Granted, using birth as a causal starting point omits consideration of genetic predispositions that play—or may play—a potentially critical causative role in the development of character and the like, but we are still some distance from possessing a sufficient understanding of that phenomenon, if it ever comes, that it hardly seems appropriate to label as “arbitrary” the decision to omit genetic considerations as we assess wrongdoing.¹⁶³ There can be nothing arbitrary about omitting that which we do not currently know. It is also true that courts cannot routinely stage a parade of witnesses whose purpose is to catalogue each event in every wrongdoer’s life to effectuate causal-based sentencing reductions (or, in theory, enhancements). But it is a long stretch from that implausible and unhappy prospect to the reality that our Federal Sentencing Guidelines generally remove from consideration the very antecedent causal conditions that strongly determine who the wrongdoer becomes.¹⁶⁴ Thus, it is precisely because causation is so complex that our practical reasoning demands line-drawing.¹⁶⁵ Morse understands this explicitly, but seems to

163. To the extent that we do understand the medical/genetic features of some character traits, such as severe intellectual deficits, we do take them into consideration in assessing criminal responsibility, as Professor Morse amply illustrates. See generally Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 *Crime & Just.* 329 (1998). For a review of the nature of the work on personality and genes now in process, see Nussbaum, *supra* note 80.

164. The Federal Sentencing Commission has ruled that such factors generally fall outside judicial bounds in determining downward departures from the Guidelines. See generally Thomas W. Hutchison & David Yellen, *Federal Sentencing Law and Practice* pt. H (2d ed. 1994) (excluding from consideration the conditions in which wrongdoers, through accidents of birth alone, are raised and receive—or do not receive—a moral education).

165. Cf. Bok, *supra* note 72, at 127 (“I will refer to the collection of

beg the most important question when, describing the law's concept of personhood, he writes that "people are creatures who act for and consistently with their reasons for action and who are generally capable of minimal rationality according to mostly conventional, socially constructed standards."¹⁶⁶ Whether "minimal rationality" means something other than the ability to create practical (and potentially harmful) syllogisms is precisely the question he abandons at the critical time.¹⁶⁷

As one who subscribes to Morse's understanding of the inescapable nature of determinism, I am at a loss to appreciate the fear of opening up, or at least of considering, causal questions in a limited way—in the sentencing phase. What we take into account when we identify the causal conditions we choose to consider in determining "reasons for action" *is itself* a social construct. Because that is the case, I am describing Morse's position in the alternative: as either a category error or as fuel for a skeptic. If it is not a category error, then criminal law jurisprudence must constantly ask why the law has stopped questioning its own construction of the standards for determining the fair attribution of responsibility. To suggest that we need not continue this search because, in the words of Professor Kadish, it is contrary to our "settled moral understanding,"¹⁶⁸ implies that we have arrived at a final moral conception of criminality. Apart from its obvious conceit, the conclusion invites infinite regress.

considerations that an agent regards as giving rise to reasons for action as her standards."); and *id.* at 130 (defining the will as "those aspects [of the agent] . . . that determine the use [one] . . . make[s] of [his or her] . . . freedom . . .").

166. Morse, *Excusing*, *supra* note 150, at 339.

167. See my *Justifying Punishment*, *supra* note 24, at 174-77.

168. See Kadish, *supra* note 25, at 690.

V. CONTINUING THE SEARCH¹⁶⁹

The idea that we need not (or cannot) move beyond settled moral understanding illustrates what J.L. Mackie describes as “the supposed objective prescriptivity of moral features”¹⁷⁰ Mackie surely wasn’t asserting that one can find an objective account of moral qualities or facts; he rightly rejects this kind of foundationalism. Rather, he argues that our moral intuitions come through a socialization process to objectify moral truths which “yield the misleading appearance of objective reality.”¹⁷¹ In the domain of moral philosophy, including political morality, one of those truths is that citizens in a liberal democracy begin their journey to some kind of civic virtue from different places.¹⁷² Our starting points, including those described generally as intuitive and thus a priori, don’t begin until we are “already immersed in the assumptions and precedents of a tradition [They are] not so much arbitrary as inescapable[,] . . . shaped by the grammar of our native tongue.”¹⁷³ I try to begin with ordinary people using ordinary language in ordinary circumstances, following the dictum of J.L. Austin: “[O]rdinary language is *not* the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it *is* the *first* word.”¹⁷⁴

169. I have discussed these ideas in different fora, including Book Review, 16 J.L. & Religion 901 (2001) (reviewing Robert Audi, *Religious Commitment and Secular Reason* (2000)); *Justifying Punishment*, supra note 24; and *An Essay on Liberalism and Public Theology*, 14 J.L. & Religion 229 (1999/2000).

170. Mackie, *Morality*, supra, note 11, at 7.

171. Id. Mackie is not, despite the quotes in text, a thorough-going moral skeptic. Rather, he suggests a number of reasons why we must believe in the objective reality of moral obligations. See Mackie, *Ethics*, supra note 11, at 111-24.

172. For a helpful intellectual history of virtue in modern moral philosophy, see Schneewind, supra note 3 (arguing that natural law was a reaction to the lack of storable rules provided by, and thus lack of usefulness of, Aristotelian ethics in the seventeenth and eighteenth century experiences).

173. Jeffrey Stout, *Ethics After Babel: The Languages of Morals and Their Discontents* 120 (1988).

174. Austin, supra note 18, at 11.

The basic principle I want to advance, a first word, is one to which most of us subscribe, at least formally.¹⁷⁵ Following the teaching of Hillel, however, I will state the maxim in the negative: “*What is hateful unto you, do not unto your neighbor. The rest is commentary—now go and study.*”¹⁷⁶ The standard interpretation of Hillel’s negative phrasing is articulated by Leo Baeck:

When he put his maxim into negative form, Hillel had a good reason. For the beginning of all love of man is the resolve not to hurt anyone. The positive follows by itself. If hardly any other virtue so often becomes an empty shell as does the love of our neighbor, it is because we so easily forget what love ought not to do.¹⁷⁷

A second, complementary interpretation comes from Hermann Cohen, the nineteenth-century German philosopher/theologian who brought Kant to Reform Judaism. Cohen writes that for man to love God, “man must love his fellowmen first of all. In this love, which produces social politics, lies the true foundation of human love. Only on this foundation can the idea arise that man can elevate himself to the love for God.”¹⁷⁸ Love of others, as Hillel exhorted, was not an early utopian ideal.¹⁷⁹ Rather, it reflected his perception of the self in community: “If I am not for myself,” Hillel asked, “who will be for me,

175. Leviticus 19:18: “Love your fellow as yourself: I am the LORD” (Tanakh 1985). Matthew 22:39: “You shall love your neighbor as yourself.” (Quoted in its entirety in Elaine Pagels, *The Origin of Satan* 85 (1995)).

176. The legend behind the story is told in many sources, including Karen Armstrong, *A History of God: The 4000-year Quest of Judaism, Christianity and Islam* 72 (1993); Joseph Telushkin, *Jewish Literacy: The Most Important Things to Know about the Jewish Religion, Its People, and Its History*, 62-63 (1991).

177. Leo Baeck, *The Essence of Judaism* 221 (Victor Grubweiser & Leonard Pearl trans., 1976); see also Max I. Dimont, *Jews, God, and History* 46 (rev. & updated ed., 1994) (suggesting that a “gulf in thinking” distinguishes the positive and negative wording).

178. Cohen, *supra* note 38, at 405.

179. But see Telushkin, *supra* note 176, at 121 (suggesting that Hillel’s effort to prevent the creation of a permanent underclass by regulating debt collection has a utopian flavor).

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and if I am only for myself, what am I?"¹⁸⁰ Love of self is a necessary condition to love of others: The plea to forego conduct toward others which one was unwilling to experience oneself, therefore, was understood in a universal, balanced context, and in terms that went beyond the purely local to become the foundation for a general ethics.

I want to identify a third congenial feature of Hillel's maxim, which combines with love of self as a necessary condition for love of others to produce a more compassionate attitude toward punishment than the one by which we now abide. Hillel's negative phrasing should produce a different moral psychology on the part of one who genuinely subscribes to his teaching. Recall that the dictum begins with a prohibitory maxim: "Do not!" The object of Hillel's maxim is conduct directed at one's neighbor. The conventional "Do unto others . . ." formulation proposes conduct in the first instance directed toward the third person. This approach too often slips into "tough love," which easily sinks further into neglect and even disdain: "Lock the door and throw away the key!" This hardening tendency may prevent us from inquiring deeply enough into the actual effects of the intended punishment. By phrasing the proposition in the first person, the asking self becomes the object test of permissibility. Here one begins with as much information as possible about the crime and the criminal, assesses the prospects of education and reformation, then sweeps away personal prejudices and passions and hopes to find compassion in the disassociation of prejudice and informed judgment. At this point, one asks the hypothetical "what if" question: What if *I* occupied the place of the person who is about to be affected by my conduct—what if *I* had been unlucky enough to be born into and raised in the

180. Telushkin, *supra* note 176, at 122 (quoting Ethics of the Fathers 1:14). Cohen's theology supports this reading. According to Cohen, God created the universe in order to create mankind, and created everyone in His image; thus, each man is also a fellow man, a member of the "plurality of men" in whose heart God planted love. Cohen, *supra* note 38, esp. ch. VIII.

circumstances in which most criminals survived? What treatment would I wish directed at me? And is it feasible?

To this point the process proceeds consistently with Kant's first categorical imperative—that a maxim be “universalizable.” That is to say, Hillel's dictum and the procedures it implies must apply at all times to all rational persons: “I ought never to act except in such a way *that I can also will that my maxim should become a universal law.*”¹⁸¹ At the same time, Hillel's teaching is (roughly) congruous with the Kantian notion of freedom: To be autonomous means that one participates in moral reflection by prescribing “universal laws.” Where it parts with Kantian principles is in the radical supposition that everyone can legislate “free in respect of all laws of nature, and obeying *only* those which he makes himself.”¹⁸² Like Kant's categorical imperative, it applies to “all *rational beings as such,*” and it applies “*with absolute necessity.*”¹⁸³ What Hillel's maxim denies, however, is that all people universally can determine imperative obligations wholly free from contingent conditions and exceptions.

In Chapter 4 of *Ethics and the Limits of Philosophy*, Bernard Williams describes the identity of autonomy and rationality in Kant's thought from something like a psychological-egoist perspective, beginning with an insightful reconstruction of the thought patterns which might induce Kant to intuit that rational people seeking to protect their own freedom must conclude that only universally applicable laws safeguarding the freedom of all rational agents could meet the basic need for noninterference.¹⁸⁴ As Williams notes, however, the rational individual deliberating in the first person on her own conduct need not take into account the needs of other

181. Kant, *Groundwork*, supra note 10, at 70; see e.g., id. at 99 (noting that “the *principle* that every human will is a *will which by all its maxims enacts universal law*”).

182. Id. at 97 (emphasis added).

183. Id. at 76.

184. Bernard Williams, *Ethics and the Limits of Philosophy* 59-60 (1985).

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rational agents.¹⁸⁵ Hillel's prescription hopes to avoid both Kant's wholly formal universality requirement and Williams's understanding of the potential egoistic selfishness of individual cognition by adding a psychological component. The question for each of us deliberating in the first-person singular to determine the appropriate conduct toward third persons, including not least criminals, becomes: What would I wish to see happen to me, understanding fully the crimes of the present and the need to incarcerate the dangerous?¹⁸⁶ The deliberative *I* will forebear treatment of others that the *I* would not want imposed upon the self were the *I* him or her; for there *but for the grace* of God go I.

VI. CONCLUSION

I have argued for retaining sentencing distinctions between attempted and completed crimes. I have done so largely on the basis of the different duties served by morality and law: The Kantian commitment to autonomy/rationality as the normative ideal of moral philosophy loses some of its potency in the real world that produces crime and criminals. Thus I began by setting out the traditional views of jurisprudence, which focus almost exclusively on intentions and choice, then questioned the reality of choice as the *sine qua non* of law, and offered reasons for retaining the distinction based on our moral intuitions. Although we cannot do away with the distinction between practical and theoretical reasoning, we ought to ask whether all of us are even capable of exercising practical reasoning, given the circumstances in which fortune has placed many of us. Finally, I offered a theological perspective on softening the settled moral order based on Hillel's understanding of Leviticus.

Thus, when I deliberate practically on such circumstances, I ask myself how would I wish to be treated

185. Id. at 64-69.

186. See Blumoff, *Justifying Punishment*, *supra* note 24, at 195-98.

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had I, unfortunately, been placed in those situations. I would want a second and a third chance, provided (a) that my chance is accompanied by some meaningful opportunity to habilitate those capable of habilitation, and (b) that I didn't present a substantial threat to the first-order interests of others. From a theoretical standpoint, I recognize that the ideal of choice, predicated on an intuited "good will," is objectively absurd for some people even to consider most of the time. Insofar as the settled moral understanding simply leaves such people out, by consigning them to hopeless and endless encounters with incarceration, it insures and enables their future failures. The brief I carry is for educated expiation, whereby the incidence of future danger might be reduced.