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The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next

Albert W. Alschuler[†]

Discussions of the textbook purposes of criminal punishment—retribution, deterrence, incapacitation, and rehabilitation¹—sometimes seem too abstract to matter. This Essay, however, examines two unmistakably consequential shifts in the stated objectives of punishment. It describes America's turn to rehabilitative goals early in the twentieth century, the persistence of these goals through most of the century, and the demise of rehabilitation and emergence of a "new penology" in the century's final quarter. It contends that both American revolutions in penal objectives were mistaken. Retribution, the purpose of punishment most disparaged from the beginning of the century through the end, merits recognition as the criminal law's central objective.

I. THE DAWN OF THE TWENTIETH CENTURY

The twentieth century began with the confident march of rehabilitative trumpets. The nation's first juvenile court, established in 1899 in Cook County, became a model for reform throughout America.² The guiding principle of this court was that juvenile delinquents should be helped, not blamed. Society's best interests matched the child's.

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¹ One might reasonably add a "moral educative" objective to the traditional list to emphasize that the criminal law seeks to influence conduct through mechanisms other than the fear of punishment.

² See Emily Buss, *The Missed Opportunity in Gault*, 70 U Chi L Rev 39, 39 (2003).

During the late nineteenth and early twentieth century, an overwhelming majority of states also approved two other major penal reforms: probation (treatment in the community for juveniles and adults) and indeterminate sentences (grounded on the view that a parole board could monitor a prisoner's progress toward rehabilitation and release him under supervision at the appropriate time).³ All of these reforms deemphasized the historic view, voiced by William Blackstone, that "punishments are . . . only inflicted for abuse of that free will, which God has given to man."⁴

Many early twentieth-century reformers doubted their ability to blame. They saw people as the far-from-divine products of heredity, social circumstances, random breeding, and Darwinian struggle. They and others also insisted that blame was functionless and that society should direct its efforts to more constructive goals. Like the rest of law, criminal punishment should look forward, not backward. Psychology and sociology, the handmaidens of consequentialist jurisprudence, would determine the causes of crime and what social reforms and treatment programs would correct them.

The turn-of-the-century penal reforms were part of a jurisprudential revolution that reshaped all of American law. This revolution deemphasized corrective justice in civil proceedings just as it did retribution in criminal proceedings.⁵ It often is called "the revolt against formalism,"⁶ but it is better understood as a revolt against natural law or objective concepts of right and wrong.⁷ In positive terms, it could be called the "consequentialist" or "pragmatic" revolution. Its ideas developed in the period following the American Civil War and the publication of Charles Darwin's *On the Origin of Species*. These ideas triumphed, at least among intellectuals, within less than half a century.

Criminal law was more resistant to the new jurisprudence than other fields. Roscoe Pound complained in 1909, "The truth is . . . criminal law is the most archaic part of our legal system."⁸ It "is so rooted in theological ideas of free will and moral responsibility and juridical ideas of retribution . . . that we by no means make what we

³ See Lawrence M. Friedman, *Crime and Punishment in American History* 159–63 (Basic 1993).

⁴ William Blackstone, 4 *Commentaries* *27.

⁵ See Richard A. Posner, *Overcoming Law* 391 (Harvard 1995) ("The instrumental concept of law breaks with Aristotle's influential theory of corrective justice.").

⁶ Morton G. White, *The Revolt against Formalism in American Social Thought of the Twentieth Century*, 8 *J Hist Ideas* 131 (1947) (also published as chapter 2 of White's *Social Thought in America* (Viking 1949)).

⁷ See Albert W. Alschuler, *Law without Values: The Life, Work, and Legacy of Justice Holmes* 9–10, 86–103 (Chicago 2000).

⁸ Roscoe Pound, Book Review, 3 *Am Polit Sci Rev* 281, 284 (1909), reviewing Maurice Parmelee, *The Principles of Anthropology and Sociology in Their Relation to Criminal Procedure* (Macmillan 1908).

should of our [scientific] discoveries.”⁹ Criminal law was—and is still—a backwater in which subjective standards of culpability and talk of personal blame persist.

The 1870 meeting of the National Congress on Penitentiary and Reformatory Discipline effectively inaugurated the movement that produced the twentieth-century reforms.¹⁰ The Congress’s Declaration of Principles “arraign[ed] society itself as in no slight degree accountable for” crime, declared that “the supreme aim of prison discipline is the reformation of criminals,” and concluded that “[s]entences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time.”¹¹ The Declaration added, “[R]epeated short sentences for minor criminals are worse than useless Reformation is a work of time; and a benevolent regard to the good of the criminal himself, as well as to the protection of society, requires that his sentence be long enough for reformatory processes to take effect.”¹²

In 1881, Oliver Wendell Holmes, Jr. declared, “Prevention would . . . seem to be the chief and only universal purpose of punishment.”¹³ Holmes, however, championed deterrence rather than rehabilitation. He revealed that the deterrent worldview could be as deterministic and as uninterested in blame as the rehabilitationist:

If I were having a philosophical talk with a man I was going to have hanged . . . I should say, I don’t doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.¹⁴

Progressive reformers generally echoed the National Penitentiary Congress while their critics echoed Holmes. Gino Carlo Speranza wrote in 1904:

⁹ Pound, 3 Am Polit Sci Rev at 283–84 (cited in note 8).

¹⁰ To be sure, reformers had advocated and implemented rehabilitative programs before this meeting. See generally David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Little, Brown 1971); Norval Morris, *Maconochie’s Gentlemen: The Story of Norfolk Island and the Roots of Modern Prison Reform* (Oxford 2002).

¹¹ National Congress on Penitentiary and Reformatory Discipline, *Declaration of Principles*, in E.C. Wines, ed, *Transactions of the National Congress on Penitentiary and Reformatory Discipline* 541–45 (Weed, Parsons 1871).

¹² Id at 543.

¹³ Oliver Wendell Holmes, Jr., *The Common Law* 46 (Little, Brown 1991).

¹⁴ Letter from Oliver Wendell Holmes, Jr. to Harold Laski, Dec 17, 1925, in Mark deWolfe Howe, ed, 1 *The Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916–1935* 806 (Harvard 1953). Holmes sought to replace requirements of subjective mental culpability in criminal cases with objective standards, but apart from a few opinions of his own for the Supreme Judicial Court of Massachusetts, he achieved little success. See Alshuler, *Law without Values* at 107–11 (cited in note 7).

The conception of punishment as a defence to crime has gone into bankruptcy: it neither defends nor deters. Criminal therapeutics must take its place; that is, where a cure is possible, let the remedial agencies suggested by criminologic and sociologic science have full scope. But where juridic therapeutics fail, let there be no mistaken altruism to perpetuate the unfittest.¹⁵

Roscoe Pound spoke of the American legal system's "exaggerated respect for the individual,"¹⁶ declared that behavioral science had "routed" the concept of free will,¹⁷ and wrote, "We recognize that in order to deal with crime in an intelligent and practical manner we must give up the retributive theory."¹⁸

John H. Wigmore joined Holmes rather than Speranza and Pound. He called deterrence "the kingpin of the criminal law"¹⁹ and condemned "that false sympathy and dangerous weakening that is apt to arise on first acceptance of the biopsychologic doctrine of Determinism."²⁰ Wigmore opposed only false sympathy and dangerous weakening, however, not determinism itself. He wrote,

The measures of the modern penal law are not based on moral blame, but on social self-defense. When there is a weed in your garden, and you cut it down, you do not do this on any theory of the moral blame of the weed, but simply on the theory that you are entitled to keep weeds out of your garden.²¹

In 1924, Clarence Darrow's twelve-hour summation saved from the gallows University of Chicago law student Nathan Leopold and his friend Richard Loeb (who until his arrest expected to enter the

¹⁵ Gino Carlo Speranza, *The Survival of the Weakest as Exemplified in the Criminal*, 43 Am L Reg 159, 165–66 (1904). Thomas A. Green examines the writings of Speranza, Pound, and their contemporaries in *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 Mich L Rev 1915 (1995).

¹⁶ Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 Colum L Rev 339, 347 (1905).

¹⁷ See Green, 93 Mich L Rev at 1965 (cited in note 15).

¹⁸ Roscoe Pound, *Criminal Justice in the American City—A Summary*, in Roscoe Pound and Felix Frankfurter, eds, *Criminal Justice in Cleveland* 559, 586–87 (Cleveland Foundation 1922).

¹⁹ *A Symposium of Comments from the Legal Profession*, in *The Loeb-Leopold Murder of Franks in Chicago, May 21, 1924*, 15 J Crim Law & Criminol 395, 401 (1924).

²⁰ Id at 405.

²¹ Id at 404. Wigmore added, "Society's right of self-defense is equally valid even when the human weed was predetermined by nature and environment to do just what he did." Id. Holmes had used similar metaphors ten years earlier:

The world has produced the rattlesnake as well as me; but I kill it if I get a chance, as also mosquitos, cockroaches, murderers, and flies. My only judgment is that they are incongruous with the world I want; the kind of world we all try to make according to our power.

Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein, May 21, 1914, in James B. Peabody, ed, *The Holmes-Einstein Letters: Correspondence of Mr. Justice Holmes and Lewis Einstein 1903–1935* 93 (St. Martin's 1964).

Law School himself).²² After Leopold and Loeb pleaded guilty to the murder of Bobby Franks, Darrow argued to the sentencing judge, John Caverly:

What had this boy to do with it? He was not his own father; he was not his own mother; he was not his own grandparents. All of this was handed to him. He did not surround himself with governesses and wealth. He did not make himself. And yet he is to be compelled to pay.

There was a time in England . . . when judges used to . . . call juries to try a horse, a dog, a pig, for crime. . . . Animals were tried. Do you mean to tell me that Dickie Loeb had any more to do with his making than any other product of heredity that is born upon the earth?

...

Your Honor, I am almost ashamed to talk about it. I can hardly imagine we are in the 20th century. And yet there are men who seriously say that for what Nature has done, for what life has done, for what training has done, you should hang these boys.²³

* * *

Is Dickie Loeb to blame because [] of the infinite forces that conspired to form him, the infinite forces that were at work producing him ages before he was born? . . . Is he to blame that his machine is imperfect? . . . I know that somewhere in the past that entered into him something missed. It may be defective nerves. It may be a defective heart or liver. It may be defective endocrine glands. I know it is something. I know that nothing happens in this world without a cause.²⁴

Wigmore's paean to deterrence responded to Darrow's argument.

At the Sociology Department of the University of Chicago, the first "Chicago School" used the city as a laboratory and developed

²² Hal Higdon, *Leopold and Loeb: The Crime of the Century* 199–200 (Illinois 1999) (noting that Leopold enrolled in the Law School at the University of Chicago in the fall of 1923 and that Loeb "planned to . . . enter law school in the fall of 1924, remaining at the University of Chicago").

My late uncle Jacob Alschuler (University of Chicago Law School Class of 1927) recalled Darrow's visit to the Jewish fraternity Zeta Beta Tau in search of character witnesses for his clients. Upon ascertaining my uncle's opinion of Nathan Leopold, Darrow told him, "Obviously we can't use you."

²³ Arthur Weinberg, ed, *Attorney for the Damned* 65–66 (Simon & Schuster 1957).

²⁴ Id at 55–56.

pathbreaking cultural and environmental explanations of crime.²⁵ The university established America's first chair of police science, the precursor of today's many schools and departments of criminal justice, in 1929.²⁶ Scholars, reformers, and many criminal justice officials continued to view crime as a public health problem susceptible to diagnosis and cure.

II. A QUIET AFTERNOON

Rehabilitation remained the central professed goal of American criminal justice—at least in most public rhetoric—until the final quarter of the twentieth century.²⁷ In 1949 the Supreme Court declared, “Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals.”²⁸ In 1952, the Court spoke of “a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.”²⁹ In 1962, the Court held that narcotics addiction was an illness whose punishment violated the cruel and unusual punishment clause.³⁰ The Court, however, qualified its ruling sufficiently that it was able to beat a speedy retreat.³¹

The Model Penal Code issued by the American Law Institute in 1962 endorsed almost the entire list of penal purposes,³² but it mentioned retribution only as a limiting principle.³³ Its sentencing provisions emphasized indeterminacy and treatment. They required that every penitentiary sentence be for at least one year so that correctional authorities could adequately diagnose each offender.³⁴ More-

²⁵ See Martin Bulmer, *The Chicago School of Sociology: Institutionalization, Diversity, and the Rise of Sociological Research* 12 (Chicago 1984); James T. Carey, *Sociology and Public Affairs: The Chicago School* 97 (Sage 1975).

²⁶ See Arthur F. Brandstatter, *A History of Police Education in the United States*, online at <http://www.cj.msu.edu/~history/scrap/abhistoryofpoliceed.pdf> (visited Dec 1, 2002).

²⁷ Unsurprisingly, everyday practice frequently bore little resemblance to the aspirational writings and podium rhetoric of judges, prison wardens, probation officers, and academics.

²⁸ *Williams v New York*, 337 US 241, 248 (1949). The Court offered its praise of rehabilitation in a case in which the trial judge had sentenced the defendant to death partly on the basis of hearsay allegations in a pre-sentence report.

²⁹ *Morissette v United States*, 342 US 246, 251 (1952).

³⁰ See *Robinson v California*, 370 US 660, 667 (1962).

³¹ See *Powell v Texas*, 392 US 514, 532 (1968) (plurality) (distinguishing the case from *Robinson* on the ground that the appellant was not punished for the “mere status” of drunkenness but “for being in public while drunk on a particular occasion”).

³² See MPC § 1.02 (ALI Proposed Official Draft 1962).

³³ See id § 1.02(1)(c) (declaring that one goal of the Code was “to safeguard conduct that is without fault from condemnation as criminal”). See also Michael Tonry, *Unthought Thoughts: The Influence of Changing Sensibilities on Penal Policies*, in David Garland, ed, *Mass Imprisonment: Social Causes and Consequences* 150, 155–59 (Sage 2001).

³⁴ See MPC § 6.06; MPC § 6.06 & cmts 4, 26 (ALI Tent Draft No 2 1954) (“A minimum of

over, the code supplied the principal alternative to the traditional “right-wrong” test of legal insanity.³⁵ Much of the post-World War II effort to substitute treatment for punishment had focused on the terms of this defense.³⁶ The Model Penal Code’s formulation was adopted by about half the states and every United States Court of Appeals but one.³⁷

Francis A. Allen, a member of the University of Chicago Law School faculty, was the chair of the drafting committee for the Illinois Criminal Code of 1961, one of the earliest codes to adopt the Model Penal Code’s insanity defense and sentencing principles.³⁸ Allen’s scholarship, however, noted that the rehabilitative ideal had a troublesome side, for it seemed to authorize both lengthy restrictions of liberty and broad assumptions of governmental power over offenders’ personalities.³⁹

Allen’s work encouraged a search for limits, and scholars like Stanford’s Herbert Packer and Chicago’s Norval Morris⁴⁰ contended that although moral desert or retribution could never justify punishment, it should limit the punishments society imposes for other reasons.⁴¹ The Packer-Morris position sought to tame the utility monster,

one year on prison sentences for felony appears . . . to be an institutional necessity.”).

³⁵ See MPC § 4.01 (ALI Proposed Official Draft 1962).

³⁶ The District of Columbia Circuit ruled in *Durham v United States*, 214 F2d 862, 875 (DC Cir 1954), that a defendant could be convicted only if a jury “believe[d] beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality.” The *Durham* opinion made its author, Chief Judge David Bazelon, an icon of the psychiatric profession. The D.C. Circuit abandoned the “product” test in *United States v Brawner*, 471 F2d 969, 981–82 (DC Cir 1972). Despite heated battles over the issue, variations in the phrasing of the insanity defense seem to have little effect on jury verdicts. See Rita James Simon, *The Jury and the Defense of Insanity* 67–68 (Little, Brown 1967) (finding no statistically significant difference between the verdicts of juries receiving instructions under the right-wrong test and those receiving instructions under the product test).

³⁷ See Sanford H. Kadish and Stephen J. Schulhofer, *Criminal Law and Its Processes: Cases and Materials* 894 (Aspen 7th ed 2001).

³⁸ The Illinois Code was in fact enacted before the American Law Institute approved the MPC itself.

³⁹ See Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J Crim L, Criminol & Police Sci 226, 229 (1959) (“[T]he rehabilitative ideal has often led to increased severity of penal measures.”); Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 47 (Yale 1981) (“One immediate consequence of a rehabilitative regime is a drastic enlargement of state concerns. The state’s interests now embrace not only the offender’s conduct, but . . . his motives, his history, his social environment.”).

⁴⁰ Morris, who joined the Chicago faculty in 1964, served for ten years as the founding director of the Law School’s Center for Studies in Criminal Justice and for four years as the Law School’s dean. See Albert W. Alschuler, *Norval*, 1994 U Chi Legal F 1, 1–4 (celebrating the (truly) epic life of Norval Morris upon his retirement).

⁴¹ See Herbert L. Packer, *The Limits of the Criminal Sanction* 66 (Stanford 1968) (“I see an important limiting principle in the criminal law’s traditional emphasis on blameworthiness as a prerequisite to the imposition of punishment. But it is a *limiting* principle, not a justification for action.”); Norval Morris, *Madness and the Criminal Law* 199 (Chicago 1982) (“Desert is not

and although Packer and Morris did not say so, it required the rejection of determinism. Moreover, the Supreme Court seemed to recognize the danger of rehabilitative rhetoric when it imposed many traditional safeguards of the criminal process on juvenile delinquency proceedings.⁴²

Although scholars and courts increasingly recognized the need to constrain rehabilitative goals, these goals remained dominant.⁴³ In 1968, 72 percent of the respondents to a Harris poll declared that the prison system's primary purpose should be rehabilitation.⁴⁴ In 1970, soon after concluding his service as Attorney General, Ramsey Clark (University of Chicago Law School class of 1951)⁴⁵ revealed that the orthodox progressive view of criminal justice had changed little since the start of the twentieth century:

Rehabilitation must be the goal of modern corrections. Every other consideration should be subordinated to it. To rehabilitate is to give health, freedom from drugs and alcohol, to provide education, vocational training, understanding and the ability to contribute to society.

...

Rehabilitation is individual salvation. What achievement can give society greater satisfaction than to afford the offender the chance, once lost, to live at peace, to fulfill himself and to help

a defining principle; it is a limiting principle.”).

⁴² See *In re Gault*, 387 US 1, 34–57 (1967) (affording the right to counsel and the privilege against self-incrimination to accused delinquents); *In re Winship*, 397 US 358, 365 (1970) (affording the right to proof beyond a reasonable doubt). But see *McKeiver v Pennsylvania*, 403 US 528, 543–50 (1971) (declining to extend the right to jury trial to accused delinquents).

⁴³ See, for example, the optimistic assessments of rehabilitative prospects in Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* 110–44 (Chicago 1970) and Karl Menninger, *The Crime of Punishment* 219–48 (Viking 1966).

⁴⁴ Francis T. Cullen and Karen E. Gilbert, *Reaffirming Rehabilitation* 8 (Anderson 1982).

⁴⁵ Four Attorneys General in the past 35 years have studied or taught (or both) at the University of Chicago Law School, and all have played significant roles in shaping American criminal justice. Ramsey Clark approved the prosecution of Dr. Benjamin Spock, authored some portions of the Omnibus Crime Control and Safe Streets Act of 1968, and temporarily brought a halt to widespread FBI wiretapping. Clark's predecessor as Attorney General, Nicholas Katzenbach, who recently had been a member of the Law School faculty, headed the President's Commission on Law Enforcement and Administration of Justice. Surprisingly, this group's 1967 report still provides the best comprehensive treatment of the operation and failings of the criminal justice system as a whole. The war on terrorism has led Attorney General John Ashcroft (class of 1967) to approve a number of procedural innovations, including relaxation of the guidelines for undercover FBI investigations promulgated by Attorney General Edward Levi (class of 1935, professor, dean of the Law School, and president of the University). See Neil A. Lewis, *Traces of Terror: The Inquiry; Ashcroft Permits F.B.I. to Monitor Internet and Public Activities*, NY Times A20 (May 31, 2002) (describing Ashcroft's revision of the guidelines to allow increased surveillance of the internet, and political and religious organizations).

others? Rehabilitation is also the one clear way that criminal justice processes can significantly reduce crime.⁴⁶

III. THE SUNSET OF THE CENTURY

Within fifteen years of Ramsey Clark's remarks, rehabilitation had gone from the top of most scholars' and reformers' lists of the purposes of punishment to the bottom. The dominant goal of criminal punishment changed almost in an instant, and the first became last.

The demise of rehabilitation was attributable less to jurisprudential reflection than to apparent empirical failure. After Vietnam and Watergate, Americans were skeptical of government's ability to achieve its goals, and ambitious rehabilitative programs seemed especially inviting targets for reform. The title of an influential 1974 article asked *What Works?* In essence the article answered, "nothing."⁴⁷ This article reviewed all of the empirical evaluations of rehabilitative programs then in print in England and America, and found 231 that met minimal methodological standards. It concluded, "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."⁴⁸ Later studies (including one by the author of *What Works?*) declared this judgment too pessimistic,⁴⁹ but social science plainly had not provided the happy answers its early champions expected.

The sentencing reform movement of the 1970s and 1980s prompted America's reconsideration of its penal goals. Initially, this movement seemed to be about reducing the sentencing disparities that can result from the differing views and personalities of judges. The hawks and the doves of criminal process both welcomed it. In retrospect, however, the movement appears to have been a Trojan horse whose procedural facade concealed the soldiers of substantive change. It proved to be less about correcting disparities than about radically altering sentencing standards, deemphasizing the personal characteristics of offenders, substituting aggregated for individualized sentences, enhancing the power of prosecutors, and increasing the

⁴⁶ Ramsey Clark, *Crime in America: Observations on Its Nature, Causes, Prevention and Control* 220 (Simon & Schuster 1970).

⁴⁷ See generally Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 Pub Int 22 (Spring 1974).

⁴⁸ Id at 25 (emphasis omitted).

⁴⁹ See Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 Hofstra L Rev 243, 252 (1979) (declaring that "new evidence from our current study leads me to reject my original conclusion" in *What Works?*); Michael Vitiello, *Reconsidering Rehabilitation*, 65 Tulane L Rev 1011, 1032 (1991) (stating that "opponents of rehabilitation grossly overstated the case against rehabilitation").

severity of criminal penalties.⁵⁰

A few sentencing reformers spoke explicitly of abandoning forward-looking preventive goals and embracing a policy of “just deserts.”⁵¹ Their concept of “desert,” however, was primitive, emphasizing social harm rather than the character and culpability of offenders. Statutes and guidelines took the form of crime tariffs.⁵² The earliest of the new determinate sentencing statutes, enacted in California in 1976, declared:

The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.⁵³

Talk of “just deserts” soon vanished, but the emphasis on quantifiable harm rather than circumstances or personal characteristics persisted. In 1987, a preliminary draft of the Federal Sentencing Guidelines declared, “[T]o the extent that principles derived from retributive and crime control models conflict, justice for the public is the overreaching goal.”⁵⁴ The Sentencing Commission (perhaps embarrassed by its inadvertent substitution of the word “overreaching” for the word it apparently intended) used more amorphous language in its final draft but did not significantly alter the Guidelines’ content.⁵⁵

⁵⁰ I noted in 1991,

The change in sentencing philosophy that sentencing guidelines and sentencing reform legislation have produced may be attributable partly to limitations of language. Describing the appropriate influence of situational and personal characteristics on punishment is difficult. Sentencing guidelines have become crime tariffs in part because it is easier to write them that way.

Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U Chi L Rev 901, 914 (1991). See also Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 1–8 (Chicago 1998) (reviewing the history of the Guidelines and describing their pernicious effect on sentencing).

⁵¹ See, for example, Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 66–76 (Northeastern 1976) (arguing that just deserts “should have priority over other objectives in decisions about how much to punish”).

⁵² von Hirsch initially recognized that “[s]eriousness’ depends both on the harm done (or risked) by the act and the degree of the actor’s culpability.” Id at 69. Ultimately, however, he proposed a sentencing scheme with a “presumptive sentence” for every offense from which a judge could depart only if a case was “out-of-the-ordinary” and then only slightly. Id at 98–102.

⁵³ Cal Penal Code § 1170(a)(1) (West 1985).

⁵⁴ United States Sentencing Commission, *Revised Draft Sentencing Guidelines* 2 (Jan 1987).

⁵⁵ United States Sentencing Commission, *Sentencing Guidelines and Policy Statements* 1.3–1.4 (Apr 1987) (“A clear-cut Commission decision in favor of [either the retributive or crime control model] would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing

When sentencing authorities in the late twentieth century took account of offender characteristics, they focused more on characteristics indicating dangerousness than on those indicating culpability. Notably, the Virginia Sentencing Commission declared that a drug, larceny, or fraud defendant who “scored” ten or more points should go to prison. It then directed judges to add six points whenever the offender was younger than twenty.⁵⁶ Until the end of the twentieth century, virtually everyone had regarded youth as a mitigating rather than an aggravating circumstance. The Virginia Commission also directed judges to add points for being unmarried, unemployed, or male.⁵⁷

Late twentieth-century crime control emphasized incapacitation and deterrence. For a time, “selective incapacitation” (the statistical identification and long-term confinement of a relatively small group of offenders believed responsible for a disproportionate share of crime) was fashionable,⁵⁸ but variables other than prior criminal record added very little to the predictive power of the social scientists’ formulas.⁵⁹ Economists emphasized deterrence, and they sometimes were influential. For example, although most Americans regard stealing money from the government as a more serious offense than failing to pay the same amount in taxes,⁶⁰ the United States Sentencing Commission punished the tax evasion more severely. Because tax evaders were detected less frequently than thieves, the Commission approved the harsher punishment for deterrent reasons.⁶¹

Although one can describe the crime control techniques of the last quarter-century in terms of traditional purposes of punishment, they differ from earlier measures. Scholars have spoken of a “new pe-

decisions both philosophies may prove consistent with the same result.”).

⁵⁶ See Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L Rev 1751, 1759–61 (1999).

⁵⁷ See *id.*

⁵⁸ See Peter W. Greenwood and Allan Abrahamse, *Selective Incapacitation* xix (Rand 1982) (“[W]e have shown that selective incapacitation strategies may lead to significant reductions in crime without increasing the total number of offenders incarcerated.”).

⁵⁹ See Jacqueline Cohen, *Incapacitating Criminals: Recent Research Findings* (National Institute of Justice 1983).

⁶⁰ See Francis T. Cullen, Bruce G. Link, and Craig W. Polanzi, *The Seriousness of Crimes Revisited: Have Attitudes Toward White-Collar Crime Changed?*, 20 Criminol 83, 98 (1982) (describing a survey in which respondents gave a relatively low seriousness rating to income tax fraud); Peter H. Rossi, et al, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am Soc Rev 224, 228–29 (1974) (reporting that in a survey in which respondents were asked to rank the relative seriousness of various crimes, tax evasion ranked 106, below various forms of theft and embezzlement).

⁶¹ United States Sentencing Commission, *Sentencing Guidelines and Policy Statements* 2.112 (cited in note 55) (“Especially in light of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations . . . deterring others from violating the tax laws is the primary consideration underlying these guidelines.”).

nology” that emphasizes monitoring, risk management, and the control of dangerous groups.⁶² This penology regards the criminal justice system as an ever-more prominent component—indeed, the dominant component—of society’s response to an enduring “underclass.” Its focus is on system rationality and actuarial thinking. Rather than treat cases and people one by one, the new penology treats cases and people in groups.

One can discern this new penology in sentencing guidelines and mandatory minimum sentences that allocate punishment wholesale rather than retail. The new penology also is evident in a number of other innovations and practices: “real offense sentencing” (the practice of adding punishment-enhancing points not only for crimes of which a defendant has been convicted but also for other crimes described as “relevant conduct”);⁶³ supposed alternatives to incarceration that do not in fact reduce the number of people sentenced to confinement but instead widen the net of penal control;⁶⁴ preventive detention prior to trial;⁶⁵ mass searches;⁶⁶ gang loitering ordinances, youth curfews, and order-maintenance policing;⁶⁷ limitations of the in-

⁶² See Malcolm Feeley and Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *Criminol* 449 (1992).

⁶³ These other crimes need not be proven beyond a reasonable doubt and may include offenses of which the defendant has been acquitted. See *United States v Watts*, 519 US 148, 156–57 (1997) (“[A] jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.”).

⁶⁴ See Michael Tonry, *Intermediate Sanctions in Sentencing Reform*, 2 U Chi Roundtable 391, 397 (1995) (“This not uncommon pattern, where judges use intermediate sanctions for offenders other than those program planners had in mind, is often pejoratively characterized as ‘net widening.’”). The nearly 300 specialized drug courts established in 48 states also seem to have widened the net of penal control. These courts have facilitated the felony prosecution of defendants who earlier would have been prosecuted for misdemeanors if prosecuted at all. Although drug courts emphasize treatment and monitoring as their initial response to drug crime (and although their methods do seem to reduce drug recidivism slightly), so many of their “clients” fail to respond to treatment that the courts ultimately sentence larger numbers to prison. See Morris Hoffman, *The Drug Court Scandal*, 78 NC L Rev 1437, 1534 (2000) (“Net-widening is so large that, even if drug courts truly were effective in reducing recidivism, more drug defendants would continue to jam our prisons than ever before.”).

⁶⁵ See Bail Reform Act of 1984, 18 USC § 3142(c) (West 2000) (ending a right to bail in noncapital cases that had existed in the federal courts since the first Judiciary Act in 1789).

⁶⁶ See, for example, *Board of Education v Earls*, 122 S Ct 2559, 2562 (2002) (upholding a school policy requiring students in competitive extracurricular activities to submit to drug testing); *United States v Drayton*, 122 S Ct 2105, 2110–14 (2002) (illustrating today’s expansive concept of consent searches); *Vernonia School District v Acton*, 515 US 646, 664–65 (1995) (upholding the use of random drug tests for student athletes); *Florida v Bostick*, 501 US 429, 434–35 (1991) (upholding the practice of boarding buses during scheduled stops and requesting consent to conduct drug searches); *Michigan Department of State Police v Sitz*, 496 US 444, 455 (1990) (upholding the use of checkpoints to search for drunk drivers).

⁶⁷ See Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* 1–22 (Harvard 2001) (discussing the rise of order-maintenance and “broken windows” policing).

sanity defense;⁶⁸ requirements that sex offenders register and give public notice of their presence in a community;⁶⁹ the confinement of sex offenders who are not sufficiently mentally ill to satisfy ordinary civil commitment standards but who have completed their criminal sentences;⁷⁰ restrictions of habeas corpus;⁷¹ and requiring the trial and punishment of many juveniles as adults.⁷²

The politics of crime contributed to the change in penology, and the 1960s heralded the change. This decade was a period of increasing crime, youthful experimentation with drugs, police repression of civil rights demonstrators, draft-card and flag burning, Stokely Carmichael, Jane Fonda, the assassinations of John F. Kennedy, Robert Kennedy, and Martin Luther King, Jr., Black Panthers, Richard Speck, the appearance of a University of Chicago Law School graduate on the F.B.I.'s ten-most-wanted list,⁷³ sexual liberation, the Chicago Eight, and the Warren Court's due process revolution. Although political calls for tough punishments were nothing new, the presidential election of 1964 appears to have been the first in which a major-party candidate, Barry Goldwater, made crime a national issue. Goldwater lost badly, but in 1968 Richard Nixon supported the "peace forces" against the "criminal forces," called for a new attorney general, and won. Crime remained an issue in subsequent presidential elections—perhaps most notably in 1988 when George H.W. Bush, after carefully testing voter responses to potential campaign issues, made Willie Horton and the Massachusetts prison furlough program a model of negative campaigning and appeal to fear.

⁶⁸ The history of the insanity defense can be separated into two periods—the 800 years prior to 1982 and the 20 years after. The event dividing these periods was the acquittal by reason of insanity of John Hinckley following his shooting and wounding of President Reagan. During the pre-1982 period, courts and legislatures expanded the scope of the insanity defense. In the post-1982 period, Congress and state legislatures restricted it. They did so by reverting to the 1843 *M'Naghten* or "right-wrong" test of insanity, by shifting the burden of persuasion to the defendant, by authorizing juries in some states to return verdicts of "guilty but insane" (meaning "guilty"), and in four states by abolishing the insanity defense altogether. See Kadish and Schulhofer, *Criminal Law and Its Processes* at 894–95, 902 (cited in note 37).

⁶⁹ See, for example, NJ Stat Ann § 2C:7 (West 1995) (Megan's Law).

⁷⁰ See *Kansas v Crane*, 534 US 407, 411–15 (2001); *Kansas v Hendricks*, 521 US 346, 371 (1997).

⁷¹ See, for example, *Teague v Lane*, 489 US 288 (1989); Antiterrorism and Effective Death Penalty Act of 1996, Pub L No 104-132, 110 Stat 1214.

⁷² See Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 *Crime & Just* 81, 84 (2000) ("Between 1992 and 1997, legislatures in forty-four states and the District of Columbia enacted provisions to facilitate the removal of young offenders to criminal court.").

⁷³ Bernadine Dohrn (class of 1967), a member of the Weather Underground, surrendered in 1980 and pleaded guilty to two counts of aggravated battery and two counts of jumping bail. She later was imprisoned for seven months for refusing to cooperate with a federal grand jury. She is now the Director of the Children and Family Justice Center of the Northwestern University Law School.

As the new penology grew in influence, the number of inmates in state and federal prisons increased from 196,000 in 1972 to 1,159,000 in 1997—a nearly six-fold increase in 25 years.⁷⁴ A similar explosion in local jail populations has brought the total number of Americans behind bars to more than 2,000,000.⁷⁵ In the decade from 1985 to 1995, federal and state governments opened an average of one new prison each week.⁷⁶ Our current rate of incarceration—roughly 1 of every 150 Americans—is 6 to 10 times the rate of other Western industrialized countries.⁷⁷ It is higher than that of every other nation whose rate we can approximate except Russia's.⁷⁸ This difference between the United States and other industrialized nations is explained more by our penal policies than by our not-very-different crime rates.⁷⁹ The United States not only incarcerates a higher proportion of its population than other Western democracies; it is also the only Western democracy to retain the death penalty, and the number of executions has been rising.⁸⁰ David Garland writes:

Imprisonment becomes mass imprisonment when it ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population. In the case of the USA, the group concerned is, of course, young black males in large urban centres. For these sections of the population, imprisonment has become normalized. It has come to be a regular, predictable part of experience, rather than a rare and infrequent event.⁸¹

IV. MAKING SENSE OF CRIMINAL PUNISHMENT

In retrospect, American penology in the twentieth century appears to have been a mistake. Optimistic reformers led penology from its traditional path early in the century, and disillusioned reformers marched it deeper into the woods at the century's end.

⁷⁴ Marc Mauer, *Race to Incarcerate* 114 (New Press 1999).

⁷⁵ Fox Butterfield, *Tight Budgets Force States to Reconsider Crime and Penalties*, NY Times A1 (Jan 21, 2002).

⁷⁶ Mauer, *Race to Incarcerate* at 1 (cited in note 74).

⁷⁷ Id at 19–23.

⁷⁸ See id at 19.

⁷⁹ See generally Franklin E. Zimring and Gordon Hawkins, *Crime is Not the Problem: Lethal Violence in America* ch 1 (Oxford 1997) (demonstrating that, apart from crimes of lethal violence, “rates of crime are not greatly different in the United States from those in other developed nations”).

⁸⁰ See Franklin E. Zimring, *The Contradictions of American Capital Punishment* Figure 1.1 (Oxford forthcoming 2003).

⁸¹ David Garland, *Introduction: The Meaning of Mass Imprisonment*, in Garland, ed, *Mass Imprisonment* at 1–2 (cited in note 33) (emphasis omitted).

This Part turns from history to jurisprudence. It contends that retribution, a seemingly archaic, backwards-looking goal dismissed by the champions of rehabilitation at one end of the twentieth century and by the champions of “crime control” at the other, merits recognition as the central purpose of criminal punishment.

The term retribution is often misunderstood. A retributivist believes that the imposition of deserved punishment is an intrinsic good. This proposition defines her as a retributivist, and it is the only proposition to which she must be committed. Her view of punishment separates her sharply from people who regard punishment as an intrinsic evil—who declare with Jeremy Bentham, “[A]ll punishment in itself is evil. . . . [I]f it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”⁸²

The champions of retribution and its critics have combined to give it bad press. Although a retributivist must believe that the imposition of deserved punishment is an intrinsic good, she need not believe that it is the only intrinsic good. She need not join Immanuel Kant in the view that imposing just punishment is a categorical imperative.⁸³ She need not join Michael Moore in saying that the retributivist punishes only because the offender deserves it.⁸⁴ She need not deny the legitimacy of other goals of punishment. She need not join James Fitzjames Stephen in the belief that “it is morally right to hate criminals.”⁸⁵ She may impose punishment with sadness rather than with what Jeffrie Murphy calls “retributive hatred.”⁸⁶

A recently invented mechanical device, the Pulverizer, supplies a test of whether one views retribution to some degree as a virtue independent of its consequences—that is, whether one supports retributivism as a deontological position. This imaginary machine also tests whether one regards retribution, not merely as a limiting principle, but as an affirmative reason for punishing.

⁸² Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in Jeremy Bentham and John Stuart Mill, *The Utilitarians* 162 (Dolphin 1961).

⁸³ See Immanuel Kant, *The Philosophy of Law* 195 (Augustus M. Kelley 1887) (W. Hastie, trans) (“The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it.”).

⁸⁴ Michael S. Moore, *The Moral Worth of Retribution*, in Ferdinand David Schoeman, ed., *Responsibility, Character and the Emotions: New Essays in Moral Psychology* 179, 179 (Cambridge 1987).

⁸⁵ James Fitzjames Stephen, 2 *A History of the Criminal Law of England* 81 (MacMillan 1883).

⁸⁶ Jeffrie G. Murphy, *Hatred: A Qualified Defense*, in Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* 88, 108 (Cambridge 1988) (declaring with many qualifications that “retributive hatred” is “in principle the natural, fitting, and proper response to certain instances of wrongdoing”).

The Pulverizer instantly and painlessly dematerializes murderers. To maximize its deterrent effect, its inventors have proposed using it for televised executions at the halftime of the Super Bowl. Or, to be more forthcoming, everyone *believes* the Pulverizer dematerializes murderers. In reality, it transports them to Candy Mountain where they enjoy better lives than they have ever known. The inventors of the Pulverizer realized that, compared to actual executions, simulated executions would be Pareto efficient. A murderer's pretended execution coupled with his banishment to a lovely mountain in a galaxy far, far away would make at least one person (the murderer) better off and no one worse off.⁸⁷

People who oppose use of the Pulverizer must believe that efficiency and consequences are not everything. They believe that rewards and punishments should be allocated at least partly on the basis of desert.

Although the classical retributive position is deontological, a retributivist who emphasizes the beneficial consequences of her position is not cheating. When someone is convinced that her position has good consequences, to ask whether she would take the same position if she did not believe in its good consequences is to ask an impossible question. Socrates said that justice is a good of the highest order—a good to be valued both for itself and for its consequences.⁸⁸ The intrinsic and consequential virtues of justice cannot entirely be untied.

Paul Robinson and John Darley recently published a fine article with an even finer title, *The Utility of Desert*.⁸⁹ Robinson and Darley, however, missed the principal effect of justice on behavior, and most other commentators have missed it too.⁹⁰

A familiar consequentialist argument for retribution—one not endorsed by Robinson and Darley—is that law must accommodate

⁸⁷ The parable of the Pulverizer was told to me by David Friedman, but I have embellished it. Jeremy Bentham obtained the initial patent on the principle of the Pulverizer. He suggested that a forger might be exhibited to the public with his hand "transfixed by an iron instrument fashioned like a pen," and a slanderer might be exhibited with his tongue pierced. In both instances, the punishment might "be made more formidable in appearance than in reality, by dividing the instrument in two parts, so that the part which should pierce the offending member need not be thicker than a pin, whilst the other part of the instrument may be much thicker, and appear to penetrate with all its thickness." Jeremy Bentham, *Principles of Penal Law*, in John Bowring, ed., 1 *The Works of Jeremy Bentham* 365, 408 (William Tait 1843). Bentham declared that "the apparent punishment . . . does all the service" while "the real punishment . . . does all the mischief." Jeremy Bentham, *Principles of Morals and Legislation*, in Bowring, ed., 1 *Works of Bentham* 1, 92–93.

⁸⁸ See Plato, *The Republic* 45 (Collier rev ed 1901) (Benjamin Jowett, trans).

⁸⁹ Paul H. Robinson and John M. Darley, *The Utility of Desert*, 91 *Nw U L Rev* 453 (1997).

⁹⁰ At least one commentator, however, has not missed it. See Herbert Morris, *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* 34 (California 1976) (People's "disposition to comply voluntarily will diminish as they learn that others are with impunity renouncing burdens they are assuming.").

the retributive sentiments of the public to prevent lynchings, blood feuds, and other ugly forms of self-help.⁹¹ Another argument—also blessedly unendorsed by Robinson and Darley—is that the act of punishing promotes social solidarity.⁹² The society that slays together stays together. Robinson and Darley regard the criminal law principally as a signaling mechanism. They speak of expressing social disapproval, of shaping norms, and of moral education. Retributive justice can do these things, but it also can do more.

I have argued that somewhere in the psychology of most of us is an implicit “giving-receiving” ratio. Some people—a few—may give regardless of whether they receive anything in return. Others may take and never give. Most people, however, fall into neither of these categories. Some of them give two, three, or ten times what they receive, yet even these people are likely to cease giving when they sense that the “return for giving” ratio has grown too far out of line. Criminal punishment is one of the social institutions that helps to keep the “return for giving” ratio in balance.⁹³

I offered a parable of parking violation to explain my thesis:

Several years ago, Adam moved to a neighborhood in Chicago in which parking regulations were seldom enforced. He frequently found his way and his vision blocked by unlawfully parked, unticketed cars. As Adam grew accustomed to the realities of life in this neighborhood, his own parking behavior changed.

Adam still does not park in . . . spaces reserved for the handicapped. When the only available parking space is too close to an intersection to be lawful, however, Adam takes it. Adam was a nicer person and a better citizen when he lived in Colorado. Adam also was happier. When he could improve other people’s lives (or, more modestly, facilitate their driving and parking) with confidence that most of them would do the same for him, he felt better about himself and his community.⁹⁴

The lack of parking-law enforcement in Adam’s neighborhood changed his behavior. The principal reason for his violation of the

⁹¹ See Stephen, 2 *Criminal Law of England* at 82 (cited in note 85) (arguing that the criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite).

⁹² See Émile Durkheim, *The Division of Labor in Society* 62–66 (MacMillan 1933) (George Simpson, trans).

⁹³ See Alschuler, *Law without Values* at 149 (cited in note 7). The golden rule—“do unto others as you would have them do unto you”—prescribes non-reciprocal altruism, but reciprocal altruism is the more natural kind. See Timothy H. Goldsmith and William F. Zimmerman, *Biology, Evolution, and Human Nature* 136–37 (John Wiley & Sons 2001) (describing the evolution of reciprocal altruism in nonhuman species).

⁹⁴ Alschuler, *Law without Values* at 149 (cited in note 7).

parking laws, however, was not that he thought he could get away with it. It was not that he feared punishment less than he did in his former neighborhood. It was not that he was less concerned about incurring social disapproval. It was not that he was less educated about the wrongfulness of illegal parking.

Adam would have desisted from his lawlessness if only his neighbors had desisted from theirs. When he was required to endure the burdens of life among incorrigible parking violators, however, he thought himself a fool not to capture a portion of the benefits. Adam, I noted,

is unwilling to do much more than his share. He would prefer a regime of mutual cooperation to one of every person for himself, but he prefers a regime of every person for himself to one of “cooperation for suckers.” In Adam’s neighborhood in Chicago, the bonds of the social compact have weakened.

...

Sanctions matter to Adam less because his own principal reason for law observance is the fear of punishment than because sanctions applied to others reinforce his sense of reciprocity and mutual obligation.⁹⁵

Adam’s tale brings the central reason for imposing criminal punishment into focus. Withholding punishment is inappropriate when doing so would encourage people to conclude, “Everyone else is looking out for themselves, and I’ll be a fool unless I become a little bit like them.” When withholding criminal punishment would leave the giving-receiving ratio out of balance and make selfish action more likely, society has good reason to punish.

Sometimes, however, withholding punishment does not undercut the social contract or the general sense of reciprocity and mutual obligation. The wrongdoer may not seem to be a freerider; he may appear to be more sinned against than sinning; he may have had no real choice; he may have been subjected to extraordinary temptations; he may have been too immature to be responsible; he may have suffered enough; we may accept his apology and expression of remorse as sincere. Retributivism takes these circumstances into account without strain or rationalization. The other textbook purposes of punishment do not.⁹⁶ Recognizing the need to take circumstances like these into account yields no metric for punishment and allows room for other,

⁹⁵ *Id.* at 150.

⁹⁶ Some of the circumstances recited do indicate whether an offender is likely to repeat her misconduct and therefore bear on whether punishment would advance rehabilitative or incapacitative goals, but several others do not.

non-retributive goals to influence an offender's punishment. Blame, however, remains at the core of the criminal process.

Part of retributivism's bad press stems from the perception that its object is to match punishment to harm. Using the word "retribution" as a prompt in a game of free association probably would evoke one response more frequently than any other: "an eye for an eye." Envisioning retribution as "an eye for an eye" makes the other purposes of punishment look good. Desert, however, not harm, is what retributivism is about, and desert depends as much or more on circumstances and personal characteristics as upon physical actions and harm. The formula "an eye for an eye" is horrifying precisely because it does not adequately take account of an offender's culpability.⁹⁷

The consequential argument for retributivism offered above—that keeping the giving-receiving ratio in balance promotes a sense of mutual obligation—turns on how a society perceives desert rather than on desert itself. When perceptions of desert conflict, however, the concept that emerges from democratic processes is probably the nearest approximation of desert a polity can attain.⁹⁸ Official judgments of blame are likely to reflect either the majority's own view of desert or its recognition that officials with greater knowledge, time, or other advantage can make sounder judgments than the majority itself. The concept of desert that emerges from democratic processes ordinarily will be widely shared or respected. It will have the utilitarian virtue of promoting a sense of reciprocity. Moreover, recognizing that criminal punishment is not simply an instrumental good discourages unweighted procedural tradeoffs of the sort that have characterized the new penology.

David Dolinko has written, "[O]ne commonplace of moral reasoning is that 'ought' implies 'can'—people cannot be blamed for conduct they could not have avoided."⁹⁹ Twentieth-century reformers gave up on retribution largely because they gave up on human autonomy, a concept they believed science had discredited. "I know nothing happens in this world without a cause," Clarence Darrow told the sentencing judge in the Leopold-Loeb case. It was turtles all the way down.

Philosophers continue to write about free will, recently offering and criticizing a strange series of "compatibilist" arguments that free

⁹⁷ Generations of progressives, taught that retribution focuses on the crime and rehabilitation on the criminal, may have believed themselves more committed to rehabilitation than they were in fact. Their principal commitment may have been simply to recognizing the importance of an offender's personal circumstances in determining his punishment.

⁹⁸ Obviously this is not to say that desert is itself a purely social concept or that any individual should abandon her own view of moral desert in favor of the majority's.

⁹⁹ David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L Rev 1063, 1095–96 (1986).

will and determinism can both be true.¹⁰⁰ The conundrums of free will remain mysteries, however, and whichever side bears the burden of proof is sure to lose. I cannot prove you have free will, and you cannot prove I don't.

The seventeenth-century shift in focus from irregularities in nature (miracles) to regularities or patterns changed the world for the better. Of course, the search for material causes of mental phenomena should proceed as far as it will go. The methodological premises of the scientific enterprise, however, remain premises, not answers.

The philosopher Robert Fogelin once described his fourteen-year-old son's junior-high-school science project—a crab machine. This machine consisted of a photoelectric beam and two pairs of pincers. It seized any object that interrupted the beam. Fogelin remarked, "That is all there is to a crab, and in fifty years we will know it is all there is to us."¹⁰¹

Consciousness, however, seems to distinguish a crab from a crab machine, and it clearly distinguishes us from computers. The phenomenon of consciousness remains terra incognita to neurobiologists and cognitive scientists—an impenetrable wall for now.¹⁰²

Our choices proceed from our brains, and our brains are material. In principle, a scientist who assembled one hundred billion neurons one by one might build a brain that could do what ours do. Stimulating a brain, depriving it of stimuli, or destroying a part of it can alter a person's choices. We do not expect scientists to discover a ghost in the machine.¹⁰³ Although this machine has capacities we do not fathom and is at least centuries beyond our ability to duplicate, the idea of a free-will ghost inside it is silly.

It follows that when I decided to applaud David Currie's address at the Law School's centennial celebration and then did it, my subjective sense of agency was an illusion. Within a fraction of a second of the big bang, when the universe was the size of a softball, it was inevitable that a person of my appearance and with my name—namely me—would applaud Currie's remarks at that moment. The idea that my applause, the Ten Commandments, hippopotamuses, the Taj Ma-

¹⁰⁰ See, for example, Hilary Bok, *Freedom and Responsibility* (Princeton 1998); John Martin Fischer and Mark Ranizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge 1998); R. Jay Wallace, *Responsibility and Moral Sentiments* (Harvard 1994); Gary Watson, ed, *Free Will* (Oxford 1982).

¹⁰¹ This account depends on my ability to recall a conversation a dozen years ago, but I am confident that my quotation is verbatim. Fogelin and I still have thirty-eight years to go to learn whether he was correct.

¹⁰² See Steven Pinker, *How the Mind Works* 131–48 (Norton 1997) ("As far as scientific explanation [of consciousness] goes, it might as well not exist.").

¹⁰³ The "ghost in the machine" imagery is Gilbert Ryle's, *The Concept of Mind* 15–16 (Chicago 1949).

hal, Adolf Hitler, and Starbucks coffee were built into a softball-sized universe billions of years ago seems as implausible as the idea that there might be a ghost in my head-machine. Moreover, indeterminacy or quantum-style randomness—a newcomer to the old contest—is no more convincing as an alternative to human agency than determinism.¹⁰⁴ Iris Dement says that we must let the mystery be.¹⁰⁵ Science should do all it can to trace my applause to its Planck-time origins, but you should not mistake science's working assumption for the truth about my clapping.

Although whoever has the burden of proof on the issue of autonomy will fail, the business of living requires assumptions about the unknowable, and deciding which way to bet does not seem difficult. Declaring ourselves powerless when, for all we know, we may not be would be foolish. We have meaningful lives and perhaps a meaningful universe to gain and nothing whatever to lose by wagering on our ability to choose.¹⁰⁶

In 1978, at the outset of the sentencing-reform movement, I noted that although a corrective for the undue optimism of the past was in order, the corrective could be carried too far. People might grow tired of thinking of offenders as individuals: "Don't tell us that a robber was retarded. We don't care about his problems. We don't know what to do about his problems. The most important thing about this robber is simply that . . . [h]e committed the same crime as Bonnie and Clyde." If this sort of sentiment prevailed, I thought that we would lose something as human beings.¹⁰⁷

Talk of rehabilitation through most of the twentieth century seemed to mask only slightly the moral judgments that, almost everyone realized, justified criminal punishment. When a judge announced that an offender was young, had no prior record, and was therefore a good prospect for rehabilitation, he simply declared in twentieth-century code that the offender was not very blameworthy. A century

¹⁰⁴ Scientists seem increasingly comfortable with the idea of uncaused *physical* phenomena and with complex systems that provide "lessons, rather like the lessons for life our grandmothers told us. They are general ideas which apply broadly, but they must be applied with care and good judgment." Leo P. Kadanoff, *The 2000 Nora and Edward Ryerson Lecture: "Making a Splash, Breaking a Neck: The Development of Complexity in Physical Systems,"* The University of Chicago Record, Vol 35, No 4 at 2, 2.

¹⁰⁵ Iris Dement, *Let the Mystery Be*, (Forerunner Music, Inc), recorded on Iris Dement, *Infamous Angel* (Warner Bros Records 1992).

¹⁰⁶ For an explanation of why this sort of analysis does not duplicate Pascal's discredited wager on the afterlife, see William James, *The Will to Believe and Other Essays in Popular Philosophy* (Longmans, Green 1897), reprinted in Louis Menand, ed, *Pragmatism: A Reader* 69, 72–73 (Vintage 1997). Of course everyone does wager that she and others are not automatons except for periods when she lives at a university and gets weird.

¹⁰⁷ See Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U Pa L Rev 550, 557–58 (1978).

of consequentialism, however, may persuade Americans actually to become Clarence Darrow and to foreswear blame. They already have turned too far from the most humane and humanizing of the purposes of punishment.