Summer 1992

The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility

Samuel H. Pillsbury
Loyola Law School

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Criminal Law Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol67/iss3/4

This Essay is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.
The Meaning of Deserved Punishment: 
An Essay on Choice, Character, and Responsibility†

SAMUEL H. PILLSBURY*

For if justice and righteousness perish, human life would no longer have 
any value in the world.¹

I was a couple years out of college, working in the South as a newspaper 
reporter when I first confronted the question of deserved punishment. 
Assigned to cover state court, I reported on many criminal cases, but only 
one really got to me. It raised in disturbing fashion the problem of justice 
in criminal law.

The facts were horrific. A father was convicted of the terrible abuse of 
his four children, abuse so severe that it killed two of them and left another 
battered and nearly blind. During a six-month period when his wife—who 
had been the main target of his abuse—was in jail, the heavy-set man with 
a brutal temper kicked, punched, and slapped his children, who ranged 
from three to eleven years old. To punish them, he jammed their small 
heads in a flushing toilet; he beat and kicked them, breaking their limbs 
and causing internal injuries; he scraped his fingernails on the insides of 
their mouths; and on and on. Two of the children died of the abuse. 
Finally, the eldest son escaped and the father fled the city, leaving his 
youngest daughter at a hospital with two dollars, her teddy bear, and a 
note pinned to her clothes bearing the name and telephone number of her 
grandmother.²

At the time I was influenced 
by the liberal creed of the sixties, which 
viewed punishment with great suspicion, but as I listened to this tale of 
horrors, so much worse than any fiction, I thought surely these acts deserved 
severe punishment. Surely if anyone deserved the death penalty it must be 
this Ernest John Dobbert, Jr.³

† © Copyright 1992 by Samuel H. Pillsbury. 
* Professor of Law and Rains Fellow, Loyola Law School, Los Angeles. My thanks go 
to Elyn Saks, Larry Solum, and Tom Morawetz for their critiques of earlier drafts of this 
paper and especially to Peter Arenella, who in his work and careful criticisms has helped me 
enormously, especially in the area of moral agency. The fact that we disagree about critical 
issues has only made our discussions more fruitful. I would also like to thank research 
assistants Michael Dibb and Ruth Pinkel for their efforts.

2. This account is drawn from newspaper stories. For a summary, see Ernest John 
3. The reported decisions in the case include: Dobbert v. State, 328 So. 2d 433 (Fla. 
1976) (affirming conviction); Dobbert v. Florida, 432 U.S. 282 (1977) (affirming conviction); 
Dobbert v. State, 375 So. 2d 1069 (Fla. 1979) (affirming resentencing).
Then I met Dobbert's defense attorney, one of the most perceptive observers of the criminal justice system I have known, and heard the testimony offered at Dobbert's resentencing hearing. The defendant had himself had been abused as a child. His father had emotionally and physically degraded him. He so feared his father that, once, to prevent him from learning about a bad grade, Dobbert, Jr. cut the telephone wires to the house. The defense evidence suggested that, in his own way, Dobbert, Jr. loved his children but was caught in a cycle of abuse far beyond his power to control. In fact, in prison he had shown himself to be a peaceful, even kind, person.

The question of why and when punishment is deserved goes to the heart of the modern debate over criminal justice. Although as a society we often try to avoid the question, either by assuming the validity of current practices or by emphasizing the utilitarian aims of punishment, justice requires an answer to the mystery of individual desert. How is it that Ernest John Dobbert, Jr. deserved severe punishment, when his actions may have stemmed from a background he never chose?

In this Essay I provide a practical but provisional answer to this question, one that largely defends the law's current approach to criminal responsibility. My answer is provisional because it does not address the central problem of free will. I do not—and cannot—resolve whether persons freely choose their actions despite the unchosen influence of genetics, environment, and chance. Instead, I offer a kind of practical compatibilism, a way of evaluating the justness of punishment in the face of metaphysical doubt.

In the first part of the Essay, I frame the issue of criminal responsibility. After a brief look at the importance and difficulty of the free will problem, I argue for a pragmatic approach. Regardless of the arguments that can be mounted against it, responsibility for choice is fundamental to the human condition; we cannot do without it. Thus, instead of asking whether we can prove the metaphysics of responsibility for choice, we may ask what our commitment to such responsibility entails.

The main subject of this Essay is a familiar one in the literature of criminal law: the definition of the basic elements of responsibility for serious criminal offenses. The traditional approach of criminal law asserts three basic requirements: that the offender's choice be intentional, rational, and

---


5. I limit myself to considering what punishment is deserved for serious offenses—those criminal acts that involve culpable violations of another's autonomy through violence or deceit. That is, I am interested in the punishment of those harmful acts that almost all persons would call criminal. American criminal law extends to many more acts than this, and punishment for these offenses raises questions which I do not consider here.

6. Here I use intentional in the philosophic sense to designate a culpable mental state. I do not mean to limit it to what is often described as purposeful action. The term should be seen to include all mental states generally employed in the criminal law. See MODEL PENAL Code § 2.02 (1980).
uncoerced. I call this the chosen-action model of criminal responsibility. Modern commentators generally agree that the elements of chosen action are necessary to just punishment; they disagree on whether these elements are sufficient. In recent years, many have argued for additional responsibility requirements based on various conceptions of moral character. The arguments fall into three general categories: what I call the causal, the representative action, and the moral capacity approaches. In the first part of the Essay, I briefly review each of these approaches and conclude that the moral capacity model presents the most serious challenge to the traditional model.

In the second part of the Essay, I return to the larger question of responsibility for choice and offer a pragmatic explanation and justification for our commitment to it. In short, I suggest that our deep commitment to responsibility stems from our effort to find meaning in life. Starting with the assumption that life has meaning, we see that our most important endeavors aim at supplying meaning by connecting individual actions to contexts of greater value. Responsibility for choice provides the essential link between persons and value. In particular, moral responsibility allows us to construct a normative order in a world otherwise indifferent to human norms. I apply this approach to criminal justice in the last part of this essay. I contend that punishment is deserved when necessary to defend basic human value. In punishing according to deontologic principles, we defend the moral values that criminal offenses demean. We engage in a dialogue about basic value with those persons who choose to challenge our fundamental moral scheme. This explanation provides a practical justification for deserved punishment by tying it to the essential task of finding meaning in life. It also provides a new definition of criminal responsibility. In addition to the requirements of chosen action, the offender must have had some minimal experience as a feeling, rational chooser. This package of requirements allows us to read the offender's action as a challenge to basic human value. We see that the offender is making choices about meaning for himself, choices that implicate our own vision of meaning based on moral values.

The defense-of-value approach conflicts with the most important aspects of character theories of responsibility. Most importantly, it rejects the argument of moral capacity proponents that to be criminally responsible the offender must have a demonstrated capacity for empathy. I argue that while it may be true that persons who do not feel for others cannot—without help—have moral concern, this does not excuse their actions. In making moral judgments we assess the actor's moral motivation or its lack. We may concede that Dobbert's attacks on his children stemmed from a variety of unchosen influences and that, given his character at the time, he could not have done otherwise, yet he still deserved punishment. We say this because he still chose to attack our basic moral values.
The defense-of-value approach undercuts the easy assumptions of moral superiority that deontologic views of punishment often inspire. It should make us realize that we punish persons for deeds "we" might have done in their situations. We also see that in punishing we do not—or should not—condemn the offender as a person. Even while punishing the offender's action, we should value the offender as a person. Any other approach violates the moral basis of punishment. Most fundamentally, the defense-of-value approach does not contend that the wrongdoer chose to be a bad person; it only asserts that the wrongdoer chose to disregard our concept of basic human value. The approach reveals the potentially tragic nature of punishment.

I. DEFINING THE ISSUE

When we call punishment deserved, we mean that punishment depends on the person's choice to do wrong and not on the consequences that flow from punishment. We judge according to the person's responsible choice to harm another. The critical question for determining deserved punishment, therefore, is what kind of choice supports criminal responsibility.

I begin my look at deserved punishment with the metaphysics of free will. After a brief and inconclusive examination of the conflict between free will and determinism, I suggest a different approach. I suggest that we may learn more about desert by examining the implications of our basic commitment to responsibility for choice. In this light I review the criminal law's traditional approach to responsibility and preliminarily consider the various challenges of modern character theory.

A. The Free Will Debate—Causes and Reasons

A complete understanding of free choice requires an understanding of the connection between moral judgment and the natural, or physical, world.

7. That is, we might have acted in similar fashion if we were shaped by the same environmental influences. See Part I.C. The "what I might have done" analogy is a common one in moral discourse, and so may be useful as a persuasive tool, but it has a serious conceptual limitation. Changes in a person's "situation" will generally change the person's identity as well, undercutting the significance of the original comparison. To truly adopt another's situation, for example, I would have to adopt his genetic heritage as well as his environment, leaving almost nothing of "me." For a good sampling of modern philosophical thought on personal identity, see THE IDENTITIES OF PERSONS (A. Rorty ed. 1976).

8. In discussing desert, that hallmark of retribution, I do not always adhere to classical retributiv theory. In determining the noncontingent moral principles that should guide punishment, I do not limit myself to first-order principles of right and wrong. In keeping with what I see as a pragmatic approach to criminal responsibility, I also look to the goods that come from deserved punishment. To some extent this may be justified by a category distinction: I admit the relevance of consequences in justifying the theory of punishment, not in its practice. See Parts II and III.A. Nevertheless, strict retributivists may well object to this sort of theoretical eclecticism, and indeed it requires extended justification. I hope to supply it in a later paper.
Free choice stands in the intellectual space between our status as creatures of the natural world, subject to its physical laws, and as thinking persons who make moral choices. In earlier times, the gap between these understandings was bridged by a belief in the normative structure of the natural universe. Man lived in a *kosmos* ordered by the gods and principles of right and wrong conduct could be derived from observation of the natural universe. Thus in law, as in social life, humankind followed the perceived command of God. In our pluralist and secular age, however, we cannot ground the law in beliefs about a normative physical universe. The legal separation of church and state explicitly prohibits the argument that law is right because God said so. Perhaps even more important, the modern triumph of science has dispelled the most appealing grounds for a belief that the physical world has a normative order. The laws of human behavior, like those of chemistry and physics, may be logical, but they say nothing about right and wrong as we generally understand those concepts. Instead of taking normative guidance from the world around us, we seem to be losing our sense of the normative in the face of scientific understanding.

As a result, the first and perhaps hardest question for any modern theory of deserved punishment is whether free choice is possible. The answer involves the interrelationship of three fundamental concepts: reasons, cause, and freedom. Almost all who believe in free choice do so on the ground that persons have the ability to control their own actions according to their rational powers. In other words, persons act according to reasons for which they can be held responsible. Most who reject free choice, or express serious doubts about it, do so on the ground that actions are caused by physical processes. They argue that human actions can be traced to, and explained in terms of, principles of genetics, environment, and probability. In this sense, all human action is determined; it can be predicted given an understanding of the physical processes that apply in the particular situation. No individual can break free of these causal forces and rationally create himself, however much we might like to believe in that possibility.

---

9. On the need to move from an explanation of the universe as *kosmos* to one of *nomos*, a human ordering of the world, see L. Weinfeld, *Natural Law and Justice* (1987); Cover, Foreword: Nomos and Narrative, 97 HARV. L. REV. 4 (1983).


Philosophers naturally tend toward the reasoned explanation of action; scientists focus on causation. The dispute between the two approaches sometimes involves different conceptions of the physical universe. Some behavioral scientists deny the reality of reasons, arguing they are but a fiction of our consciousness, while some philosophers argue that reasoned action is not subject to the causal laws of the physical universe. Increasingly, however, scientists and philosophers concede the reality of both reasoned and causal explanation. The battle now rages over freedom, over the moral significance of the fact that chosen action is also caused. The question becomes: Can a person truly deserve punishment or reward if her rationally chosen action can be traced to underlying circumstances over which she had no control?

Most legal philosophers today take the compatibilist position that while human choices are caused—and so are determined—free choice is not precluded. Even if caused, choice can be rational and noncoerced, and that is all that matters for responsibility. They contend that determinism is not only compatible with choice as the basis for responsibility, it also

---

12. By this I mean naturalistic causation: the laws of the physical universe as they affect humans. This is most obvious in the work of behavioral scientists. See supra note 11. Many criminologists take a similar approach. See, e.g., J. Wilson & R. Hirshey, Crime & Human Nature 489-507 (1985). Some scientists, particularly those in the social sciences, take a different approach, one that has been called interpretive. See A. Rosenberg, Philosophy of Social Science 13-17 (1988). That is, such scientists do not seek to reduce human behavior to its physical causes but rather seek to interpret human action; they try to render it intelligible in human terms. They work within the common sense structure of desire-belief-action analysis to deepen what we know from the ordinary experience of life. To put this another way, interpretivist scientists work to illuminate and improve on what has been called folk psychology; naturalistic scientists seek to replace folk psychology with an alternative way of understanding human behavior. Since, as we will see, the interpretivist approach essentially parallels the moralistic approach of law, it does not present the challenge of naturalistic science. For the remainder of the essay when I refer to science, I mean naturalistic science.


14. For a full statement of the incompatibilist argument in philosophy, see P. Van Inwagen, An Essay on Free Will (1983). Good introductions to the modern free will-determinism debate can be found in Freedom and Responsibility 436-99 (H. Morris ed. 1961) and Free Will (G. Watson ed. 1982); see also Free Will and Determinism (B. Berofsky ed. 1966); M. Thornton, Do We Have Free Will? (1989).

15. In the natural sciences, this trend is most evident in the burgeoning field of cognitive science. See Horgan & Woodward, Folk Psychology Is Here to Stay, in Mind and Cognition 399 (W. Lycan ed. 1990). For the philosophic perspective, see infra note 16 and accompanying text.


17. For clear statements of this compatibilist position, see Moore, supra note 16; Morse, supra note 16. See also R. Nozick, supra note 16, at 393-97; 2 J. Stephen, A History of the Criminal Law of England 101-04 (1883). For a somewhat different argument to the same effect, see Vuoso, Background, Responsibility, and Excuse, 96 Yale L.J. 1661 (1987).
may be a necessary precondition to choice.\textsuperscript{18} They argue that the choice need be free only in the sense that the person acted rationally and without coercion.\textsuperscript{19}

The modern compatibilist generally views the differences between philosophic and scientific inquiries as a matter of perspective.\textsuperscript{20} We might imagine a zoom lens that can be focused on events near or far along the causal chain. The scientist, with his interest in causation according to genetics and environment, adjusts the lens to telephoto length and looks beyond the conscious reasons for a decision to its causal origins. By contrast, the philosopher or lawyer adjusts the lens to the everyday perspective of human experience, in which reasons for choice dominate the foreground while genetic and environmental causes remain in the distant background.

The standard compatibilist view provides a persuasive account of how we handle choice, but it does not support the special meaning of desert based on choice. Generally when we say that a person deserves punishment we mean that the consequence should attach because of the person's free choice to do a wrong.\textsuperscript{21} We assume that the person could have done otherwise.\textsuperscript{22} The standard compatibilist view does not address this need for freedom. Compatibilism explains how we can hold a rational actor like Dobbert responsible—he rationally and without coercion chose to harm others—but it does not say how, given his unchosen background, he could have done otherwise.

\textsuperscript{18} See, e.g., Ayer, \textit{Freedom and Necessity}, in \textit{Free Will}, supra note 14, at 15. One of the central objections to indeterminism is that the only plausible alternative to determinism is chance—that actions cannot be predicted because they occur randomly. Yet random occurrences provide no support for personal responsibility either. See Vuoso, supra note 17, at 1674-78.

\textsuperscript{19} As J.L. Austin put it: "Like 'real,' 'free' is used only to rule out the suggestion of some or all of its recognized antitheses." Austin, \textit{A Plea for Excuses}, in \textit{Philosophy of Law} 316, 318 (J. Feinberg & H. Gross eds. 1975). \textit{See also} 2 J. Stephen, supra note 17, at 99-110.

\textsuperscript{20} This stems from the fundamentally different perspectives of the disciplines. By training and practice, scientists are committed to finding the deterministic causes of phenomena, while lawyers concern themselves with human choice. Each ask fundamentally different questions. In fact, the differences between the related disciplines of criminal law, psychology, criminology, and sociology depend upon the different questions each seeks to answer. See, e.g., Cohen, \textit{The Assumption that Crime Is a Product of Environments: Sociological Approaches}, in \textit{Theoretical Methods in Criminology} 223, 229-32 (R. Meier ed. 1985).


\textsuperscript{22} See, e.g., H.L.A. Hart, \textit{Legal Responsibility and Excuses}, in \textit{Punishment and Responsibility} 28, 30 (1968). The work of several philosophers, especially that of Harry Frankfurt, has indicated that in some situations "could have done otherwise" does not capture the basic moral intuition about chosen action that lies behind the criminal law. See H. Frankfurt, \textit{Alternate Possibilities and Moral Responsibility}, 66 J. Phil. 829 (1969); M. Klein, \textit{Determinism, Blameworthiness, and Deprivation} 30-48 (1990). \textit{See also infra} notes 92-122 and accompanying text.
Perhaps, as legal philosopher Lloyd Weinreb suggests, there is no articulable, rational bridge between the natural and moral spheres. Perhaps within the rational realm, freedom and cause are fundamentally and irrec- oncilably opposed. The metaphysics of free choice may present a problem like that of "life" after death, which defies rational discussion. Yet we cannot simply leave the matter here. We must find a way of working with our present state of rational understanding. We must decide whether an offender like Dobbert deserves severe punishment.

Some philosophers have suggested that our understanding of problems like free will depends essentially upon perspective, upon whether we adopt a God-like view of the universe and its possibilities or contemplate the world from the particular perspective of humanity. They argue that retaining the peculiarly human perspective—the world as it makes sense to humans—can provide a critical grounding to philosophy. If it does not supply ultimate answers, it may supply the answers we need. This is the perspective I adopt for the remainder of the essay.

B. The Human Commitment to Choice

In his influential essay *Freedom and Resentment*, philosopher Peter Strawson argues that both sides of the classically framed debate about free will and determinism have asked the wrong question. Strawson maintains that we should not worry about proving the existence of free will, because this assumes the possibility of its negation. In fact, we cannot live without it. He argues that our "reactive attitudes," the personalized, assessing reactions that we have to others' actions and that play a critical role in our moral judgments, are fundamental to human nature. He notes that these reactive attitudes are so basic to our condition that they stand independent of the truth or falsity of determinism or free will. These attitudes are a given, that "neither calls for, nor permits" rational justification. In other words, our form of conscious, rational life commits us to a belief in free choice.

In fact, our commitment to responsibility for choice is fundamental. Despite the metaphysical gulf, somehow we do reconcile freedom and cause

23. See L. WEINREB, supra note 9, at 263-65.
26. In other words, our reactive attitudes do not change according to what view of determinism and free will we hold. Id. at 64-70.
27. Id. at 78.
28. See L. WEINREB, supra note 9, at 3-8.
29. See Weinreb, *What Are Civil Rights?*, 8 SOC. PHI. & POL'Y 1, 3-8 (1991). Strawson seems to make a related, but quite different, point in his essay. He suggests that our reactive
and build the most important aspects of our lives on the concept of responsible choice.\(^3\) If we take this commitment as our starting point, the problem of criminal responsibility looks quite different. We now ask: What does our commitment to choice involve? Does our commitment mandate the traditional, chosen action view of responsibility, or does it support any of the alternative character models?

C. The Chosen Action Model of Criminal Responsibility

American criminal law generally restricts its view of choice to the actor's immediate decision to do wrong. As long as the individual rationally and without coercion from an external source\(^3\) chooses to do wrong, the actor may be blamed and punished. Under this view persons who deliberately and without justification or excuse seriously harm others deserve severe punishment.\(^3\) The chosen action approach does not investigate the internal source of the actor's decision to do wrong, nor does it explicitly analyze the relationship between the offense and the individual's essential moral character.\(^3\)

The criminal law emphasizes rational mental processes. Its greatest concern is with intentions—the actor's mental attitude toward the wrong involved in his act. The law categorizes crime according to these attitudes—the deliberation, purpose, knowledge, recklessness, or negligence of the criminal actor.\(^4\) The criminal law also requires that the actor be a rational chooser. In assessing criminal liability, we ask if the actor perceives the world and acts upon his perception in ways that the rest of us can readily accommodate to our own world view. We ask whether the actor displays cognitive rationality: Does he, for example, see that he is the individual described on his driver's license and not the reincarnation of Jesus Christ? We ask whether he works toward ends that we understand, such as the pursuit of money, physical pleasure, or career advancement, as opposed to ends that attitudes are fundamental and in fact constitute moral responsibility. That is, he seems to argue that in considering morality all we can do is examine our own attitudes to determine their efficacy in regulating behavior. There are no independent moral standards by which our attitudes can be judged, because our attitudes are our morality. Strawson, Freedom and Resentment, in Free Will, supra note 14, at 80. For an illuminating exploration of this theory, see Watson, Responsibility and the Limits of Evil: Variations on a Strawsonian Theme, in Responsibility, Character and the Emotions 256 (F. Schoeman ed. 1987).

30. L. Weitreb, supra note 9, at 263-65.

31. As classically represented in criminal law, the noncoercion requirement explains the defenses of duress and necessity. The noncoercion requirement is often stated in terms of ability to do otherwise. See H.L.A. Hart, supra note 22, at 28, 30.


34. See Model Penal Code § 2.02 (1980).
appear bizarre, such as preparing the planet for an invasion of space mushrooms. We ask whether the means he has chosen to achieve his ends make sense. Does he seek fame and fortune by such time-honored routes as playing in a rock band or writing a self-help book, or does he expect to achieve material success by constantly reciting prime numbers? We look finally to volitional control: Is the individual sufficiently self-integrated that his conscious mind maintains basic control over his actions?35

In some ways the criminal law tends toward a narrowly cognitive view of rationality, one that emphasizes practical reasoning. Psychopaths, for example, are held responsible for their chosen actions even though social scientists have presented strong evidence that they feel no empathy for others, an emotion probably essential to good moral character and moral action.36 Claims of excuse for brainwashing and organic brain damage are normally treated as questions of immediate coercion and reasoning power and not of general moral capacity.37

Those excuses that directly implicate moral responsibility—infinity and insanity—suggest a broader perspective, however.38 In evaluating insanity claims, most courts leave the definition of "knowledge" of right and wrong open to broad jury interpretation.39 This suggests that moral agency involves emotional as well as cognitive abilities.40 The excuse of infancy also supports a noncognitive component. Anglo-American law deems children under the age of seven incapable of criminal choice, and those under the age of

35. See M. Moore, LAW AND PSYCHIATRY 387-415 (1984). The criminal law's view of rationality is a broad one; desires to harm others, while in some senses self-destructive, are viewed as rational since they provide basic, readily comprehensible, satisfactions. See Pillsbury, supra note 32.

36. See Harris v. Pulley, 885 F.2d 1354, 1381-83, denying rehe'g and rehe'g en banc and amending 852 F.2d 1546 (9th Cir. 1988), cert. denied, 493 U.S. 1051 (1990); see also MODEL PENAL CODE § 4.01(2) (1980).


38. I am grateful to Peter Arenella for pointing out the link between these particular excuses and moral agency.


40. See H. Fingarette, supra note 39, at 137-42; Zilboorg, supra note 39, at 552-53.
fourteen are presumed to be nonresponsible, 41 despite the fact that many young people, including young children, are rational actors. 42

The criminal law generally rejects excuses based on causal accounts of criminality. For example, we know from personal experience and scientific study that much of our basic temperament derives from—that is, is caused by—genetic inheritance and so provides a classic instance of unchosen influence upon action. 43 If the bad-tempered person feels a much greater temptation to violence in aggravating situations than do others, the difference stems from genetics, not free choice. Nevertheless, the ill-tempered person cannot base a provocation claim on personality type, 44 nor can the absent-minded claim exemption from reckless or negligent conduct. The result is no different if the offender presents evidence that his basic disposition toward doing wrong resulted from unchosen environmental influences. 45 We know that emotional and physical violence to a person as a child can make that person a cruel and abusive adult, but criminal law provides no excuse based on upbringing. Defendants with childhoods like that of Ernest John Dobbert, Jr., and worse, compose most of those on the nation’s death rows. 46 Likewise, although we know that the combination of certain socioeconomic and racial statuses—all unchosen—create some predisposition to criminality, we do not take them into account in determinations of guilt or innocence. 47

41. In formal terms, the presumption of incapacity is irrebuttable for those under age 7 and rebuttable for those aged 7 to 14. See W. LaFave & A. Scott, supra note 39, at 398-400; J. Stephen, supra note 17, at 97-99.
42. See Zilboorg, supra note 39, at 552-53.
43. For a general overview of genetic causes of crime, see J. Wilson & R. Herrnstein, supra note 12, at 69-244.
44. See J. Dressler, supra note 33, at 480-81. While some have argued that provocation provides a partial excuse to those whose tempers cause them to act violently where the reasonable person would restrain violent impulses, e.g., Williams, Provocation and the Responsible Man, 1954 Crim. L. Rev. 740, 750-51, others (more plausibly in my view) ground the provocation doctrine in a sympathetic moral judgment of offender’s motivation. See Von Hirsch & Jareborg, Provocation and Culpability, in Responsibility, Character and the Emotions, supra note 29, at 241; see also Dressler, Rethinking Heat of Passion: A Defense in Search of a Rationale, 73 J. Crim. L. & Criminology 421 (1982).
45. That is, it does not change offense liability. Many consider it relevant to sentencing, however. See infra note 47.
46. A particularly striking instance is that of Robert Alton Harris in California, whose childhood saw abuse in all of its cruel variety and shaped a person capable of great cruelty. See Harris v. Vasquez, 913 F.2d 606, 613-14 (9th Cir. 1990); Harris v. Pulley, 885 F.2d at 1381-83. For a fascinating discussion of the case, see Watson, supra note 29, at 267-86. For a revealing look at one state’s death row, see K. Miller & B. Miller, To Kill and Be Killed: Case Studies from Florida's Death Row (1989).
47. Cf. United States v. Alexander, 471 F.2d 923, 957-65 (D.C. Cir. 1973) (Bazelon, J., dissenting). Such factors may, however, be influential in some of the discretionary decisions of criminal justice, such as plea bargaining and, in some instances, sentencing. For example, in capital punishment decision making, where current law imposes few checks on mitigation evidence, the defense presentation frequently consists of an extended character-based argument
D. The Challenge-of-Character Theory

Recently a number of philosophers and legal theorists have revived an approach suggested by David Hume that grants the importance of chosen action but sees character as central to responsibility. These theorists argue that only those chosen actions that reflect badly on the individual's essential moral character should be punished. The proposed definitions of essential moral character differ substantially, however. At least three different strands of character theory can be identified: (1) a causal model, (2) a representative action model, and (3) a moral capacity model. As we will see, the moral capacity approach presents the most significant challenge to the traditions of criminal law.

1. The Causal Model

The causal approach seeks to distinguish those aspects of character caused by unchosen influence and those that can fairly be attributed to the actor. Under this view, wrongful actions that stem from those aspects of character


Our common experience of morality reflects some of the same ambivalence about character formation. If a mutual friend complains of the extreme jealousy another man exhibits toward his wife, we might respond by saying, "That's Steve for you. He goes crazy whenever his wife talks to another man. You have to understand what happened with his first wife. She ran off with his best friend." Or we might say, "That's the way he was raised. In his family the wife's not supposed to talk to other men." Usually, such comments are followed by the caveat: "not that it's any excuse," suggesting that the explanation of character provides no mitigation. This may be disingenuous, however. The plea for understanding is often seen as a plea for mitigation. The speaker seems to imply that, at least for purposes of social interaction, the subject should not be treated as harshly as if he had not experienced the particular unchosen influence upon his character.


49. R. BRANDT, ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS 460-78 (1959). Brandt views moral assessment as involving judgment of character traits, which he describes as involving the "relatively enduring response-tendency of the whole person." Id. at 466 (emphasis in original); see also G. FLETCHER, RETHINKING CRIMINAL LAW 799-807 (1978) (viewing criminal excuses as limited distortions of the actor's true character, such that we cannot infer the nature of the actor's character from the act); N. LACEY, STATE PUNISHMENT 65-68 (1988); Bayles, Character, Purpose, and Criminal Responsibility, 1 LAW & PHIL. 5 (1982); Vuoso, supra note 17, at 1670-730; cf. Arenella, Character, Choice, and Moral Agency, in CRIME, CULPABILITY AND REMEDY, supra note 33, at 59-61 (presenting a theory of moral agency under the rubric of character theory).
caused by other persons or by natural forces should be excused; wrongful actions that stem from character traits attributable to the individual should be punished. 50 The approach builds on the common intuition that, while persons are generally responsible for their own character, extraordinary environmental or genetic influences may preclude such responsibility. 51

The causal model is in some ways the most appealing of the character theories. It combines the reason-based judgment of traditional morality with a causal understanding of human behavior. Psychologists who study human patterns of attribution tend to use the causal approach as their theoretical framework. 52 They contend that, in assessing others, persons distinguish those aspects of the individual caused by external influence from those that can be attributed to the individual. 53 Arguments based on the causal approach


51. Thus, a number of character theorists argue that blame for action stems from the individual's responsibility for having the character trait behind the action. They argue that the person is responsible for the trait either because she initially chose it or, following the Aristotelian view, is responsible for retaining the trait. E.g., G. Fletcher, supra note 49, at 805-06 (although recognizing problems with responsibility for character); see ARISTOTLE, supra note 48, at 1103a-1106a; Audi, Responsible Action and Virtuous Character, 101 ETHICS 309 (1991); cf. Arenella, supra note 49 (arguing for character responsibility based not on choice but on the achievement of certain moral capacities). The scientific response to the argument that persons are thus responsible for their characters is to push the analysis back one more step. At some point, the initial "choice" on character must be traceable to genetics, environment, or chance. The decision on retaining character seems no more chosen, since it flows from those second-order desires—desires about character—that themselves can be traced to genetics or environment. For critical accounts of responsibility for character from the legal and philosophic perspectives, see L. WEINREB, supra note 9, at 205-14; Dressler, Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code, 19 RUTGERS L.J. 671, 695-97 (1988); Watson, supra note 29, at 256. The concept of second-order desires comes from the work of Harry Frankfurt. See Frankfurt, Freedom of the Will and the Concept of a Person, in FREE WILL, supra note 14, at 81-95.

52. For an introduction to attribution theory, see M. Shaw & P. Costanzo, THEORIES OF SOCIAL PSYCHOLOGY 232-58 (2d ed. 1982); ATTIbUTION THEORY AND RESEARCH: CONCEPTUAL, DEVELOPMENTAL AND SOCIAL DIMENSIONS 3-36 (1983) [hereinafter Attribution Theory and Research].

53. See F. HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS 16-17, 79-124 (1958); H. DELGADO, CAUSAL SCHEMATAs AND THE ATTIbUTION PROCESS 1-4 (1972). Both philosophers and psychologists have criticized the standard approach of attribution theory for its failure to recognize the variety of type and function of attributional decisions. See Attribution Theory and Research, supra note 52; Schoeman, Statistical Norms and Moral Attributions, in Responsibility, Character and the Emotions, supra note 44, at 287. More seriously, some psychologists confuse an accurate description of attribution patterns with a description of morality. The relationship between common patterns of attribution and morality is highly complex, involving the interplay between the science of behavior and moral expectations. See infra Part III.C.
commonly surface at sentencing in criminal cases and in everyday moral conversation. Unfortunately, the causal approach does not survive careful scrutiny; its essential argument, taken to its natural conclusion, eliminates choice entirely.54

In law and modern social policy, the most popular application of the causal theory involves excuse for socioeconomic background. Since we know that racial discrimination, poverty, bad education, and a subculture of criminality dispose some persons to crime, we might excuse those persons for acting in accord with these unchosen influences. Yet, this argument, which ties excuse to causation, has much broader implications.55 Logically, all unchosen influences on action, including age, sex, intelligence, and even geographic residence, should excuse.56 In fact, the argument has no stopping place.

Proponents of the causal theory try to save responsibility for choice by limiting their analysis of causation to certain aspects of character while retaining traditional moral analysis for others. But the two approaches are incompatible, at least as described. The scientific view of causation, from which the causal model draws, holds that all action, including rational, uncoerced, and reflective decisions, can be traced to the unchosen influence of genetics, environment, or rules of probability. The scientific view holds that if causation excuses, it excuses all human behavior—because all behavior is caused.57 While metaphysically arguable,58 this causation-excuses-all position contradicts the human commitment to choice and responsibility that provides the grounding for this Essay. For this reason, I will concentrate on those character approaches that distinguish actions according to the nature of the choices involved, rather than their causal history.

2. The Representative Action Model

Some commentators argue that chosen action should form the basis of punishment only when it reflects the actor's enduring moral character.59

54. See Moore, supra note 16. Moore provides a thorough criticism of what he calls the causal theory of the excuses, which provides the basis for much of the discussion here.

55. Some argue that the excuse rests not upon the individual's lack of responsibility for self, but upon society's responsibility for the harmful influences on character. That is, since society made the person bad, society's fault, its "unclean hands," precludes it from punishing. See Bazelon, supra note 50, at 386-87; Delgado, supra note 50, at 13-15, 68-70, 77-78. This argument lies beyond the scope of this Article, because it concerns society's right to punish rather than the individual's ability to choose. See H. Gross, supra note 33, at 319-23. As should be clear from the discussions in Parts II and III, however, it takes a very different view of punishment than I do here. For a criticism of the unclean hands approach, see Dressler, supra note 44, at 686.


57. See Moore, supra note 16, at 1112-28; see also M. Klein, supra note 22, at 110-49.

58. See supra Part I.A.

59. We have to be careful here about a significant overlap between character approaches.
Proponents of this approach, which I call the representative action model, argue that criminal law generally punishes when wrongful action represents the expression of a bad character trait. The theory rests on the idea that in punishing we judge not only the action but also the person revealed by the action. For example, when we declare that a purposeful killing is manslaughter rather than murder, we make a judgment about the person as well as the act. That is, we say that the offender did not reveal himself to be the sort of evil-minded person we associate with the label "murderer."

The emphasis that proponents place on character in determining punishment accords with many of our nonlegal blaming practices, but its shape and usefulness depend on the definition of character. We need to know what counts as an enduring character trait in order to determine whether chosen action reveals character or some other nonculpable aspect of the actor's situation. Unfortunately, proponents have not yet presented a clear definition of what counts as a character trait, thus leaving murky the question of what counts as a moral choice. As a result, the theory's significance seems limited to the most general understanding of criminal punishment. I will return to it in the last section of the Essay, after presenting my own theory of deserved punishment.

3. The Moral Capacity Model

Finally, some character theorists argue for a closer examination of the capacities necessary for moral decision making. For example, Peter
Arenella contends that moral responsibility requires certain moral-emotional capacities beyond those mandated by chosen action. Although proponents differ on their definition of moral capacity, all give a central place to the ability to empathize. Without an ability to care for others, proponents argue that a person cannot deserve punishment, even if her harmful act was rational, intentional, and uncoerced.

The moral capacity model presents the most serious challenge to chosen action. It avoids the pitfalls of the causal model in that it works within the human perspective and seems consistent with our fundamental commitment to choice. It also seems to enrich our view of choice. We know that good character involves more than a working intellect. The person with good character has empathy for others and can be self-critical. Since these qualities are needed to be good and since we blame offenders for failing to attain goodness, it seems to follow that these qualities are a prerequisite for responsible choice. The model's inclusive perspective thus allows the criminal law to recognize the complexity of moral concerns. It brings the law closer to both the novelistic insights of the writer and the scientific insights of the psychologist.

The capacity model does present a practical problem, however. The denial of responsibility can have dangerous consequences for those purportedly excused. Society normally deals with the dangerous but nonresponsible by subjecting them to forcible confinement and "treatment." Experience teaches that this approach may be more destructive to individual worth than actual punishment. While this consequentialist concern is serious, I will put it aside here. My main concern is to determine, consistent with a commitment to responsibility for choice, what conception of choice best supports deserved punishment. In the next part of the Essay I offer an explanation and

64. See Arenella, supra note 49, at 82-83.
65. E.g., id. at 82; Murphy, supra note 63, at 130-31; see also R. Duff, supra note 63, at 263-64 (emphasizing capacity to understand punishment, a capacity the psychopath lacks by his lack of empathy).
67. See, e.g., id. at 59-61.
68. Id. at 82-83.
69. The position also has some support in current law in the excuse doctrines of insanity and infancy. See supra Part I.C. At least in the context of insanity, an alternative explanation is available, however. The breadth of the insanity defense might be explained by a broad view of rationality that includes the emotions—a sense that persons can have crazy feelings as well as crazy perceptions or ideas. See sources cited supra notes 38-42 and accompanying text for more on the rationality of emotion. The example of infancy causes more problems for a pure rationality model. See infra Part III.C.
practical justification for our commitment to responsibility for choice. This provides a theory of responsibility which I use, in the final portion of the Essay, to evaluate the moral capacity approach.

II. MORAL RESPONSIBILITY AND THE ARGUMENT FROM MEANING

There is but one truly serious philosophical problem, and that is suicide. Judging whether life is or is not worth living amounts to answering the fundamental question of philosophy.\(^7\)

So begins Albert Camus' classic investigation of humanity's existential dilemma. Camus' concern with the worth of life brings us back to our basic problem: the nature of our commitment to choice and moral responsibility. Only when we understand that commitment can we decide what deserved punishment involves. For present purposes, I assume that we can answer Camus' question in the affirmative. Obviously, I cannot prove that life has worth or meaning; most likely this is a question not susceptible to logical or empirical proofs. Like most people, I live in the faith that life has meaning and take that as my starting point. This perspective proves enlightening; it reveals that moral responsibility provides one of our most important ways of finding meaning in life.

A. The Argument from Meaning

The hoary phrase "the meaning of life" has been a figure of fun in modern culture.\(^2\) Even in modern philosophy, the question has received scant attention. Most twentieth-century philosophers have treated meaning as purely a question of language—an inquiry into what words signify.\(^3\) As Robert Nozick has shown, however, investigating meaning in the larger sense of ultimate-values-in-life remains a critical part of moral philosophy.\(^4\) Nozick argues that we find meaning in life by transcending the limits of individual existence. Each of us transcends our small, isolated situations by connecting ourselves and our actions to a wider context of value. The extent to which we find meaning depends on the nature and extent of our connections to larger value. A life devoted entirely to physical gratification—a limited existence—provides less meaning than one that includes the rewards of love and friendship—wider contexts of value.

---

\(^2\) For example, see Monty Python's The Meaning of Life (Celandine Films 1983).
The argument from meaning, as I call it, makes a tentative connection between the normative constructs of morality and the nonnormative laws of the physical universe. In a pragmatic fashion—for what could be more useful to the living of life than a conception of how it can be meaningful?—the argument explains how moral values work in a "morally indifferent universe." It sheds new light on the nature of moral responsibility. If morality involves an effort to find a certain kind of meaning in social life, moral responsibility is the basic mechanism for its expression and construction. The argument from meaning suggests that moral responsibility is a more creative, human-centered process than it is often considered. Such responsibility involves the construction of a normative order based on essential human experience rather than the deduction of moral truths from first principles.

The meaning approach should not be oversold. The argument from meaning does not dictate the values critical to morality; it simply provides a way of addressing issues of moral value. In the context of punishment, meaning arguments may be made on behalf of all extant theories. Not all will be equally strong, but all may be phrased in its terms. The signal contribution of the meaning approach here is its answer to the question: Where does desert come from?

The remainder of this Article tracks the meaning approach from its most general statement to the particular concerns of criminal justice. In this section I explore the way in which moral responsibility provides meaning by connecting individual actions to moral values. In the last part of the Essay, I consider how moral responsibility provides meaning in the context of criminal justice.

B. The Basic Elements of Moral Responsibility

Moral responsibility may be understood as a mechanism to establish moral order over time by attaching consequences to chosen actions. A determination of moral responsibility involves four basic dimensions: the normative goal—the moral order to be established; the temporal dimension—the linkage of past action to present and future consequences; the range of consequences that may attach to a determination of responsibility; and the definition of free choice—the range of actions attributable to the actor. For analytic purposes, these dimensions may be distinguished, but in operation they are closely intertwined.

Two examples will illustrate the basic features of moral responsibility. First, a friend who has had a great deal to drink at a party calls you—quite without justification—a fascist pig. Second, a young boy is caught
DESERVED PUNISHMENT

stealing an expensive video game from a store. In each instance, if we hold the individual responsible, we will do so according to an idea of moral order. For example, we might say that, according to the norm of friendship, friends should not insult each other. Likewise, the boy's theft violates a basic principle of personal property. In each instance, depending upon our evaluation of the other responsibility elements, we use responsibility to impose human order on the world. We construct a nomos for the relevant community.

Determinations of responsibility involve an important temporal dimension. We must decide whether to link the past deeds of the boy and the friend to present or future consequences. Responsibility forges links between past, present, and future that otherwise would not exist. In this respect there are critical variations in emphasis between responsibility modes. For example, in punishment theory, the utilitarian approach emphasizes the present and future effects of punishment. The utilitarian determining the boy’s responsibility may find most relevant the chance of his doing it again. The retributive approach emphasizes the past deed and considers the present and future consequences only as by-products of past action, not independent considerations. The retributivist would concentrate on the nature of the boy’s offense, rather than his future behavior, in determining punishment.

Determinations of responsibility vary in important ways according to the consequence that attaches to the finding. For example, we may decide that the light-fingered boy should be held responsible but only for purposes of parental reprimand and not criminal sanction. The range of consequences is closely tied to that of normative order. A judgment according to the norms of friendship implies application of friendship consequences; an application of criminal consequences implies a judgment according to criminal norms. Then questions of degree arise. If we believe that the friend’s action was culpable, we must decide whether it merits direct reproof, snubbing, or ending the relationship.

Finally, and most importantly, each form of moral responsibility involves a particular conception of choice. For moral responsibility to obtain, we must determine that the boy and the friend chose in a fashion that makes them responsible. We must decide whether the boy was old enough to warrant punishment and whether the friend’s intoxication amounts to an excuse. The fact that all moral responsibility is based upon choice does not determine how broad a definition of choice we use in any particular context,

76. See supra note 9.

77. Note that regardless of philosophy, punishment necessarily involves all three time dimensions: past, present, and future. This suggests one reason why the debates between utilitarians and retributivists are likely to go unresolved: both sides tend to emphasize one time dimension without adequately considering the importance of other dimensions. For a discussion of desert’s relationship to the past, see G. Sher, supra note 21, at 175-93.
however. Depending on the responsibility mode, we may define choice narrowly and so restrict the range of responsible actions, or we may define it broadly and enlarge the realm of responsibility. In this sense, the definition of choice may depend on our view of responsibility and not the other way around.

C. Responsibility and Emotion

An important mystery about responsibility remains: In a human sense, how does it work? Separated into its component parts, responsibility seems an abstract construct far removed from everyday experience. Yet, responsibility suffuses our world, informing virtually every significant aspect of our lives. How is it that this collection of principles applies with such force in our lives? Or, to put the question differently: Why is responsibility meaningful?

The animator of responsibility is human emotion. Emotion supplies the current that brings responsibility to life within us. It provides the essential connection between the individual's internal existence and the stimuli of the outside world. If an event matters to us, we react emotionally. This fact of human life is so obvious that we often forget it. Especially in a field like criminal law, where dispassion is highly regarded, we may overlook the ubiquity of emotional reaction. When we speak of judicial temperament and the ability of a judge to avoid personalizing courtroom disputes, for example, we do not ask the judge to become unfeeling. Rather, we say that certain kinds of feelings should be avoided. And even as to these emotions, we in essence urge that the judge find satisfaction—a variety of emotion—in the role of dispassionate arbiter.

Although we generally experience emotion without prior calculation, emotional reactions nevertheless have their own kind of rationality. Contemporary theorists divide emotion into three essential elements: intellectual assessment, reactive sensation, and desire for responsive action. Anger, for example, involves a judgment of blame, a sensation of violent arousal, and a desire to inflict pain on the wrongdoer. If you become enraged by your friend's insult, it is probably because you consider his words a violation

---

78. R. Solomon, supra note 24, at 12-15.
79. To give another example, scholarship is also considered a dispassionate endeavor. But unless meant as a fundamental criticism—that is, it is passionless because it does not matter—this observation represents a misunderstanding about emotion. The satisfactions and frustrations of academic writing may lack the drama of compelling art, but they nevertheless represent critical, and emotional, aspects of the experience.
of the principles of friendship. Even a strong "gut" reaction such as this involves some assessment of action, some assessment of choice.

The rationality of emotion suggests that emotions play a complex role in determinations of responsibility. Even our most reasoned judgments of responsibility normally have an emotional basis. We all have deeply embedded value systems that are expressed by our emotional reactions and that inform deliberative decision making. Yet emotions do not, by themselves, determine responsibility. By definition, responsibility follows a consistent normative order. Therefore, determinations of responsibility cannot validate those emotional reactions that violate the applicable norms. Our initial reaction to the friend's insult may be harsh; upset at his words, we may reply in kind and make statements we later regret. In this instance we would say that our emotions led us astray. Although our reaction felt right, it was not.

We begin moral assessment with an emotional inclination, but this must survive rational scrutiny to become the basis of moral judgment. If we see some flaw in our emotional reaction, as we often do, we work to correct it. If you recognize that your immediate reaction to your friend’s insult is more the product of your own bad mood than the wrongful act of your friend, you try to restructure your reaction. You might try to hold your tongue until you can respond in an appropriate fashion. Or if you have already spoken, you might issue a partial apology. This process of emotional evaluation and reconsideration does not always work, of course. Our efforts may be hampered by self-deception or a lack of commitment to underlying norms. The point is that emotional evaluation is an inescapable part of moral assessment. Determining responsibility almost always involves working from what feels good to what is good.

D. Responsibility and Value

Individual responsibility supports two fundamental bases of morality: the continuing identity of the person and the individual's power of self-determination. The identity component is easily overlooked because it rarely causes a problem. Without realizing it, we identify and relate to each other by the expressions we make, the words we use, and the deeds we do. We use the concept of responsibility to link the past, present, and future actions of the individual; responsibility allows us to consider her an integral, though changing and complex, being. If we could not do this, if we could not attribute actions to a person over time, our notion of identity would

82. Id.
We would be like characters in a science fiction movie, wondering what aliens inhabit the human bodies we confront.84

Moral responsibility involves more than attribution of deeds to particular actors, however. We can, after all, attribute certain kinds of "actions" to animals and machines and respond accordingly. We can cage dangerous animals and repair defective machines. Moral responsibility, by adding the imprimatur of praise or shame, recognizes a different kind of choice on the part of the actor. Moral responsibility signifies our belief that human worth comes from our choices. Because we can choose, because we can react to stimulus and change, we have enormous potential. Responsibility tracks this choice-making power by valuing the way in which we use it. Responsibility tangibly values the source of human uniqueness, what philosophers call autonomy.85

By supporting autonomy, responsibility validates the emotional responses necessary for meaning. We all want to be somebody, somebody special, that is, and this requires responsibility for what we do. If an athlete were not personally rewarded for her feats or a scholar for his writings, much of the joy of those endeavors would be missing. Even the personal rewards of accomplishment—the soul's sense of a job well done, which may come without regard to the recognition of others—represents a kind of responsibility. If we could not validate the experience of achievement, if we agreed that one's work reflects nothing more than environment and genetic heritage, a basic life satisfaction would disappear. Without the incentives provided by responsibility, simply gathering the energy to get out of bed every day would be an enormous challenge.

Moral responsibility, in at least some of its forms, supports a third value as well—that of moral community. Moral responsibility supports a wide range of affirmative obligations owed by members of society to each other. Responsibility for purposes of friendship, for example, supports the value of companionship and mutual support in the absence of romantic or family involvement. While considerations of moral community potentially have great influence on criminal law, I will concentrate my efforts here on the value of autonomy as the basis of criminal responsibility.86

83. This is why the identity question is a central one for any punishment theory, especially a character-based one, that seeks to distinguish between actions on an identity basis. See Dresser, Personal Identity and Punishment, 70 B.U.L. Rev. 395 (1990); see also G. SHER, supra note 21, at 150-74.


85. See G. Hegel, PHILOSOPHY OF RIGHT 70-71 (T. Knox trans. 1952); Morris, supra note 70, at 46-57.

86. For an interesting treatment of community concerns in the criminal justice context, see N. Lacey, supra note 49; see also J. Braithwaite & P. Pettit, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990); R. Ellis & C. Ellis, THEORIES OF CRIMINAL JUSTICE (1989).
Moral responsibility enforces basic notions of right and wrong by providing concrete rewards for good conduct and punishments for bad. Without consequences that attach to actions according to moral standards, we would have little incentive to become better persons. Why should the insulter behave better at parties when he can always blame his drinking? Why should the boy respect property as long as he remains too young to be blamed? Responsibility is our primary means of inspiring morality in each other. It is our only way of forcefully telling each other about the moral status of our actions. It helps us create order in a disordered world.

E. Denying Responsibility and the Requirement of Symmetry

The discussion of moral responsibility has so far focused on the value of finding persons responsible for their actions. Yet moral responsibility also involves instances of excusing individuals, and such excuses reflect value determinations as well. When we see the damage wreaked by a natural disaster—a flood or earthquake, for example—we recognize an event beyond human influence, for which no person should be held responsible. Certain human "actions," such as an unwarned epileptic seizure, fall into the same category. We say in these instances that there was nothing anyone could have or should have done differently.

In the short term, denying responsibility enhances personal freedom. Such denials mean we can live in a nearly unlimited present, free to remake ourselves with every new day. Denying responsibility is most attractive, of course, when a determination of responsibility would entail painful consequences for ourselves or those we care about. For the friendly insulter, denying responsibility means awaking the next day with an aching head but a clear conscience. He may tell himself: There's no need to apologize because everyone was drinking, and by now, it's ancient history anyway. Denying responsibility permits a new start to life, with all the wonderful possibilities that implies. It emphasizes the person that the individual might become rather than the one he has been.

87. Although my main concern is with responsibility as an external event, one in which a person is found to be responsible by another, the internal experience of morality also involves responsibility. If the boy came to understand the wrong of stealing and resolved in some way to make amends, he would be holding himself responsible. In this way we see the impossibility of morality without responsibility.

88. I should make clear that my focus is upon denying rather than shifting individual responsibility. Often, when we speak of denying responsibility, we really mean that we should shift primary responsibility between individual actors. For example, we might decide that the young thief should not be punished because he was forced to steal by his older brother. This kind of responsibility shifting does not concern us here because our immediate concern is determining whether to hold any individual responsible.

89. Although, of course, we assign responsibility for failing to prepare for such events.
Whatever approach to responsibility we take, we must be consistent, however. If responsibility is to be principled, we need norms that produce determinations without regard to selfish concerns. We often fail this standard. Too often we tip the judgment scales in our favor for our own actions and tip them the other way for strangers or enemies. We are quicker to praise ourselves for good results than we are to accept blame for bad ones. We must constantly remind ourselves that such self-interested, unprincipled methods cannot support moral responsibility. Certainly the notion of desert, as generally understood, does not permit such asymmetry.

The symmetrical approach to responsibility requires absolute consistency in attribution between blame and reward. If the insulter seeks to renew his friendship with you by inviting you to lunch, yet sees no need for apology, he acts from contradictory beliefs. Why should he gain the positive consequences of one act—the lunch invitation—yet not suffer the negative consequences of another—the insult? His only philosophic hope is to provide a theory that shows that exceptional reasons excuse the insult while the general rule of responsibility governs the invitation.

Widespread denials of responsibility sever the link between human action and value. They create a sense of disorder by declaring that human actions occur arbitrarily—at least in a moral sense. Those who contend that determinism precludes deserved punishments or rewards have a plausible metaphysical argument for this position, but as we have seen, the argument contradicts the human commitment to responsibility. That commitment requires us to find a principled stopping place for both excuse and responsibility.

III. DESERVED PUNISHMENT RECONSIDERED

Armed with new insights into meaning and responsibility, we now return to the definition of deserved punishment. In the final part of this Essay, I offer the outlines of a theory of punishment grounded in the argument from meaning. I argue that, as part of our larger effort to find moral meaning in life, punishment involves a defense of value, particularly the value of autonomy. This approach finally allows us to resolve how an offender like Dobbert, Jr. may deserve serious punishment.

90. Attribution research indicates, unsurprisingly, that in explaining their own actions individuals tend to attribute actions that produce bad results to adverse situations and actions that produce good results to positive personal qualities. See E. Hollander, Principles and Methods of Social Psychology 115 (4th ed. 1981). Another asymmetrical tendency in our attribution practices, called the fundamental attribution error, is the tendency of observers to explain others’ actions by reference to intentions and individuals’ tendency to explain their own actions by situation. See E. Jones & R. Nisbet, The Actor and the Observed: Divergent Perceptions of the Causes of Behavior (1971).
In the modern American context, there is something odd about considering criminal justice in terms of the meaning of life. We normally think of meaning questions as intensely personal. Whether I find meaning in making money or in helping others, in teaching law or in writing novels, these are matters of personal choice. Our liberal, democratic, and pluralist approach to social life seems to rule out the application of criminal sanctions—the state's most forceful intervention into private life—based on meaning considerations. Yet serious criminal offenses represent such broad-based attacks on our normal conception of meaning that we must, and do, consider meaning in punishment.

In committing a serious offense, the criminal necessarily challenges the possibility of moral meaning. Crimes such as murder, rape, and robbery involve intentional decisions to pursue personal satisfaction at the cost of others' autonomy. The offender deliberately disrespects others' lives, bodies, or property for nonmoral, sometimes immoral, reasons. The intentionality of the act gives crime its special horror, and punishment its special importance.

Persons who challenge moral meaning do so in two basic ways: by a deliberate attack on human value or by action that displays indifference to human value. Offenders may thus be either consciously immoral or morally indifferent. The former act out of a conscious desire to flout moral principle and aggressively seek another's injury as an end in itself; the latter pursue selfish ends without any regard for the value of others. Both kinds of offenders challenge moral meaning because their disregard for human autonomy represents a radically reductionist stance on meaning in social life. Directly or indirectly, the actions of these offenders argue that meaning comes only through satisfaction of selfish, nonmoral wants. At their most extreme, serious criminal offenses express the Nietzschean philosophy of the superman, whose will to gain power overrides all who might stand in his way. Even in our pluralist, secular society, we can agree that such radical selfishness is evil. Even if we cannot agree on a single conception of good, we can agree on a minimal conception of evil in social conduct.

This suggests another way of understanding punishment: as a defense of value. When we say that a murderer deserves serious punishment for his action, we morally connect his action and our response to the value of autonomy. We defend our own vision of moral meaning by linking the

---

91. For an illuminating account of the varieties of immorality, see R. Milo, Immorality (1984). See also Pillsbury, supra note 32, at 1445-46.
92. See R. Nozick, supra note 16, at 630.
93. See F. Nietzsche, Beyond Good and Evil 21 (W. Kaufmann trans. 1966); Pillsbury, supra note 32, at 470-74.
wrong of his choice to kill with the consequence of punishment.94 We deliberately shape our emotional reaction to the offense into a proportionate, morally based reaction.95 In this sense “crime and punishment” represents a moral dialogue, but one waged with action as well as words, in fact, one in which action counts for more than words. In committing a serious crime, the offender argues for nonmoral or immoral meaning;96 in punishing, the state insists upon moral meaning based on the value of autonomy. The act of punishment defends the victim’s right to autonomy by penalizing its unjustified violation, yet it respects the offender’s autonomy by taking his criminal decision seriously.97

B. The Basics of Criminal Responsibility

Under the defense-of-value approach, punishment is deserved according to the offender’s choice to challenge moral meaning. For this reason, we are preoccupied with an offender’s mental state in judging the extent to which her action demeans the value of autonomy. To determine just punishment we must assess the offender’s awareness of and attitude toward the harm done.98 We look for evidence of coercion, for coerced actors do not challenge moral meaning. Their deeds, even if wrongful, represent the choices of others. This approach also requires basic rationality. A nonrational person does not, by her harmful actions, effectively challenge our basic values. We can understand the usual criminal motivations—the urges to violence and other forms of moral disregard resonate in basic human...
nature—but how can anyone find satisfaction in basic delusion? Even if dangerous, crazy wrongdoers do not engage us in a dialogue about moral meaning. In a fundamental sense, their actions seem meaningless.

The hard question is whether criminal responsibility requires more than mental state, rationality, and noncoercion. Must we also find that the wrongful action reflects something basic about the actor's character, that the offender possessed a "moral capacity" to appreciate the values that his actions implicate? Although I disagree with the character theory proposals, I agree that responsibility requires something more than rationality, intentionality, and noncoercion. The offender must also have had enough experience of life as a feeling, rational chooser in order for us to understand his action as implicating meaning. We need to see that the person has had enough experience of life to take a stance on basic human value.

In order to judge a person criminally responsible, she must have a basic conception of human value. She may not agree with our conception, and indeed she may reject the idea that humans have any special value. We look to see, however, if she knows enough of life to take a position on the question. The excuse granted for youth may provide the clearest example. Although rational, children are not criminally responsible because they have not experienced enough suffering from others' actions and have not witnessed enough instances of others' suffering at their own hands for us to presume basic comprehension of human pain. Our blaming practices suggest that although young children may have some cartoonish notion of the connection between act and consequence we believe they lack the experience to comprehend its significance in terms of meaning. Similarly, we can imagine other rational and uncoerced actors, such as the brainwashed or brain damaged, who do not seem responsible because of their lack of choosing experience following their traumatic event.

The experience requirement presumes that the individual feels emotion. As we have seen, emotions play a critical role in finding meaning in life. We work from our emotional reactions to develop the values that make up a moral philosophy. Here we must distinguish, though, between the emotions needed to build a moral philosophy and those needed to be a morally sensitive person. In order to take a position on human value, the actor need only experience personal pleasure and pain. He need not have any feelings for others. The utterly selfish person has a philosophy about human value: only he counts. We may disagree with this philosophy—indeed we may punish the person when it leads him to harm others—but it does constitute a philosophy. The selfish person takes a stand on what makes life meaningful.

100. See supra Part I.D.3.
101. See supra Part II.C.
An example from popular culture illustrates the point in bright colors. In the movie *Terminator 2*, a boy becomes the focus of a deadly struggle between two killer robots, terminators, which have been sent back from the future. As a classic example of the human-meets-alien/robot genre, the movie concerns, in part, the humanization of the robot, in this case the “good” terminator played by Arnold Schwarzenegger. Early on, when the boy protests the robot’s willingness to kill, Schwarzenegger blithely explains: “I’m a terminator.” When told that he cannot kill, the robot expresses complete bewilderment. At this point the robot displays rationality but lacks the experience of choosing and feeling necessary for moral agency. By the end of the movie, Schwarzenegger is transformed. By virtue of his own experiences and those of the persons around him, he comes to recognize, and also appreciate, human value.

Hollywood spectaculars notwithstanding, the experience requirement will only rarely make a difference in criminal adjudication. Some instances of brainwashing or organic brain damage might represent claims under the requirement. Where an unchosen event so alters the choosing consciousness as to render the individual a different person, harmful actions by the person appear in a different moral light. The “new” person appears childlike in that she has not had a sufficient opportunity to experience life as a rational, feeling chooser. This approach puts a time limit on the excuse, however. If over a period of time the “new” person suffers from others’ actions and sees others suffer from her own actions, assuming continuing rationality, the person again becomes responsible.

The experience requirement would not excuse most psychopaths, those who by virtue of genetics or environment lack empathy for others. Such persons are rational actors; they experience pain at the hands of others, and they can see the pain they cause others. They are engaged in finding meaning in a readily comprehensible and morally challenging way. The pleasures such persons take in deception, manipulation, and a host of other selfish strategies may seem self-defeating in the long run, but this does not make them irrational. The same might be said of the unstinting pursuit of money and power that characterizes so many of our leading citizens. Only if a psychopath lacks selfish feelings should he be excused. If the person has no experience of emotion, if she reacts to generally harmful or pleas-

102. See supra note 84.
103. Defining what this is represents a task beyond the scope of my efforts here.
urable events with robot-like indifference, she cannot challenge our moral scheme and should not be held criminally responsible.\textsuperscript{105}

\textbf{C. The Defense of Value and Punishing for Bad Character}

The defense-of-value approach to deserved punishment differs in important respects from that of both the representative action and the moral capacity models. In both instances the distinctions revolve around the understanding of desert itself. The representative action model draws from the common idea\textsuperscript{106} that desert signifies an all-encompassing examination of the person. Punishment, therefore, must examine character as well as deed.\textsuperscript{107} By contrast, defense of value emphasizes the moral principles implicated by the offender's intentional choice. The character source of that choice is important only to the extent it affects the actor's intentionality and status as a moral agent. Punishment as defense of value focuses on the wrongdoer because only persons can challenge moral meaning. The value approach insists on the worth of offenders as well as victims, and so, from this perspective, the tendency of representative action to blame based on character appears unjustified and morally dangerous. It looks like a rejection of worth rather than an assessment of moral action.

In at least one respect, however, the defense-of-value approach may coincide with representative action analysis. The defense of value, like most theories of punishment, requires a basic identity between the individual who committed the wrong and the one to be punished. This requirement of identity is usually satisfied by a presumption of identity from continuous physical existence.\textsuperscript{108} Certain kinds of radical personality changes within the same physical person may rebut this presumption, however.\textsuperscript{109} The requirement that wrongdoing reflect an enduring character trait may provide important clues to these complex problems of personal identity. There may

\textsuperscript{105} Such offenders will be rare, if they exist at all. It is hard to imagine a person without any self-concern undertaking significant interaction with others. I should add that the emotion requirement here goes to something more fundamental than simple self-esteem. While most offenders have low opinions of themselves and do not care for themselves in psychologically healthy ways, this does not preclude their taking a position on matters of human value. Indeed, it leads them to disvalue human life and autonomy.

\textsuperscript{106} The idea is common in punishment arguments used in the practice of law and by the public.

\textsuperscript{107} See generally supra Part I.D. Looking beyond the offender's intentional choice to see if action reflects something essential about the actor’s moral character suggests a firmer and broader basis for blame. \textit{E.g.}, Bayles, supra note 49, at 8-12; G. Fletcher, supra note 49, at 799-806.

\textsuperscript{108} See Dresser, supra note 83, at 405-06.

\textsuperscript{109} Identity questions of this kind arise when the chooser of the action seems, in a moral sense, to be fundamentally different from the agent subject to punishment, despite physical identity. Such questions usually involve mental disorders such as multiple personalities or the sane offender who becomes insane after legal proceedings begin.
be such a discontinuity between the character of the person who committed
the crime and that of the person to be punished as to preclude a dialogue
of crime and punishment. In this limited sense, the requirement that action
represent essential character accords with the defense-of-value approach.\textsuperscript{110}

D. Defense of Value and the Moral Capacity Model

Moral capacity proponents also take a quite different view of deserved
punishment than I have proposed here. They contend that punishment is
not deserved unless the offender had the ability to do otherwise, including
the ability to feel otherwise. Capacity proponents argue, in essence, that we
should excuse those persons who have not previously shown feeling for
others, because such persons have no capacity for moral concern, and if
they lack capacity for moral concern, they also lack capacity for moral
action.\textsuperscript{111} The significant appeal of this approach is that it seems to track
our basic conception of free choice—that is, ability to do otherwise—and
applies it in common sense fashion. However, the approach stands in
considerable tension with our commitment to responsibility for choice.

Initially, the most significant problem with moral capacity appears to be
empirical: How do we determine capacity? Generally speaking, the best way
to tell what a person can do is to look at what he has done. Yet the notion
of capacity goes beyond proven ability. It includes the idea of moral
potential—the possibility that a person could do better than he has. We
must resist the conclusion that a person who never \textit{has} done better, also
\textit{could not} do better. Otherwise, we lose the essence of morality. This insight
leads us closer to the central problem with the capacity approach: its
inclusion of moral motivation within the requirement of ability to do
otherwise.

Consider three categories of potential moral agents. The first group—we
may call them the selfish—are persons who have never shown concern for
anyone but themselves. The second group—limited empathizers—have dem-
onstrated concern for one or two other persons in their lives. The third
group is comprised of full empathizers—those who have demonstrated
concern for many persons in their lives. For each of these groups, the
capacity question is: In any given instance of demonstrated lack of moral
concern, did the person have the capacity to feel, and thus do, otherwise?

Our experience of life allows us to make predictions about what persons
in each category will do, but this does not resolve the question of what

\textsuperscript{110} As noted before, this will require a great deal more conceptual work and precision
than have been done to date. \textit{See supra} note 61.

\textsuperscript{111} \textit{See, e.g.,} H. \textsc{Fingarette} \& A. \textsc{Hasse}, \textit{supra} note 63, at 218-39; \textit{see also} M. \textsc{Bavidge},
\textit{supra} note 63, at 92-93, 132-37 (Psychopaths are not autonomous and so not morally
responsible.); \textsc{Murphy}, \textit{supra} note 63, at 134 (Psychopaths cannot claim rights, including rights
to punishment, because they feel no obligations to others.).
they could do.\textsuperscript{112} In fact, we have virtually no information about capacity, except reports of past action.\textsuperscript{113} Even comparisons between categories of persons seem problematic. We have no good way of telling whether a selfish person had more or less capacity to care for another than would a limited empathizer who confronted one outside of his inner circle of persons to be cared for. And how do these situations compare with that of a full empathizer confronted by a long-time enemy?

Let us assume for the moment that we can answer these empirical questions. Assume that, even if not provable, we can devise satisfactory moral standards for moral capacity. We now see the essential problem, that the moral capacity approach contradicts our fundamental commitment to responsibility for choice. To understand the contradiction we must return to the question of what kind of choice supports responsibility.

The moral capacity approach rests on the traditional requirement of free choice, of choice as ability to do otherwise. As we have seen,\textsuperscript{114} determinism creates serious problems with this understanding of responsible choice. We cannot say, with any degree of assurance, that an offender like Dobbert, Jr. could have done otherwise under the circumstances he faced. His genetic and environmentally inspired disposition to child abuse may have precluded any different choice. All we can say is that, \textit{given proper motivation}, Dobbert, Jr. could have chosen differently. To put the problem another way, we generally accept that persons can exercise control over what they do, and, to a lesser extent, what they want. If we wish to change our dispositions, we have some ability to do so. We have little or no control, however, over what have been called second-order desires—our desires about desires.\textsuperscript{115} We have little or no control over the sort of person we want to be. Yet the moral capacity approach, by excusing for lack of moral motivation, centers responsibility on just this aspect of character. The capacity model mandates that the person must have the ability \textit{to want} to do good. A brief look at some of our accepted blaming practices illustrates the problems with this approach.

When we describe wrongdoers as cold, sadistic, or cruel, we do not signify any excuse for their lack of moral concern; we blame them for it. Counselors

\textsuperscript{112} Another way of putting this is that we must distinguish between what people will do in a particular situation and what we expect they should do. The famous Milgram experiment established that many people will inflict great suffering on others if given authoritative instructions to do so. See S. MIlGRAM, OBEDIENCE TO AUTHORITY (1974). In a moral sense, the fact of instruction does not provide an excuse, however.

\textsuperscript{113} On the difficulties of determining capacity in a somewhat different context, that of mental state, see Morse, Undiminished Confusion in Diminished Capacity, 75 J. CRIM. L. & CRIMINOLOGY 1, 42-44 (1984).

\textsuperscript{114} See supra Part I.A.

\textsuperscript{115} See Frankfurt, Freedom of Will and the Concept of a Person, in FREE WILL, supra note 14, at 81-86.
who work with rapists report that many are "numbed out," that they have experienced so much horror and pain in their own lives that they are desensitized to it in the lives of others. This explains their behavior and gives us a new basis for appreciating them as persons. We can sympathize for the way in which they have been devalued. As a matter of criminal justice, however, this account cannot provide an excuse. Regardless of how he came to be an uncaring, violent person, we blame the rapist for his uncaring, violent act.  

Similarly, when we tell someone that we think they could have done better, what we really mean is that if the person cared more, if she tried harder, she would have done better. If the student had studied harder, she would have written a better exam. If the driver had paid more attention, he would have avoided the accident. In all instances we judge the motivation itself.

E. The Dobbert Case Revisited

We should end with a look at the case that started this inquiry, that of Ernest John Dobbert, Jr., the father convicted of terrible crimes against his children. In his repeated, brutal assaults on his children, Dobbert, Jr. valued his own worth and emotional self-satisfaction over that of his sons and daughters. He vented his rage on their bodies and souls. His intentional actions declared that he was their ruler, that they would have no separate existence from his and, in two instances, no existence at all. Dobbert's murderous abuse spoke of a world without moral meaning, where autonomy held no special value. The State of Florida punished Ernest John Dobbert, Jr. to defend moral meaning against his violent challenge. The state, acting for society generally, sought to defend the possibility of moral meaning based on autonomy.

This account of punishment seems correct, and yet incomplete. It still seems vulnerable to the objection of the psychologist-skeptic who argues...
that this picture of fault is radically foreshortened, excluding the full dimension of human tragedy. So much of what we know about why Dobbert, Jr. attacked his children is ignored. As a matter of individual moral responsibility, this argument does not concern me. The argument from meaning supports a broad view of free choice that excludes most causal excuses and capacity excuses. Yet determinations of individual culpability do not exhaust our concern with moral responsibility. Society has its own responsibilities to consider.

The Dobbert case had a major impact on the city in which it occurred. Before the case broke, most people in Jacksonville knew little about child abuse. During the critical period of abuse, neighbors repeatedly called police about their concerns for the Dobbert children, but investigating officers, ignorant of abuse, always accepted Dobbert’s explanations and assurances. The case educated local authorities and the rest of the populace.\textsuperscript{119} Public outcry about the cases led to the creation of a state hotline for the reporting of child abuse.\textsuperscript{120} From the time of its inception, Jacksonville had the highest rate of child abuse reporting in the state, a fact that some attributed to awareness of the problem generated by the Dobbert case.\textsuperscript{121}

From this small example we see the possibilities of a different mode of responsibility, one that involves obligations owed by society generally to its individual members. If environment contributes to crime—and it surely does—and society determines environment, at least in part, society bears some responsibility for crime. This does not change individual responsibility for criminal purposes, but neither does punishment end all responsibility inquiry. In determining those obligations that each of us owe our fellow citizens, we should consider responsibility for fostering good character. The values of autonomy\textsuperscript{122} and moral community should create general obligations to minimize harmful influences on character formation. Here our normative order is the just society; the choice involved is the set of actions and inactions of society members that provoke and perpetuate conditions such as racism, poverty, and lack of opportunity. The temporal focus must be broad, including a recognition of the long history of such conditions and the importance of change for a better future. The consequences of a

\textsuperscript{119} Assisting in the education process was a lawsuit filed on behalf of the surviving Dobbert children against the City of Jacksonville for the negligence of the police in investigating reports of their abuse. Florida First Nat’l Bank of Jacksonville v. City of Jacksonville, 310 So. 2d 19 (Fla. Dist. Ct. App. 1975), cert. dismissed, 339 So. 2d 632 (Fla. 1976). The case was settled during the course of trial for nearly a million dollars.

\textsuperscript{120} Florida Is Half-Hearted in Fighting Child Abuse, Florida Times Union, June 4, 1981, at A14.


\textsuperscript{122} That is, maximizing the total autonomy enjoyed by law-abiding citizens. I am not sure that encouraging good character rather than bad actually changes the degree of autonomy experienced by the would-be offender.
determination of responsibility in this context are the commitment of social resources, that is, energy and money. Such collective responsibility is entirely consistent with present approaches to criminal punishment; it simply represents a different mode of responsibility. While we hold offenders responsible for who they are and what they do, we must do the same for ourselves. That means that the project of self-improvement requires a social as well as an individual effort.

CONCLUSION

For several years I used the last session of my criminal justice class for a discussion of the death penalty and the Dobbert case. It seemed to bring together the essential themes of the course. I assigned background reading on the case and in class gave an oral account of the prosecution and defense perspectives. The raw power of the story and the conflicting emotions it evokes made the discussion difficult but worthwhile. Only at the end of class did I mention how the case ended: In the fall of 1983, the State of Florida killed Ernest John Dobbert, Jr. in its electric chair.

Usually when I gave the story's ending, the class was quiet for a moment and I went on with my closing words for the course. I liked to think that the students shared my sadness at the execution and perhaps a little of my revulsion for that form of punishment. I remembered the strange, disquieting feeling I had when I first heard of the execution. But the last time I used the case, the class burst into applause at the news of Dobbert's death. I was so stunned that I said nothing, and for that I have always been sorry. I understood their reaction, but I should have said something. I should have protested: "No! Don't do that. Whatever you feel about his crimes, don't applaud. This is not a game, it's not us against them. It's us against us."

Dobbert, Jr. deserved punishment not because he was bad but because he did bad. He assaulted his children so terribly that he challenged the very idea of human value. His challenge required a strong, punitive response. Yet we must resist the temptation of the Hollywood crime movie, with its pandering to bloodlust. We punish offenders not because they stand outside of society, not because they are alien enemies, but because they are fundamentally like the rest of us. The argument from meaning illustrates the way in which all humans are engaged in a struggle to become moral. The argument supports the common belief that persons like Dobbert, Jr. deserve punishment, but not the belief that they lack value. Distinguishing between these beliefs constitutes the most difficult, and perhaps most important aspect of determining what punishment is deserved.