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THE JURISPRUDENCE OF PUNISHMENT

KYRON HUIGENS*

INTRODUCTION

Does a complete punishment theory require a particular theory of legality, that is, a theory of what makes a valid legal rule valid? I suspect that most punishment theorists' initial response to this question will be contradictory. On one hand, it seems obvious that a theory of punishment, if it is a theory of legal punishment, must assume some account of legality. It seems equally clear which theory of punishment matches which school of jurisprudence. We assume that an aretaic theory is necessarily part of a natural law jurisprudence or that a consequentialist punishment theory is tied somehow to legal positivism. Fewer observers would make a connection between Dworkinian jurisprudence and deontological punishment theory, but a shared emphasis on moral principle and right answers in hard cases makes it easy to draw an equally plausible connection there. On the other hand, if, as this answer assumes, we think of punishment theories as subdivisions of the great traditions in moral philosophy, then this answer must be wrong. Moral philosophy is orthogonal to jurisprudence—as the plausible but entirely specious connection between Dworkin and Kant indicates—and if this is so, then there is no necessary connection between any particular jurisprudence and any particular theory of punishment.

The fact that a theory of punishment does not require a theory of legality is trivial. To say, for example, that an aretaic theory of punishment can be reconciled with legal positivism means no more than to say that an aretaic theory of punishment can be reconciled

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with an interpretation of the gnostic gospels or a reading of Dr. Seuss. For the advocate of a punishment theory, however, establishing this trivial point is not itself trivial. For many of those interested in punishment theory, the point will in fact be a revelation. It is difficult to say how widespread this confusion is, but it seems sufficiently widespread to merit attention and correction. It matters to the field of punishment theory if a consequentialist in punishment theory dismisses natural law jurisprudence out of hand, particularly if she then uses that dismissal as a reason to reject an aretaic theory of punishment as well. To see that punishment theory and jurisprudence are orthogonal to one another would have the effect of removing this large and entirely illusory constraint on the development of punishment theory.

The difficulty is that it is not clear that jurisprudence and punishment theory really are orthogonal to one another. For one thing, the presumed subordination of punishment theory to moral theory is false. The moral justification of punishment is only one of the standing questions that a theory of punishment addresses, if it is meant to be a comprehensive theory of punishment. And most of these other questions are not questions in moral theory. Instead, most questions in punishment theory concern the description of criminal law: What is the difference between a defense in the nature of justification and a defense denying responsibility for wrongdoing? Is culpability or, the term preferred here, criminal fault part of the structure of wrongdoing? If so, does fault apply per offense or per element? Does the term "excuse" refer to denials of responsibility, to the absence of fault, or to both? Where does duress or provocation fall in these categories?

Given punishment theory's large descriptive component, we might begin to think that descriptive jurisprudence is not orthogonal to punishment theory at all. It is true that the two disciplines as ordinarily conducted have little or nothing to do with one another. Jurisprudence is focused exclusively on explaining the validity of legal norms, whereas the descriptive questions with which punishment theory is concerned ordinarily do not include the question of legal validity. On the other hand, there is no reason to assume that punishment theory is not sensitive to differing conceptions of legal

validity—as the intuition behind the first answer to the opening question of this Essay indicates.

This Essay addresses the relationship between punishment theory and jurisprudence, and argues for the idea that jurisprudence and punishment theory are orthogonal to one another. Part I of this Essay, following this Introduction, will move punishment theory closer to jurisprudence, first by describing the overbearing role of moral philosophy in punishment theory as it is ordinarily conducted, and then by separating and highlighting the features of punishment theory that are descriptive and more concerned with legality. Part II of this Essay will continue in the same vein, beginning to treat the theory of punishment as legal theory instead of moral theory. I will describe the four major schools of jurisprudence and sketch their accounts—some actual, some projected—of criminal fault. The question is what would count as an acceptable account of criminal fault—*legal* fault within a system of *legal* punishment—under each school's conception of what counts as law? Behind this lies the question whether jurisprudence is completely orthogonal to punishment theory. Criminal fault is usually interpreted as a straightforward matter of moral desert for punishment.¹ If this conception does not run afoul of any conception of the relationship of law to morality, then this is a strong sign that jurisprudence places no constraints on punishment theory at all. We can return to the clarifying, simplifying idea that punishment theory and jurisprudence are orthogonal to one another.

The effort to reconcile punishment theory with jurisprudence across the board seems doomed, however, where an Aristotelian or aretaic theory of punishment is concerned. The idea that virtue plays a central role in criminal liability is most often and quite understandably thought of as a feature of a natural law jurisprudence. An aretaic theory of punishment seems to be inconsistent on its face with a positivist jurisprudence, if one interprets the absence of virtue as a condition of just punishment and positivism as excluding such moral concepts from the criteria of legal validity. But

1. See, e.g., Bruce Ledewitz, *Mr. Carroll's Mental State or What Is Meant by Intent*, 38 AM. CRIM. L. REV. 71, 82 (2001) ("What we are seeking to punish in criminal law is sin, which sometimes is referred to by the less religious sounding term, 'moral desert.'" (footnote omitted)).

there is no reason to assume that positivism excludes moral concepts from the criteria of legal validity. And even if it did, there would be no conflict if an aretaic theory of punishment did not treat the absence of virtue as a necessary or sufficient condition for criminal liability. Parts III and IV of this Essay will pursue this point. I will offer a distinctively aretaic account of criminal fault. I will then offer an account of desert for legal punishment as legal desert, exclusive of moral desert—an account that mimics a central argument of exclusive legal positivism. These two different accounts of fault, we will see, are perfectly consistent with one another—a point which should conclusively dispel any notion that an aretaic theory of punishment is a creature of natural law jurisprudence.

I. DESERT FOR PUNISHMENT AND THE SCAPEGOATING OBJECTION

It would be difficult to describe in a paper of any length how punishment theory is ordinarily conducted. Here, I will only put forward an instance of ordinary punishment theory, and proceed on the assumption that it is reasonably representative. It is an argument about desert for punishment—which, aside from the justification of punishment, is the main issue in the field—and it indicates the preoccupations of ordinary punishment theory. This argument is a staple of criminal law classrooms, but upon closer examination one begins to wonder why. It has nothing in particular to do with law—which is the very feature that makes it representative.

The “scapegoating objection” is aimed particularly at consequentialist theories of punishment. To quote one statement of the objection:

[T]he utilitarian must hold that we are justified in inflicting pain always and only in order to prevent worse pain or bring about greater happiness. This, then, is all we need consider in so-called punishment, which must be purely preventive. But if some kind of very cruel crime becomes common, and none of the criminals can be caught, it might be highly expedient, as an example, to hang an innocent man, if a charge against him could be so framed that he were universally thought guilty; indeed this would only fail to be an ideal instance of utilitarian “punish-

ment" because the victim himself would not have been so likely as a real felon to commit such a crime in the future; in all other respects it would be perfectly deterrent and therefore felicitic.²

It is never quite clear, however, what this objection means. This version of the objection is the one that John Rawls quoted in *Two Concepts of Rules*, and he understood the point to be this: "The question is whether utilitarian arguments may be found to justify institutions ... such as one would find cruel and arbitrary."³ But why should we care whether utilitarian arguments would justify cruel and arbitrary punishments?

An answer to this question might be found in Rawls's plausible argument against the scapegoating objection.⁴ It may be that conditioning punishment on individual desert produces optimal social welfare, simply because most people believe, rationally or not, that this is how punishment should be done, and because they would withhold necessary political support for the legal system if it were done otherwise. If punishment according to desert is not cruel and arbitrary, then a consequentialist theory of punishment would not necessarily endorse cruel and arbitrary punishment in the pursuit of optimal social welfare. For my present purposes, however, it is irrelevant whether or not the scapegoating objection fails, and whether or not consequentialist punishment theory is right. I want to focus on why and how the scapegoating objection *purports* to show a consequentialist theory to be mistaken, whether it successfully does so or not. On this point, Rawls's counterargument is unhelpful, because it merely presents the question again. Granted that a consequentialist theory of punishment does not necessarily endorse

2. E.F. CARRITT, *ETHICAL AND POLITICAL THINKING* 65 (1947) (footnotes omitted).

3. John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 10 (1955).

4. The argument was formulated by several other philosophers as well. See, e.g., A.C. EWING, *THE MORALITY OF PUNISHMENT: WITH SOME SUGGESTIONS FOR A GENERAL THEORY OF ETHICS* 66 (1929) (noting that "it is the penal system as a whole which deters, and not the punishment of a single offender"); J.D. MABBOTT, *PUNISHMENT* (1939), reprinted in *THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS* 39, 50 (H.B. Acton ed., 1969) (quoting A.C. Ewing's "it is the penal system as a whole which deters" statement). The reply was also given contemporaneously to Rawls in ANTHONY M. QUINTON, *ON PUNISHMENT* (1954), reprinted in *THE PHILOSOPHY OF PUNISHMENT*, *supra*, at 55, 63. H.L.A. Hart also drew the distinction, in terms of "general justifying aim" versus "distribution." H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 1, 8-13 (1968) [hereinafter *PUNISHMENT AND RESPONSIBILITY*].

cruel and arbitrary punishment in the form of punishment regardless of desert, why does it follow that a consequentialist theory is not objectionable?

Consider a different way in which the scapegoating objection might fail. We might not care whether a scapegoat is punished. If this seems implausible, consider a closely analogous case instead. A number of states have abolished the insanity defense, and thus authorize punishment for those who have long been thought not to deserve punishment.⁵ The reasoning behind this abolition seems to be twofold: it will preclude the acquittal of malingerers, even at the cost of punishing some genuinely undeserving defendants; and it will send a strong deterrent message to potential wrongdoers. If the scapegoating objection turns on our revulsion at undeserved punishments being inflicted for deterrence's sake, then these explanations give the punishment of the insane a strong odor of scapegoating.

It might be as Rawls suggested that to punish without regard to desert would cause a punishment system to lose critical political support, so that only punishment according to desert will optimize social welfare. Where the insanity defense has been abolished, however, it appears that to punish without regard to desert *garners* political support for the punishment system. With no offset for dissatisfaction over punishment of the undeserving, punishing the insane will produce optimal welfare—without the need to introduce desert into the equation at all.

If we are not repelled by the infliction of undeserved punishment for the sake of deterrence, then the scapegoating objection does not work. The act-consequentialism that is the target of the scapegoating objection describes the abolition of the insanity defense perfectly well, and makes sense of its scapegoating rationale. By bolstering deterrence, albeit at the cost of punishing otherwise legally irresponsible defendants, we enhance social welfare. Even in its most primitive form, then, consequentialism makes sense of a recent development that at first seems anomalous, even outrageous. It explains scapegoating as well, avoiding any suggestion of

5. See, e.g., IDAHO CODE ANN. § 18-207(1) (1996); KAN. STAT. ANN. § 22-3220 (1995); MONT. CODE ANN. § 46-14-101(1) (2005); see also *Clark v. Arizona*, 126 S. Ct. 2709, 2731-32 (2006) (holding that Arizona does not violate due process in restricting consideration of defense evidence of mental illness and incapacity).

difficulty in describing punishment in consequentialist terms. What else should we expect from a theory of punishment other than an accurate description of our actual practices and a cogent explanation of the reasons behind them?

There may be no reason to expect something different from a theory of punishment, but we do. The scapegoating objection is not meant to evaluate theories of punishment. It is meant to evaluate theories of *just* punishment. Consequentialism as a moral theory is evaluated by running it up against common judgments about the good or right action.⁶ Consequentialism as a punishment theory is evaluated by running it up against common judgments about just punishment.⁷ Hence the scapegoating objection and consequentialism's purported error in describing punishment. To treat the scapegoating objection as something other than a way to evaluate theories of just punishment is to miss its point. It is no response to the scapegoating objection to say that a simple act-consequentialism describes existing practices perfectly well, if those practices themselves are implausible as instances of just punishment. This is why my examination of the scapegoating objection above seems like a willful misinterpretation of it.

This willful misinterpretation serves, nevertheless, to indicate a potential for confusion between legal and moral theory. A theory of just punishment is not necessarily a theory of legal punishment. The scapegoating objection applies just as well to the punishment of children and the sanctions of social etiquette. It would be unjust to spank a child because I could not catch a different child who broke a window. It would be unjust to disinvite one friend to my party because I cannot disinvite the friend who insulted me, but whose attendance is necessary to make the party a success. A punishment theory that authorized these acts would seem to be mistaken. But in this light, the scapegoating objection has nothing in particular to do with law. To consciously pursue the theory of punishment as legal theory would help to ensure that only legal punishment, with its distinctive features, is under consideration.

6. See Kyron Huigens, *Dignity and Desert in Punishment Theory*, 27 HARV. J.L. & PUB. POL'Y 33, 34 n.6 (2003).

7. See Andrew R. Strauss, Note, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1560-61 (2002).

Overlooking the difference between moral theorizing and legal theorizing about punishment also clouds our thinking about desert, leaving the relationship between moral desert and legal desert unclear. The conception of desert that predominates in punishment theory is desert as a moral condition of legal punishment; that is, legal punishment is imposed only if punishment is morally deserved. George Fletcher makes the condition clear via an implicit condemnation of consequentialist theories of punishments in this passage:

If the law ignored the question of attribution, namely, the question whether individuals were properly held accountable for their wrongful acts, the criminal law undoubtedly would generate some unjust decisions. If it were true that the only relevant norms of the legal system were those of wrongdoing, injustice would be inescapable in cases in which individuals could not but violate the law. The insane would be punished like the sane; those who acted under duress would be punished like those who acted freely. If this were the English common law, one might indeed need a utilitarian theory in order to make sense of the systematic indifference to the accountability of individual defendants. Yet this is not the law and it never has been the law of any civilized society.⁸

The notion of desert as a moral condition of legal punishment is stated expressly in this passage from Herbert L. Packer:

[T]he prevention of crime is the primary purpose of the criminal law; but that purpose, like any social purpose, does not exist in a vacuum. It has to be qualified by other social purposes, prominent among which are the enhancement of freedom and the doing of justice. The effectuation of those purposes requires placing limits on the goal of crime prevention. Chief among those instrumental limits is this one: a finding of moral responsibility is a necessary although not a sufficient condition for determining criminal guilt and meting out punishment for it.⁹

8. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 511 (1978).

9. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 16 (1968).

Similarly, Hyman Gross writes: "Condemning one who is blameless is universally abhorred as an injustice, and it is astonishing that those who advocate criminal liability regardless of culpability do not perceive this abhorrence as an insurmountable obstacle to the adoption of their program."¹⁰ More recently, but in the same vein, Paul Robinson writes of the defenses in general that, "taken together, these doctrines serve 'to safeguard conduct that is without fault from condemnation as criminal,' and it is the criminal law's moral condemnation that distinguishes criminal liability from civil."¹¹ It seems a fair inference that Robinson too views moral desert as a condition of legal punishment.

There are, however, two ways in which moral desert might serve as a condition of legal punishment. It might serve as a condition of just punishment or it might serve as a condition of valid punishment. One problem with punishment theory as it is ordinarily conducted is that it usually is unclear which condition is being examined. Fletcher and Gross appear to be describing moral desert as a condition of just punishment; Packer appears to be describing moral desert as a condition of valid punishment; and in the two clauses of the quotation from Robinson he appears to be describing, respectively, both aspects of desert. None of the four writers, however, seems aware of this ambiguity. My purpose in the next Part is to examine the less familiar use of moral desert—as a condition of legal validity—in a descriptive jurisprudence of punishment.

II. CRIMINAL FAULT AND MORAL FAULT

The use of moral desert as a condition of just punishment is so unproblematic as to be invisible. The use of moral desert as a condition of the legal validity of judgments of punishment has an air of paradox. Granted that criminal law and ordinary morality are parallel in many of their prohibitions and defenses, they are nevertheless two distinct and different normative systems. To say that moral desert is a condition of legal validity presents a picture

10. HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 414-15 (1979).

11. PAUL H. ROBINSON, *CRIMINAL LAW* 9 (1997) (quoting MODEL PENAL CODE § 1.02(1)(c) (1962)) (footnote omitted).

of the jury's being required to leave law in order to find something that cannot be found in law, but that law requires. Why should we think that law is dependent on its sister normative system in this way? If the law is dependent in this way, is this dependence an innocuous feature or a genuine cause for concern? The obvious place to look for an answer to these questions is modern jurisprudence, a field in which the central question is the nature of legal validity and its relationship to morality.

A. Nonpositivist Jurisprudence and Criminal Fault

In ordinary punishment theory, a judgment of legal punishment is just, or valid, only if it imposes morally deserved punishment.¹² Several senses of "desert" need to be distinguished, because one plays a more prominent role than the others for present purposes. The desert at issue in the scapegoating objection is desert as identity and cause in fact. Desert in this sense is merely the attribution of wrongdoing to the proper agent. Criminal law addresses desert in two other, more controversial senses, and does so in two distinct categories of defense. The accused might deny that he is a fully competent agent and, as such, a fair candidate for legal punishment—as in the defenses of insanity, minority, or duress. Or the accused might contest an aspect of the alleged wrongdoing itself: the distinctive element in criminal offenses that is missing in cases of mistake of fact or that is subjected to a complex, structured adjudication in cases of provocation.¹³ I will refer to the former kind of desert as fair candidacy and to the latter kind as fault. This Essay will focus on fault, because its being an aspect of legal wrongdoing makes the paradox noted above more acute here than elsewhere. In what follows, references to "desert" should be read as references to "fault," unless otherwise noted.

Taking up the main argument again, consider John Finnis's description of criminal fault:

12. See *supra* note 9 and accompanying text.

13. As I have explained elsewhere, the prevailing views of provocation as a partial excuse or a partial justification are wrong. Provocation is a doctrine of nonintentional fault, or, as it is more widely known, objective culpability. Kyron Huigens, *Liberalism, Normative Expectations, and the Mechanics of Fault*, 69 MOD. L. REV. 462, 472-73 (2006).

Sanctions are punishment because they are required in reason to avoid injustice, to maintain a rational order of proportionate equality, or fairness, as between all members of the society. For when someone, who really could have chosen otherwise, manifests in action a preference (whether by intention, recklessness, or negligence) for his own interests, his own freedom of choice and action, as against the common interests and the legally defined common way-of-action, then in and by that very action he gains a certain sort of advantage over those who have restrained themselves, restricted their pursuit of their own interests, in order to abide by the law.¹⁴

Notice three things here. Finnis's concern is legal punishment in particular, not punishment in general. This description of fault does not apply to the punishment of children or social sanctions on violations of etiquette, neither of which concerns "the legally defined common way-of-action."¹⁵ Second, fault is described as integral to criminal wrongdoing, implying that it is a necessary condition on liability for such wrongdoing. And third, the fault at issue here is moral fault, because it pertains to "a rational order of proportionate equality ... as between all members of the society."¹⁶ For Finnis, then, a legal judgment of punishment is valid only if it imposes morally deserved punishment.

Finnis's description of fault is a description of valid punishment, not just punishment because it is fully integrated into his natural law jurisprudence. Finnis accepts a critical component of H.L.A. Hart's account of law: his argument that law is not merely a system of commands backed by threats.¹⁷ Instead, from the "internal point of view," it is clear that law creates a sense of obligation and a basis for criticism of actions inconsistent with law.¹⁸ And Finnis agrees with Hart that the correct perspective for theorizing about law is the internal point of view—that of a participant in the legal system who feels obligations within the system.¹⁹ But Finnis argues that the

14. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 262-63 (1980).

15. *Id.* at 263.

16. *Id.* at 262.

17. *Id.* at 7.

18. *Id.* at 12.

19. *Id.*

internal point of view can be and should be further specified.²⁰ Participants in the system vary in their allegiances and attitudes to law, so there is a choice to be made about the participant whose view of law matters.²¹ The central or focal case of the internal point of view is that of a person of sound morality or, more precisely, a person of practical reasonableness.²² From this, Finnis concludes:

A sound theory of natural law is one that explicitly, with full awareness of the methodological situation just described, undertakes a critique of practical viewpoints, in order to distinguish the practically unreasonable from the practically reasonable, and thus to differentiate the really important from that which is unimportant or is important only by its opposition to or unreasonable exploitation of the really important. A theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct.²³

A person who "manifests in action a preference ... for his own interests, his own freedom of choice and action, as against the common interests and the legally defined common way-of-action"²⁴ does not appreciate or act according to "principles of practical right-mindedness, of good and proper order among men and in individual conduct."²⁵ This is criminal fault as moral fault, full stop.

A Dworkinian account of criminal fault likewise identifies criminal fault with moral fault. Ronald Dworkin, like Finnis, describes legal validity in terms of moral validity. His famous claim that there are right answers in hard cases means that when the law is unclear, or when there is no applicable law on a given question, law can be extended by means of interpretation to provide a legally valid answer.²⁶ Validity depends on whether the law, so interpreted, maintains its integrity;²⁷ an interpretation maintains the law's

20. *See id.* at 13.

21. *Id.*

22. *Id.* at 15-16.

23. *Id.* at 18.

24. *Id.* at 262-63.

25. *Id.* at 18.

26. RONALD DWORKIN, *LAW'S EMPIRE* 255-56 (1986).

27. *Id.* at 257-58.

integrity if it puts the law in its best moral light; and the law is placed in its best moral light when it demonstrates equal concern and respect for persons.²⁸

Dworkin has not given us an account of criminal fault,²⁹ but Jeremy Horder's recent book on the excuses (a British term that translates into absence of fault in American terms)³⁰ offers an explicitly Dworkinian view. Horder proposes three novel defenses, "suggesting three ways in which the law should be developed to become *distinctively* liberal in its excusatory outlook."³¹ According to Horder, those defendants who are "short-comer[s]" fail at least sometimes because of their mental or emotional make-up.³² One of his defenses, for example, would allow a defendant "to combine evidence of lost self-control following something rather less than the gravest of provocations, with evidence of a mental deficiency falling short of insanity or of some other serious mental disorder."³³

Horder describes a key feature of his distinctively liberal approach to criminal fault when he writes that "[f]act-finders should be provided with a more general, formal means of expressing an opinion about the moral appropriateness of conviction."³⁴ He describes his proposed defenses as serving the Dworkinian legal values of equal concern and respect,³⁵ and argues that the defenses contribute to reciprocity between society and the individual—another value in Dworkinian political morality. This reciprocity, Horder argues, entails an opportunity for the defendant to raise moral arguments against criminal liability:

As when murder is reduced to 'voluntary' manslaughter, there is thus a formal role at the stage of *conviction itself* for the fact-finder to decide the fate of the offender on a broader range of moral criteria than is currently possible, whether or not the

28. *Id.* at 215-16.

29. The closest he has come to doing so is a short critique of one of Hart's arguments from *Punishment and Responsibility*. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 8-13 (1977).

30. See Huigens, *supra* note 13, at 466.

31. JEREMY HORDER, *EXCUSING CRIME* 197 (2004).

32. *Id.* at 163.

33. *Id.* at 150.

34. *Id.* at 144.

35. *Id.* at 4.

definitional elements of the offence in question involve some kind of moral appraisal.³⁶

These defenses are proposals for liberal law reform, but Horder's description of them is a philosophical account of criminal fault in Dworkinian terms.

This description of the absence of fault in terms of morally defensible acts is substantively indistinguishable from Finniss's description of criminal fault as a feature of morally condemnable acts. Both descriptions, significantly, are integrated into a larger conception of legal validity. The implication is that a judgment of punishment is legally valid only if punishment is morally deserved.

B. Inclusive Legal Positivism and Criminal Fault

Although legal positivists insist on the conceptual separation of law and morality, they do not reject the notion that morality can be incorporated into accounts of legal validity, and would not reject a rule that legally valid punishment must be morally deserved.

H.L.A. Hart rejected the simplistic view that crime "is the 'intentional or reckless doing of a morally wrong act,'"³⁷ and carefully distinguished between the principle that it is morally wrong to punish those whose wrongdoing is not voluntary (or intentional), and the principle that only those who have voluntarily (or intentionally) committed a moral wrong may be punished.³⁸ Nevertheless, Hart's essays on punishment strongly suggest that criminal fault can be construed as moral fault.

In *Punishment and the Elimination of Responsibility*, Hart wrote:

Human society is a society of persons; and persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered. Instead persons interpret each other's movements as manifestations of intentions and choices The bearing of this fundamental fact on the law is this. If as our legal moralists

36. *Id.* at 146.

37. H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 4, at 28, 36 (quoting JEROME HALL, PRINCIPLES OF CRIMINAL LAW 149 (1947)).

38. *Id.* at 38-39.

maintain it is important for the law to reflect common judgments of morality, it is surely even more important that it should in general reflect in its judgments on human conduct distinctions which not only underly [sic] morality, but pervade the whole of our social life.³⁹

The phrasing here suggests that the question is prescriptive, concerning how the law ought to be written. The passage, however, occurs in a discussion of whether desert has any necessary connection to retributivist, or deontological, accounts of criminal fault, to the exclusion of consequentialism.⁴⁰ That is, the discussion occurs at the same level of controversy occupied by the scapegoating objection—that concerning the choice of theory. Hart's argument is offered in support of the thesis that our choice of theory should not be affected by our views on moral fault, because moral fault can be a feature of criminal fault on any theoretical description of legal punishment. This argument assumes that morality can be implicit in criminal fault as a descriptive matter.

This reading is consistent with Hart's "soft" or inclusive legal positivism. Another of Hart's key innovations, in addition to his description of the internal point of view, is the notion of a rule of recognition. A rule of recognition is a social rule that determines legal validity; for example, laws passed by Congress in accordance with constitutional procedure should be followed. A rule of recognition is constituted by a community's engaging in a certain practice with the attitude that the practice is obligatory.⁴¹ Ronald Dworkin's major objection to Hart's jurisprudence concerned the place of moral principles in the rule of recognition. Dworkin argued that the sense of obligation and the intelligibility of criticism that bring a rule of recognition into existence could not be the product of a social practice itself, but that they must be separately premised on morality. Because the rule of recognition cannot validate moral principles, moral principles are prior to the rule of recognition. A

39. H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 4, at 158, 182-83.

40. *Id.* at 177.

41. H.L.A. HART, *THE CONCEPT OF LAW* 256-57 (2d ed. 1994).

rule of recognition must incorporate moral principles in order to do the job Hart described.⁴²

In response, Hart and other positivists conceded the role of moral principles and asserted that they could indeed be incorporated into a rule of recognition. Dworkin had argued that controversial moral claims could not be incorporated into the rule of recognition without fatally detracting from its central role as Hart had described it: providing certainty about which rules ought to be followed in an environment of conflicting and evolving duties and prohibitions. To incorporate morality into the rule of recognition, Dworkin alleged, would render a legal system unstable, from Hart's point of view.⁴³ Hart replied that the tolerable level of uncertainty in a legal system varies, and so there is no reason to expect the incorporation of moral principles in a rule of recognition to cause instability.⁴⁴ Dworkin also argued that legal positivism is motivated by doubts about moral realism and alleged a resulting positivist rejection of moral criteria in law.⁴⁵ Hart denied that any such antirealist motivation can be found in legal positivism, because legal positivism is simply agnostic on the question of moral realism. If a rule of recognition incorporates a moral principle, then "whatever the answer is to this philosophical question, the judge's duty will be the same: namely, to make the best moral judgment he can on any moral issues he may have to decide."⁴⁶

This last point deserves emphasis for reasons more central to this Essay's purpose. First, a valid legal judgment, no less than a valid legal rule, is identified by a rule of recognition. That a judgment is directed to legal officials instead of ordinary citizens—that it is a secondary rule instead of a primary rule—does not deprive it of its conduct-guiding function.⁴⁷ My judgment that my rival should be imprisoned is no more valid than my decree that all persons should defer to me in all matters. A rule of recognition tells us this. The same rule tells us that a judgment and sentence issued by a court

42. DWORKIN, *supra* note 26, at 39-45.

43. See RONALD DWORKIN, RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 248 (Marshall Cohen ed., 1983).

44. HART, *supra* note 41, at 251-52.

45. DWORKIN, *supra* note 43, at 250.

46. HART, *supra* note 41, at 254.

47. See JOSEPH RAZ, *The Functions of Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 163, 178 (1979).

of general jurisdiction in any of the United States does indeed authorize the imprisonment of the offender described in that judgment, just as it purports to do.

Second, the proposition that a judgment of punishment is legally valid only if punishment is morally deserved describes a rule of recognition for such judgments. For example, suppose that strict criminal liability results in judgments of punishment when punishment is not morally deserved—perhaps the most common understanding of strict criminal liability.⁴⁸ Strict criminal liability was at one time alleged to be invalid under the Fifth Amendment.⁴⁹ Constitutional provisions are paradigmatic rules of recognition, and they often impose moral requirements. The due process challenge to strict criminal liability was an assertion of a rule of recognition to the effect that a judgment of punishment is valid only if punishment is morally deserved. As Hart's reply to Dworkin indicates, Hart's jurisprudence does not deny that judges make such moral decisions.⁵⁰ Inclusive legal positivism, no less than non-positivist jurisprudence, recognizes a role for moral desert in determining legal validity.

C. Exclusive Legal Positivism and Criminal Fault

As the name implies, exclusive legal positivism excludes moral principles from rules of recognition; more specifically, from the sources of such rules. Hart's positivism rests on a social thesis: the notion that a rule of recognition is the product of social practices.⁵¹ Nothing in the social thesis bars moral principles from a role in the origins of a rule of recognition. In contrast, Joseph Raz advances a "sources thesis."⁵² A rule of recognition is not only a social practice.

48.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. United States, 342 U.S. 246, 250 (1952).

49. See *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 69-70 (1910).

50. See HART, *supra* note 41, at 247.

51. See *id.* at 115-17.

52. JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 194, 195 (1994) [hereinafter *ETHICS IN THE PUBLIC*].

It must also have a legal pedigree; that is, one must be able to trace the rule of recognition back to a legal institutional source.⁵³

The exclusion of moral principles from the sources of a rule of recognition is a product of a particular conception of authority, a "service" conception, that strongly distinguishes legal norms from other norms.⁵⁴ The service provided by law is the exclusion of reasons that might mislead one into ill-considered action. This conception of authority is analogous to Raz's conception of the role of rules in practical reasoning.⁵⁵ We have reasons for action, and practical rationality consists largely in our acting on the balance of reasons. However, we also have second-order reasons—reasons about reasons—that sometimes dictate that we not act on the balance of reasons.⁵⁶ Rules are second order, exclusionary reasons of this kind. A rational rule points us toward action according to the balance of reasons in a range of similar situations of choice. If we follow a rule consistently, we will inevitably find ourselves acting against the balance of first-order reasons on some occasions. But this is still rational, because the rule has enabled us to act in accordance with the balance of reasons in the vast majority of cases. The rule, moreover, has enabled us to do this both consistently and without further hazardous and costly deliberation.

Authority is like rules in this respect. The justification of authority lies in the fact that an individual has a better chance of acting consistently according to right reasons if he follows the directives of authority.⁵⁷ The directives of an authority might be based on reasons that apply to individuals making their own decisions. After the reduction of ordinary reasons into a rule, however, the rule must preempt the reasons on which an individual might have acted. This is part of the nature of authority as Raz describes it, using an arbitration as his example:

DOMAIN].

53. See JOSEPH RAZ, *The Relevance of Coherence*, in *ETHICS IN THE PUBLIC DOMAIN*, *supra* note 52, at 261, 280 n.28.

54. RAZ, *supra* note 52, at 198-99.

55. *Id.*; see JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 63-64 (Princeton Univ. Press 1990) (1975).

56. RAZ, *supra* note 55, at 39-40.

57. RAZ, *supra* note 52, at 198-99.

Two features [of the arbitrator's authority] stand out. First, the arbitrator's decision is for the disputants a reason for action. They ought to do as he says because he says so. But this reason is related to the other reasons which apply to the case. It is not just another reason to be added to the others, a reason to stand alongside the others when one reckons which way is better supported by reason. The arbitrator's decision is meant to be based on the other reasons, to sum them up and to reflect their outcome.⁵⁸

Raz continues:

The arbitrator's decision is also meant to replace the reasons on which it depends. In agreeing to obey his decision, the disputants agreed to follow his judgment of the balance of reasons rather than their own. Henceforth his decision will settle for them what to do.... Because the arbitrator is meant to decide on the basis of certain reasons, the disputants are excluded from later relying on them. They handed over to him the task of evaluating those reasons. If they do not then reject those reasons as possible bases for their own action, they defeat the very point and purpose of the arbitration. The only proper way to acknowledge the arbitrator's authority is to take it to be a reason for action which replaces the reasons on the basis of which he was meant to decide.⁵⁹

Without this peremptory force, the reasons that an authority gives are not authoritative at all. "What distinguishes authoritative directives is their special peremptory status. One is tempted to say that they are marked by their authoritativeness."⁶⁰

The exclusive nature of Raz's legal positivism is dictated by this conception of authority. Moral reasons can be reasons on which law is based, because they are reasons for which individuals act. But once the law is adopted, these moral reasons themselves can no longer guide action. They are reasons that legal authority preempts. Without its peremptory force—law's power to exclude nonlegal reasons—legal authority is not authoritative. Because law must be

58. *Id.* at 196.

59. *Id.* at 196-97.

60. *Id.* at 196.

the kind of institution that at least purports to exercise authority, a rule of recognition cannot be the product of moral reasons in the way that Dworkin claims it must be,⁶¹ and that inclusive legal positivism concedes it is. A rule of recognition that lacks authority cannot legally determine the validity of other rules.

Suppose a rule of recognition were to have a moral principle as its source. In order to determine the existence of a rule of recognition, one would have to apply the moral principle. But if this were done, then the rule of recognition would not authoritatively determine legal validity. Instead, the existence of the rule of recognition itself, and hence the validity of legal rules under it, would depend on the dictates of the moral principle. In any conflict between the legal rule and the moral principle, the latter would control. The rule of recognition itself would lack peremptory force, and would not be authoritative. The social practices constituting the rule of recognition can consist only of the actions and intentions of legal authorities. The constituent social practices of a rule of recognition must have legal pedigrees.⁶²

As with inclusive legal positivism, however, nothing that has been said so far precludes a rule of recognition's appealing to morality in its content, as opposed to its sources. To say the rule of recognition must be the product of legal sources, excluding moral principles, is not to say that a rule of recognition cannot invoke or advert to a moral principle as a criterion of legal validity.

A clear case in point is constitutional adjudication of the interpretation and application of bills of rights. Rights of freedom of expression, assembly, the free exercise of religion, freedom of movement, privacy, non-discrimination, and others are typically declared in broad terms, and the courts are left free to develop legal doctrines giving these rights concrete content in light of sound moral considerations.⁶³

61. See *id.* at 206-10.

62. There is an obvious chicken-and-egg problem here: if the rule of recognition identifies valid legal rules, then what identifies the valid legal rules that make up the pedigree of the rule of recognition? This problem is the starting point of Scott Shapiro's defense of exclusive legal positivism. Scott J. Shapiro, *On Hart's Way Out*, in *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 150, 152 (Jules Coleman ed., 2001).

63. JOSEPH RAZ, *On the Autonomy of Legal Reasoning*, in *ETHICS IN THE PUBLIC DOMAIN*, *supra* note 52, at 261, 318.

Criminal law has analogous features. Criminal codes commonly contain terms such as “malice,”⁶⁴ “depraved mind,”⁶⁵ “heinous, atrocious, and cruel,”⁶⁶ and “extreme indifference to the value of human life.”⁶⁷ The moral content of these criteria is plain, as is that of any rule of recognition that requires finding them as a condition of a legally valid judgment of punishment. But nothing in exclusive legal positivism rules them out for either role.

A judgment of punishment pursuant to a set of jury instructions containing these morally charged terms is obviously valid. The claim that a judgment of punishment is valid only if punishment is morally deserved is a perfectly good rule of recognition under either inclusive or exclusive legal positivism. The due process challenge to strict criminal liability was the assertion of a rule of recognition such as that described by Raz in the passage quoted just above—a claim about the content and meaning of a bill of rights.⁶⁸ The content of this rule of recognition appeals to moral criteria—the due process value of fundamental fairness in particular—but nothing in exclusive legal positivism rules out such an appeal.

A conflict between ordinary punishment theory and exclusive legal positivism would arise only if the pedigree of this rule of recognition were said to have a moral component. For example, assume that the passages above from Fletcher,⁶⁹ Robinson,⁷⁰ Packer,⁷¹ and Gross⁷² assert a rule of recognition, the content of which is that a judgment of punishment is valid only if punishment is morally deserved. Only the further claim that morality is the source of this rule of recognition runs into trouble, because exclusive legal positivism requires a legal institutional source for this rule. This rule of recognition cannot itself be required by morality.

64. See, e.g., 18 U.S.C. § 1111(a) (1994) (“Murder is the unlawful killing of a human being with malice aforethought.”).

65. See, e.g., Bernard E. Gegan, *More Cases of Depraved Mind Murder: The Problem of Mens Rea*, 64 ST. JOHN’S L. REV. 429, 437 (1990) (summarizing the history of depraved-mind murder).

66. See, e.g., MODEL PENAL CODE § 210.6(3)(h) (1962).

67. See, e.g., *id.* § 210.2(1)(b).

68. RAZ, *supra* note 63, at 318.

69. FLETCHER, *supra* note 8, at 511.

70. ROBINSON, *supra* note 11, at 9.

71. PACKER, *supra* note 9, at 16.

72. GROSS, *supra* note 10, at 414-15.

We seem now to have reached a dead end in describing ordinary punishment theory in jurisprudential terms. As noted above, it is simply unclear whether Fletcher, Robinson, Packer, or Gross means to describe a rule of recognition at all when he asserts that legal punishment should be morally deserved. That is, it is unclear whether they view judgments of punishment that violate the requirement of moral desert as invalid judgments, or as valid judgments that are unjust. It is even less clear whether, assuming that one of them does mean to describe a rule of recognition, he would claim that this rule of recognition has a moral source or an exclusively legal source. Exclusive legal positivism rules out the former and requires the latter, but whether there is a conflict between exclusive legal positivism and ordinary punishment theory on this point is unclear.

D. The Peculiar Jurisprudential Problem of Aretaic Punishment Theory

An Aristotelian or aretaic theory of punishment, in contrast, suffers from a peculiar and inconvenient clarity on this point. That theory is apparently tied to a single conception of the sources of legal validity. The most obvious jurisprudential home of a punishment theory drawing on virtue ethics is a natural law theory, such as the jurisprudence of John Finnis, which grounds both moral and municipal law in the common good.⁷³ Virtue is not, as colloquial usage suggests, a matter of strict adherence to a moral code. Virtue consists of a perspicacious practical reasoning exercised only by those whose desires are well-ordered with respect to the common good, as a result of their attention to and respect for the common good in their long-term deliberations on ends.⁷⁴ An aretaic theory of punishment portrays criminal fault as a failure in deliberations on ends, culminating in the criminal act.⁷⁵ Such a theoretical account

73. See FINNIS, *supra* note 14, at 100-03.

74. See Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1449-54 (1995).

75. See, e.g., *id.*; Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 278-79 (1995); John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575 (1998); Samuel Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 106, 150-51 (1996). More precisely, fault described as a failure in deliberations on ends includes not only vice, but also *akrasia*—the inability to conform conduct even when one can see the virtuous course of action. Nonfaulty or, in British theoretical terms, excused conduct, includes

of criminal fault echoes Finnis's description of fault as involving an actor's "preference (whether by intention, recklessness, or negligence) for his own interests, his own freedom of choice and action, as against the common interests and the legally defined common way-of-action."⁷⁶ An aretaic theory's implicit jurisprudence of punishment can easily be seen as a natural law jurisprudence that "undertakes a critique of practical viewpoints, in order to distinguish the practically unreasonable from the practically reasonable," and that identifies the "conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct."⁷⁷

If an aretaic theory of punishment were grounded in natural law jurisprudence, then the validity of a judgment of punishment and its underlying finding of fault would not depend on a rule of recognition with exclusively legal sources. It would not depend on a rule of recognition at all. Finnis asserts that legal validity requires a principle of practical reasonableness, or morality, that supersedes the role of a rule of recognition.

By his decision to stipulate that ϕ is legally obligatory for X, a person with authority to make laws brings it about that (i) ϕ is legally obligatory and thus (presumptively) that (ii) ϕ is morally obligatory. But ... these consequences flow not from any "force" of the lawgiver's "superior will," but from the interrelationship between (a) the fact that he has thus decided and (b) a "higher" (or "deeper") principle that makes that fact legally and/or morally significant. In a strictly legal analysis, that further principle will consist in some law which imputes legal effect to specified types of legislative act And in the wider perspective of practical reasoning, which includes but goes beyond the confines of legal reasoning, the relevant further principles will be the principles that the common good is to be advanced, that authoritative determination of co-ordination problems is for the

not only virtuous conduct but also *enkratic*—merely prudent, rule-abiding—conduct. Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 465, 493 (2004).

76. FINNIS, *supra* note 14, at 262-63.

77. *Id.* at 18.

common good, and that legal regulation is (presumptively) a good method of authoritative determination.⁷⁸

For Raz, in contrast, law has a distinctive authority that is inconsistent with morality's playing the role Finnis envisions.⁷⁹

However, an Aristotelian conception of criminal fault need not be tied to a natural law jurisprudence. Practical reasonableness need not play the role with respect to fault that Finnis describes. A theory of legal punishment might be recognizably Aristotelian because it draws on other features of virtue ethics instead, such as its distinctive moral particularism, its use of abductive reasoning,⁸⁰ its rich conception of deliberation on ends, and its resulting account of responsibility for ends. A conception of criminal fault that I call the specification account of fault draws on these features of aretaic moral theory, and is unlike Finnis's conception of criminal fault. Let me lay out this aretaic description of criminal fault as briefly as I can in Part III of this Essay. This will serve to separate my version of aretaic punishment theory from that suggested by Finnis. How thoroughly this separation can be done will be the subject of Part IV.

III. THE SPECIFICATION ACCOUNT OF CRIMINAL FAULT

In order to conclusively separate aretaic punishment theory from natural law jurisprudence, we might seek a conception of legal desert for punishment, as opposed to moral desert for punishment.

78. *Id.* at 334-35 (footnote omitted). It should be noted, however, that the passage is significantly ambiguous. One can read Finnis to say that a principle of morality makes a legal rule valid, without recourse to a rule of recognition; or that a rule of recognition must require a principle of morality. As I read it, the "strictly legal analysis" that involves a rule of recognition is not the same as "legal reasoning," in which case a rule of recognition would be an alternative to "the wider perspective or practical reasoning." However, it might be that the "strictly legal analysis" that involves a rule of recognition is the same as the "legal reasoning" that is a subset of "the wider perspective of practical reasoning," making a rule of recognition a part of that wider perspective. The latter reading seems more natural from the text alone, but because it would make Finnis an inclusive legal positivist, it seems unlikely in the end.

79. See RAZ, *supra* note 52, at 198-99.

80. See MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 161-62 (1997) (explaining abductive reasoning); Kyron Huigens, *The Dead End of Deterrence and Beyond*, 41 WM. & MARY L. REV. 943, 1024-25 (2000) (using abductive reasoning to describe criminal wrongdoing in virtue-ethics terms).

Rawls described legally deserved punishment as punishment for the violation of a legal prohibition.⁸¹ Given that this conception of legal desert covers not only strict criminal liability but also scapegoating within the rule of law, it is obviously too strong. Furthermore, to say that a judgment of punishment is legally valid only if punishment is legally deserved seems vacuous. For reasons such as these, punishment theorists have skipped over the notion of legal desert and have resorted immediately to moral desert in describing legally valid judgments of punishment. But a precise conception of legal desert is neither too strong nor vacuous. Such a conception of legal desert is to be found in an aretaic theory of punishment, in a theoretical description of criminal fault that I call the specification account.

Under an aretaic theory, criminal fault is an inference, drawn in the course of the adjudication of wrongdoing, to the effect that the practical reasoning of the defendant is deficient.⁸² This deficiency is relevant in one way or another to most of the reasons usually cited as functions of punishment: deterrence, retribution, incapacitation, education in public norms, and social catharsis. Practical reasoning is deficient if it pays no heed to public norms, if the reasoning agent is not deterred by the prospect of punishment, and so on. This assessment of the quality of the defendant's practical reasoning is not limited to his reasoning in connection with the offense—even if “in connection with” is given a very broad construction. It extends, in addition, to an assessment of the defendant's set of standing motivations, or ends—to their acquisition, development, maintenance, and ultimate issuance in the alleged offense.⁸³ From an opposite perspective, criminal fault is an aspect of criminal wrongdoing. That is, the manner, circumstances, and specifics of the individual instance of wrongdoing alleged against the defendant are the subject matter of the adjudicative assessment of the quality of his practical reasoning just described.

This adjudicative assessment of fault is complementary to the statute's general prohibition. From the point of view of an assessment of the quality of practical reasoning, the legislation of a

81. Rawls, *supra* note 3, at 7-8 & n.8.

82. Huigens, *supra* note 75, at 487-89.

83. *See id.* at 487.

criminal prohibition is a generalization about how people have reasoned well or poorly in a large set of specific, more or less similar, cases. A jury determining criminal liability applies the prohibition to a particular set of facts, and in the course of determining the relevance of one to the other the prohibition is made more specific. In other words, a finding on fault requires the jury to return the general prohibition to the level of specificity at which it originated. At this specific level, the actual course that the defendant followed, and the quality of decisions he made in that regard, can be meaningfully assessed under the general prohibition. With respect to the justification of punishment, this complementary specification of the prohibition brings whatever justifying force the prohibition has down into the individual case.

The specification of a criminal prohibition in adjudication is the process usually referred to as the jury's applying the law to the facts.⁸⁴ It is different from both the interpretation of the prohibition's terms and the exercise of discretion in order to fill its interstices. Specification is a reciprocal process involving the selection of facts that are relevant to the prohibition, and the reinterpretation of the prohibition's positive terms in light of the facts selected.⁸⁵ For example, one jury whose deliberations were videotaped considered the case of a defendant who was charged with being a felon in possession of a weapon.⁸⁶ He had honestly but imprudently complied with a police officer's request to bring his handgun into the station. The videotape shows the jury working over the word "know" in its instructions in light of the fact that the defendant clearly did not grasp the significance of his action. They painstakingly revised "know" to mean something closer to "appreciate," so as to account not only for the cognitive dimension of the defendant's practical reasoning but also for its evaluative and motivational dimensions. In this way, they avoided the unjust result that would have followed from a simpler application of their instructions.⁸⁷ Similarly, one can

84. This description of specification draws heavily on Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199 (1998).

85. *Id.* at 1219-21.

86. See *Frontline: Inside the Jury Room* (PBS television broadcast Apr. 8, 1986) (televising a jury deliberation).

87. See Brown, *supra* note 84, at 1245-49.

easily imagine the case of a sympathetic defendant who did not face either an imminent threat of death or circumstances that reasonably explain his highly emotional resort to violence—leaving him in a gap between two defenses. It would not be surprising to find a jury faced with such a case reinterpreting “imminence” or “threat” in order to expand self-defense; or shifting the focus of its provocation instructions from an objective evaluation of the defendant’s emotional distress to a more subjective one. Similarly, a jury might interpret its instructions on accomplice liability so as to contract the liability of a minor participant, or read its instructions on attempt so as to reduce the exposure of an otherwise appealing attempter who does not renounce completely, or in time, or who abandons his attempt in response to a threat of detection. All of this activity falls well short of nullification.⁸⁸ It is, instead, a normal feature of the adjudication of criminal fault.

Criminal law does not merely tolerate the specification of its prohibitions in adjudication; it relies on specification to inject a necessary measure of moral particularism into its processes. Specification serves the criminal law’s concern with granularity. Granularity can be defined as the relative level of under- and over-inclusiveness in our rules of criminal liability, relative to a background of moral desert; or defined, alternatively, as the degree of congruence between our legal judgments of desert and our moral judgments of desert. Granularity affects the moral and political authority of criminal law, and is a function of two conflicting ends of the law: moral particularity and formality. The pursuit of legal formality bolsters respect for criminal law by reducing arbitrariness and unpredictability in the legal system; but this pursuit entails both the creation of interstices associated with rules, and also a loss in sensitivity to context. The pursuit of moral particularity, on the other hand, accommodates a public that has little tolerance for counterintuitive legal judgments. But of course it requires a relaxation of formality and detracts from our pursuit of traditional rule of law values such as notice of the prohibition and legislation *ex ante*. Granularity is addressed at several points in criminal law—including resort to objective fault criteria in the drafting of

88. See Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1169-71 (1997)

offenses⁸⁹ and the tradition (nearly lost, but now reviving) of judicial discretion in sentencing⁹⁰—but the jury’s specification of the prohibition in adjudication is the most important phase in this effort, if only because it bears most immediately on the central question of the guilt or innocence of individuals. Specification of the prohibition in the adjudication of fault is essential to the regulation of granularity, and thus to the criminal law’s moral and political authority.⁹¹

The specification of a criminal prohibition determines criminal fault—legal desert for legal punishment. Desert for punishment is notoriously difficult to define, but specification plainly aims at it. Think about what we do know about desert for punishment. It is some quality of the prohibited act over and above the nominal violation of the prohibition’s terms; beyond, but related to, the prohibited act or result. The nearly universal resort to moral fault for the theoretical description of this quality indicates that desert for legal punishment is informal and particularistic. This particularistic evaluation has something to do with the defendant’s practical reasoning—as evinced by the nearly universal resort to intentional states of mind in order to describe criminal fault doctrinally. And yet desert for punishment notoriously cannot be captured by intentional states alone; it involves a broader evaluation of practical reasoning⁹²—as evinced in the resistance of nonintentional fault criteria to mid-twentieth-century efforts to eradicate them from modern criminal codes. The specification account of criminal fault describes each of these aspects of desert for legal punishment, in its description of the criminal prohibition’s transformation, for adjudicative purposes, into a particularistic, relatively informal evaluation of the quality of the defendant’s practical reasoning, emphasizing particularly his deliberations on ends.

The same features of the specification account of criminal fault make it a distinctively aretaic account. Virtue ethics notoriously

89. See Kyron Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. REV. 97, 121-25 (2002).

90. See Kyron Huigens, *Solving the Williams Puzzle*, 105 COLUM. L. REV. 1048, 1069 (2005).

91. See *id.* at 1063-65.

92. See *supra* notes 86-87 and accompanying text.

subordinates the role of rules in morality to the quality of the agent's practical reasoning.⁹³ It is characteristically particularistic in its emphasis on context-sensitive judgment in the evaluation of practical reasoning. And the distinctive feature of the aretaic analysis of responsibility is its focus on the agent's ends and on the quality of the deliberation that has contributed to the choice of ends.⁹⁴

In spite of its aretaic characteristics, however, the specification account of fault is not tied to natural law jurisprudence in the way that Finnis's account of criminal fault is. Finnis describes criminal fault as the offender's manifesting a preference for his own interests as against "the legally defined common way-of-action."⁹⁵ This focus on practical reasoning with specific reference to legal norms tells us that this is an account of legal fault—as opposed to fault in family or social contexts. But criminal fault is otherwise indistinguishable from moral fault. Criminal fault is a failure of "practical right-mindedness" with respect to the "good and proper order among men and in individual conduct."⁹⁶ It is, in other words, moral fault in a legal context. This treatment of the legal as a category of the moral is characteristic of natural law theories, as evinced by Finnis's appeal to practical reasonableness, or morality, as the criterion of legal validity.⁹⁷

Like Finnis's natural law account of criminal fault, the specification account focuses on the quality of the offender's practical reasoning. The specification account of fault, however, describes criminal fault as something other than moral fault in a legal context. For one thing, the objectives of the adjudication of fault, on the specification account, go beyond ensuring that legal punishment in the particular case is morally defensible, and extends to objectives that are specifically legal—most notably, the regulation of granularity in legal punishment and the resulting preservation of the moral and political authority of the criminal law. But even when the issue is the morality of punishment in the individual case, the specification account describes the determination of legal desert, not

93. See Huigens, *supra* note 89, at 105-07.

94. Huigens, *supra* note 74, at 1452-54.

95. FINNIS, *supra* note 14, at 262-63.

96. *Id.* at 18.

97. See *id.* at 290.

moral desert. Its evaluation of practical reasoning is conducted exclusively in terms of the particular criminal prohibition at issue. This inquiry into practical reasoning is not only bound to, but is complementary to the positive criminal law. The moral justification it provides to the individual case of punishment is the same moral justification that supports the criminal prohibition itself. It is not, as ordinary punishment theory seems to have it, a mere side-constraint—a freestanding inquiry into the moral defensibility of punishment in the case. This is so because the deficient practical reasoning that indicates fault is the same deficient practical reasoning in the same practical context leading to the same objectionable acts that have been generalized in order to frame the relevant criminal prohibition to begin with.

I believe that the argument so far is sufficient to separate the aretaic theory of punishment—of which the specification account of criminal fault is a centerpiece—from natural law jurisprudence, including the sophisticated modern form of it developed by Finnis. In Part IV, I hope to take this line of thinking one step further, and to develop more fully the argument that the specification account of fault is an account of legal desert for legal punishment. The argument will expand on the idea that the evaluation of practical reasoning in the adjudication of fault is conducted exclusively in terms of the particular prohibition at issue.

IV. THE SERVICE ACCOUNT OF CRIMINAL FAULT

In this Part, I will formulate an account of criminal fault that mimics Raz's service account of legal authority.⁹⁸ Call it the service account of criminal fault. Whereas Raz describes the source of rules of recognition as exclusively legal, I will describe the source of judgments of punishment as exclusively legal. In jurisprudential terms, I will describe a rule of recognition for valid judgments of punishment—one that could appeal to morality under either positivist school of jurisprudence, as we have seen, but that does not in fact appeal to morality.

This service account of criminal fault describes the determination of legal, not moral desert for punishment. The argument is that,

98. See *supra* note 54 and accompanying text.

because the specification account of criminal fault is consistent with the service account of criminal fault, the specification account also describes the determination of legal, not moral, desert for punishment. The immediate objective is to undermine the prevailing notion that desert for legal punishment is simply moral desert in a legal context. By framing criminal fault in radically different terms from its natural law version, we can more thoroughly distinguish between aretaic punishment theory and natural law jurisprudence. Unless this is done, the development of an aretaic theory of punishment might be hobbled in the way that I described at the outset. There should be no question that its acceptance is in any way conditioned on the acceptance of a particular conception of legality. The ultimate objective of this argument is to defend an aretaic theory of punishment.

Raz's service conception of authority describes a distinctive feature of legal rules. An authoritative reason for action is not just another reason. An authority's directives ordinarily will be based upon and will reflect the reasons for which individuals act. But an authoritative reason for action is exclusive: it preempts further appeal to the reasons that precede the authoritative determination and directive.⁹⁹ Authority is not authoritative without this preemptive force. The service conception of authority implies that legal validity cannot have a moral source.¹⁰⁰ Legal validity is determined by a rule of recognition, and a rule of recognition is a legal rule. A rule is not a legal rule if it does not have the preemptive force of legal authority. But a legal rule that permitted a direct appeal to the moral reasons that lie behind it would not have preemptive force. A rule of recognition, then, cannot and does not permit a direct appeal to the moral reasons that lie behind it. Legal validity, in other words, does not have a moral source.

The service conception of authority applies not only to rules of recognition, of course, but to any other legal rule and also to legal judgments, such as the ruling of an arbitrator, in Raz's example above.¹⁰¹ To see what a legally valid judgment of punishment looks like from the point of view of a service conception of authority, start

99. See *supra* notes 58-60 and accompanying text.

100. See RAZ, *supra* note 52, at 198-99.

101. See *supra* notes 58-60 and accompanying text.

two procedural steps forward from the jury's finding of criminal fault. In the paradigmatic criminal case, a jury's finding on criminal fault is embodied in a verdict. A jury verdict is an authoritative legal directive to another legal actor. The trial judge is bound by the verdict to enter a particular judgment concerning punishment. The trial judge cannot adduce moral reasons and enter a judgment that contradicts or alters the verdict. If this were done, if the verdict were treated as just another reason supporting the judgment, then the verdict would lack peremptory force. Without that peremptory force, it would not be authoritative and could not be described as law. For all we know so far, a verdict might consist of or incorporate moral reasons. But given that a verdict is law, peremptorily binding on a judge entering judgment, a legal judgment of punishment does not consist of or incorporate moral reasons; the verdict on which it is based excludes them.

Taking one procedural step back, we can see that a verdict in a criminal case cannot consist of or incorporate moral reasons, particularly with respect to a finding of criminal fault. A jury's finding on fault is an authoritative legal directive to another legal actor. The jury at that later stage of its deliberations at which it issues its verdict is bound to issue a verdict reflecting its precursor finding on criminal fault. The jury cannot later adduce moral reasons and enter a verdict that contradicts or alters its precursor finding on fault, as happens in cases of jury nullification.¹⁰² If this were done, if the finding on fault were treated as just another reason supporting the verdict, then the finding on fault would lack peremptory force. Without that peremptory force, it would not be authoritative, and could not be described as law. For all we know so far, a finding of criminal fault might consist of or incorporate moral reasons. But given that a finding of fault is law, peremptorily binding the jury when it later issues its verdict, a verdict does not consist of or incorporate moral reasons; the finding of fault on which it is based excludes them.

Taking one last step backward, we can see that a finding on criminal fault cannot consist of or incorporate moral reasons. The law of the jury's instructions is obviously authoritative for the jury. A deliberating jury is bound to make a finding on fault that accords

102. See Brown, *supra* note 88, at 1169-71.

with its instructions. The jury cannot adduce moral reasons and make a finding on fault that contradicts or alters its instructions. If this were done, if the instructions were treated as just another reason supporting the finding on fault, then the law of the instructions would lack peremptory force. Without that peremptory force, this law would not be authoritative, and could not be described as law. For all we know so far, the law of the instructions might consist of or incorporate moral reasons—and in fact, a legislature's appeal to moral reasons at that point would not detract from law's authority. But given that the law of the instructions is law, peremptorily binding the jury when it makes its finding on fault, a finding on fault does not consist of or incorporate moral reasons; the law of the instructions on which it is based excludes them.

A jury's decision on criminal fault under the service account does not identify "conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct," as Finnis says.¹⁰³ A finding on criminal fault is not an opportunity "for the fact-finder to decide the fate of the offender on a ... range of moral criteria," as Horder's Dworkinian account would have it.¹⁰⁴ It does not necessarily require that a jury "reflect in its judgments on human conduct distinctions which ... underly [sic] morality," as Hart describes it.¹⁰⁵ Instead, the service account describes the determination of fault exclusively in terms of the particular criminal prohibition at issue, without reference to morality.¹⁰⁶

103. FINNIS, *supra* note 14, at 18.

104. HORDER, *supra* note 31, at 146.

105. HART, *supra* note 39, at 183.

106. One point of clarification is needed at this juncture. Because terms such as "malice," "depraved heart," and "extreme indifference to the value of human life" are common features of criminal law doctrine on fault, it might seem that morality cannot be entirely excluded from the description of criminal fault, even on the services account. It is important to recognize, however, that such doctrinal fault concepts are criterial, not constitutive. They are indicators of fault; not fault itself. The choice of these nonintentional or objective fault criteria, or the rejection of them in favor of intentional-states criteria, is a function of the competing ends of formality and moral particularity, and a device in regulating the granularity of criminal law. The theoretical descriptions of fault offered here, both the service and specification accounts, concern the requirement of legal punishment for which such frankly moral terms are criteria. Because such fault criteria are entirely dispensable from a theoretical point of view—if not from a doctrinal, political, or moral point of view—their common occurrence is irrelevant to the theoretical description of criminal fault and to the formulation and evaluation of the service and specification accounts of fault under consideration.

I appraised the specification account of criminal fault in similar terms above, as fault described in terms of the particular criminal prohibition at issue, concluding that it was therefore legal fault and not moral fault. But that conclusion now seems doubtful, because the specification account seems to exclude morality less strictly than the service account of fault does. The specification account of fault claims that the adjudication of fault returns the prohibition to the level of specificity at which individual persons made better and worse practical judgments that were then generalized in the form of a criminal prohibition. If this is so, then moral reasons that lie behind the prohibition have been revived. This seems flatly inconsistent with the service account of criminal fault, because it is a return by the jury to the reasons that precede positive law. In terms of the service account of criminal fault given above, these theoretical descriptions part company at the critical juncture between the jury's finding of fault and the law of its instructions.

One way to answer this objection is to note that the particularistic reasoning that is a feature of the specification of a prohibition is not necessarily moral reasoning, meaning that morality does not detract from legal authority under the specification account of criminal fault. An aretaic theory of punishment relies on the distinctive particularism of virtue ethics. Aristotle recognized that practical reasoning occurs in a fact-rich context. He described guidance by norms in these terms, stressing the particularity of practical reasoning, and showing how norm guidance could be particularistic as well. He broadened the frame of reference to include the practical reasoning that precedes particular choices, including deliberations on ends, and showed how these prior choices and deliberations contribute to choices on the occasion of action, via character.¹⁰⁷ Particularistic practical reasoning is a matter of perceptions and desires that have been shaped and informed by norms' influence on character development. In other words, particularistic norm guidance operates by means of virtue. A virtue ethics theory of punishment posits that guidance by criminal prohibitions and the ex post normative evaluation of behavior subject to a prohibition is particularistic in this way. But this particularistic norm guidance

107. See T.H. Irwin, *Reason and Responsibility in Aristotle*, in *ESSAYS ON ARISTOTLE'S ETHICS* 117, 128-29, 142-44 (Amelie Oksenberg Rorty ed., 1980).

is neither distinctively moral nor distinctively legal. The specification account of criminal fault is an instance of this particularistic account of norm guidance, but it does not, for this reason, introduce morality into legal guidance in a way that detracts from legal authority.

This argument, however, does not really answer the objection; it just gives it a finer point. Granted that the particularistic reasoning described in the specification account of fault is not moral reasoning, what detracts from authority is not morality *per se*, but the revival of reasons of individuals—which might or might not be moral reasons. The objection against the specification account of criminal fault is, more precisely, that reasons are facts,¹⁰⁸ and the jury's selection of and apportioning weight to facts in light of the prohibition seems to be the revival of the reasons that have guided authority in its determination of the prohibition, but that cannot be appealed to after that determination without infringing on that authority.

This more precise objection, however, is just as easily answered. Reasons are facts, but, of course, they are not only facts. A reason is a fact that gives a person a positive attitude toward a particular act. A fact that is a reason for an act by one person is not necessarily a reason for another person to perform the same act—it might or might not so dispose the latter person. A fact that is a reason for a particular act is not necessarily, or even usually, a reason for a different act, no matter how similar the two acts might be. To say there is a “revival” of reasons in the specification account of fault is imprecise and misleading. The reasons of individual persons that are generalized into a prohibition are the reasons of persons different from the jury or jurors. None of the acts of persons that are generalized into a prohibition is the same act that the jury performs in specifying the prohibition for purposes of adjudication or in issuing its verdict.

The specification account of criminal fault, then, is consistent with the service account. The accounts differ in the direction in which each description moves—from a legislated prohibition to a finding of fault to a judgment of punishment, or from a judgment of punishment to a finding of fault to the legislated prohibition. But

108. See RAZ, *PRACTICAL REASON AND NORMS*, *supra* note 55, at 16-18.

neither theoretical account introduces moral norms along the way, or suggests a rule of recognition for valid judgments of punishment containing anything but pedigreed legal norms.

This point should disabuse anyone interested in punishment theory of the most common misunderstanding concerning an aretaic theory. The connection between legal desert and virtue does not lie in the defendant's morally deserving punishment because he lacks virtue. This is how criminal fault is described in Finnis's natural law jurisprudence.¹⁰⁹ In my version of an aretaic theory, however, the connection runs instead from the adjudicative specification of the criminal prohibition in the jury's determination of criminal fault, to the legislation of the prohibition, and thence to that prohibition's origin in the generalization of individual practical judgments that are better and worse with respect to practical reasonableness. This aretaic account of criminal fault has no connection to a natural law jurisprudence.

CONCLUSION

An Aristotelian theory of punishment initially seems compatible with only a modern natural law jurisprudence. This appearance both lends support to, and draws support from a common but clearly mistaken belief that particular punishment theories and particular schools of jurisprudence have some necessary relationship. This Essay sought to clear up this confusion by addressing, first, the extent to which punishment theory is misdirected in its focus on moral desert for punishment. On the other hand, the use of moral theory in punishment theory is not illogical. Desert for legal punishment is usually described as moral desert for punishment, and these are perfectly good descriptions. At least, the identification of moral desert for punishment and legal desert for punishment is not ruled out by any of the leading schools of jurisprudence—a fact which, given the diversity of those schools, further emphasizes that punishment theory conducted by reference to moral theory is orthogonal to jurisprudence.

An aretaic theory of punishment presents a special case of confusion over this point, because it is notoriously bound up with a

109. See FINNIS, *supra* note 14, at 35-36.

natural law jurisprudence. This Essay sought to dispel this impression thoroughly, by describing the aretaic conception of criminal fault, by then offering a second conception of criminal fault exclusive of moral fault, and by then reconciling these two seemingly disparate accounts. Thus an aretaic theory of punishment can offer an account of exclusively legal desert for legal punishment. This should suffice to dispel conclusively the idea that an aretaic theory of punishment is a creature of natural law jurisprudence, and also the wider confusion of which this is the most plausible and persistent instance.