HUMAN RIGHTS AND THE MORAL FOUNDATIONS OF THE SUBSTANTIVE CRIMINAL LAW*

David A. J. Richards**

TABLE OF CONTENTS

I. THE CONCEPT OF HUMAN RIGHTS ......................................................... 1404
   A. Autonomy .................................................................................. 1405
   B. Treating People as Equals ............................................................... 1409

II. THE MORAL FOUNDATIONS OF THE SUBSTANTIVE CRIMINAL LAW ............. 1414

III. THE MORAL THEORY OF THE SUBSTANTIVE CRIMINAL LAW ..................... 1421
   A. Decriminalization and the Limits of the Criminal Sanction ......................... 1421
   B. Actus Reus: Of Acts and Omissions ...................................................... 1428
   C. Mens Rea and Excuses .................................................................. 1430
   D. Legality ....................................................................................... 1433
   E. Justifications ............................................................................... 1434
   F. Inchoate Crimes: Of Attempts ............................................................. 1439
   G. Proportionality and the Death Penalty .......................................................... 1442

IV. CONCLUDING REMARKS ........................................................................... 1445

We are in the midst of a major jurisprudential paradigm shift from the legal realist-legal positivist paradigm of the legal official as a managerial technocrat ideally seeking the utilitarian goal of the greatest happiness of the greatest number, to a natural law paradigm of rights. This shift, dramatically apparent in legal theory in works of Ronald Dworkin,1 Richard Epstein,2 George Fletcher,3 Charles Fried,4 and Frank Michelman,5 has not yet been fully and

---

* This Article profited from discussions with my colleague, Graham Hughes.
3 See G. Fletcher, Rethinking Criminal Law (1978); Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972).
4 See C. Fried, An Anatomy of Values (1970); Right and Wrong (1978).
fairly articulated; therefore, one cannot be certain of the final form the paradigm will take or of the extent of its influence on thought about and the practice of the law. This paradigm shift clearly has been made possible by the most serious and profound attack on utilitarianism since Kant, namely, John Rawls’s *A Theory of Justice* and the subsequent works of Robert Nozick and Alan Gewirth which develop the neo-Kantian, deontological, anti-utilitarian trust of Rawls’s theory, but in ways expressly critical of various aspects of Rawls’s pathbreaking book. Legal theorists, who are attempting to introduce these ideas into the analysis of legal doctrines and institutions, correspondingly reflect these tensions among the deontological theories of Rawls, Nozick, and Gewirth, which unite in their opposition to utilitarianism, but in different ways. Although the natural law paradigm of rights, correctly interpreted in line with the neo-Kantian theories of Rawls and Gewirth, is of quite general significance for rethinking the normative foundations of legal doctrines and institutions, I will here address its relevance, in light of George Fletcher’s important recent book, to rethinking criminal law and its connections, in the United States, to certain constitutional law doctrines relating to the substantive criminal law. The jurisprudence of rights transforms and illuminates our critical understanding of the moral foundations of the substantive criminal law in a way in which American legal realist utilitarianism does not and cannot.

This discussion must begin with some clear thought about the objectives of a normative theory of the substantive criminal law, so that we may set ourselves and judge our performance in terms of some determinate criteria of theoretical adequacy. The tasks of criminal law theory, as is often the case in legal theory, appear to be both explanatory and normative, concerned with both understanding and recommendations for change. With respect to understanding, an adequate normative theory of the substantive criminal law is needed to illuminate the salient structural features of criminal liability—for example, the concurrence of *mens rea* and *actus reus*, the disfavor in the criminal law of strict liability, the place

---

* G. Fletcher, supra note 3.
and form of excuses in rebutting criminal culpability (for example, the insanity defense), the place and form of justifications in rebutting criminal liability (for example, the proper scope of self-defense or the necessity defense), the form of mitigation doctrines, the nature and proper scope of inchoate offenses, and the place of general requirements of legality and proportionality. Many of these features of the substantive criminal law overlap in the United States with constitutional law doctrines of due process under the Fifth and Fourteenth Amendments or proportionality requirements under the Eighth Amendment. An adequate normative theory should explain why criminal law and constitutional law principles converge in such ways.

Many of these doctrines of criminal law are, in fact, much disputed today. Accordingly, one justly expects an adequate normative theory of the criminal law to clarify such controversies and indicate the reasonable direction of reform. To what extent, if at all, should traditional mens rea requirements or specific excuses (for example, insanity) be removed to facilitate aims of therapeutic care and cure in place of improper retributive impulses? Should new excuses be recognized—for example, a defense of socio-economic deprivation? Should proportionality requirements be more aggressively developed to invalidate various forms of criminal sanction—for example, the death penalty? One central area of contemporary controversy is decriminalization.

A remarkable fact, though one not usually perceived as such, is that the often eloquent literature calling for the decriminalization of “victimless crimes” exclusively focusses on efficiency-based arguments of ending either the pointless or positively counterproductive waste of valuable and scarce police resources expended in the enforcement of these laws. The pattern of argument and litany
of evils are familiar. One begins dismissively with H.L.A. Hart’s tactical concession,\(^\text{14}\) in his defense of the Wolfenden Report,\(^\text{15}\) that the acts in question are immoral, and then discusses in detail the countervailing and excessive costs of enforcing in this area the ends of legal moralism. In the United States commentators stress implicitly utilitarian pragmatist arguments, identifying tangible evils which intangible moralism appears quixotically and impractically to incur.\(^\text{16}\) The core of these enforcement evils is that these crimes typically are consensual and private. In consequence, the absence of either a complaining victim or witness requires special forms of enforcement costs, including forms of police work (for example, entrapment) that are colorably unconstitutional, often clearly unethical, and eventually corruptive of police morals.\(^\text{17}\) Such high enforcement costs are contrasted with the special difficulties in this area of securing sufficient evidence of conviction, of deterring the strong and ineradicable motives that often explain these acts, and of the opportunity costs thus foregone in terms of the more serious crimes on which police resources could have been expended.\(^\text{18}\) The utilitarian balance sheet, in conclusion, condemns the criminalization of such acts as simply too costly.

Such arguments proselytize the already converted and, remarkably, do not seriously engage the kind of justification to which proponents of “victimless crimes” traditionally appeal. Such proponents may, reply: the mere consensual and private character of certain acts, and the consequent higher enforcement costs, should not suffice for decriminalization, for many such acts clearly are properly criminal (for example, duelling) and many other acts are also correctly criminal though enforcement costs are comparable (many homicides, for example, are intrafamilial, thus involving high enforcement costs in intrusion into privacy and intimate relations).\(^\text{19}\) If there is good moral reason for criminalizing certain conduct, quite extraordinary enforcement costs will justly be borne. Accordingly,

\(^{15}\) See Home Office, Scottish Home Department, Report of the Committee on Homosexual Offences and Prostitution, Cmnd. No. 247 (1957); see the similar view taken in Model Penal Code § 207.5(1), Comment (Tent. Draft No. 4, 1955).
\(^{17}\) See generally J. Skolnick, Justice Without Trial (1966).
\(^{18}\) See note 16 supra.
\(^{19}\) For one statement of this form of criticism, see Junker, Criminalization and Criminogenesis, 19 U.C.L.A. L. Rev. 687 (1972). See also Kadish, More on Overcriminalization: A Reply to Professor Junker, 19 U.C.L.A. L. Rev. 719 (1972).
efficiency-based arguments for decriminalization, of the kind just described, appear to be deeply question begging. They have weight only if the acts in question are not independently shown to be immoral or not seriously immoral, but the decriminalization literature dismissively concedes the immorality of such acts, and then elaborates efficiency costs that, in the absence of cognate moral analysis of the morality of these acts, may properly be regarded as of little decisive weight.\textsuperscript{20}

This remarkable absence of critical discussion of the focal issue that divides proponents and opponents of “victimless crimes” has made decriminalization arguments much less powerful than they can and should be. Indeed, arguments of such kinds have not been decisive in the retreat of the scope of “victimless crimes” whether by legislative penal code revision or by judicial invocation of the constitutional right to privacy. In those areas where there has been wholesale or gradual decriminalization (for example, contraception,\textsuperscript{21} abortion,\textsuperscript{22} consensual non-commercial sexual relations between or among adults),\textsuperscript{23} the basis of change has crucially been one of moral judgments to the effect that these acts, traditionally believed to be morally wrong \textit{per se}, are not morally wrong.\textsuperscript{24} In order to complete and perfect decriminalization arguments so that they have the full force that they should have, one must supplement such arguments with moral analysis of a kind that they, in fact, presuppose. The absence of such analysis has blinded us to the kinds of

\textsuperscript{20} H.L.A. Hart, in this connection, draws a distinction between conventional and critical morality, but does not explicate the latter concept. See H.L.A. \textit{Hart}, supra note 14, at 17-24. For general purposes of his argument, he assumes the immorality of the acts in question, and then makes various points about the costs that strict enforcement of these moral judgments would inflict.


\textsuperscript{23} The Supreme Court recently upheld the refusal to extend the constitutional right to privacy to consensual adult homosexuality. \textit{Doe v. Commonwealth’s Attorney for Richmond}, 425 U.S. 901 (1976), \textit{aff’g mem.}, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court). However, there has been a gradual movement to decriminalization of consensual sodomy by legislative repeal. At least twenty-one states have decriminalized sodomy. See Rivera, \textit{Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States}, 30 \textit{HASTINGS L.J.} 799, 950-51 (1979).

\textsuperscript{24} I have tried to explain the nature of these changes in moral judgments in Richards, \textit{Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution}, 30 \textit{HASTINGS L.J.} 957 (1979) [hereinafter cited as \textit{Sexual Autonomy}]. See also Richards, \textit{Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution}, 127 \textit{U. PA. L. REV.} 1195 (1979) [hereinafter cited as \textit{Commercial Sex}].
moral needs and interests that decriminalization in fact serves. To this extent, legal theory has not responsibly brought to critical self-consciousness the nature of an important and humane legal development.25

This glaring lacuna in legal theory derives from deeper philosophical presuppositions that the decriminalization literature appears often to assume—namely, the utilitarian pragmatism associated with America’s indigenous jurisprudence, legal realism.26 From the publication of Holmes’s The Common Law in 1881, American legal theory has been schizoid about the proper analysis of moral values in the law. Traditional moral values underlying existing legal institutions are washed in cynical acid so that the legal institution may be analyzed without begging any questions about its moral propriety;27 on the other hand, the enlightened moral criticism of legal institutions is conducted in terms of implicitly utilitarian calculations of maximizing the greatest happiness of the greatest number.28 In discussions propounding the virtues of decriminalization, this pattern of schizoid moral analysis is shown—first, by the dismissive concession of the traditional immorality of the acts in question, and second, by conducting the discussion of critical moral reform exclusively in terms of efficiency-based considerations that lend themselves to implicit calculations of utility maximization. There is not, because there cannot be, any serious, non-utilitarian critical analysis of the moral values supposed to underlie “victimless crimes,” because such values, being non-utilitarian, cannot be accommodated by the only enlightened criminal morality that there is, namely, utilitarianism.29

25 This is most evident in the area of commercial sex where the absence of critical moral thought about the putative immorality of prostitution has disabled reformers from identifying the best arguments in support of decriminalization in this area and has resulted in largely abortive attempts to achieve decriminalization. For an attempt to correct this defect, see Richards, Commercial Sex, supra note 24.

26 See, e.g., G. JACOBSOHN, PRAGMATISM, STATESMANSHP, AND THE SUPREME COURT (1977). It would be a mistake to regard legal realists as doctrinaire utilitarians when, in fact, they were antagonistic to Bentham’s ahistorical approach to jurisprudence. See, e.g., White, The Revolt Against Formalism in American Social Thought of the Twentieth Century, in PRAGMATISM AND THE AMERICAN MIND 41-67 (1973); see generally W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973). But, the appeal to social policy considerations was, for them, implicitly utilitarian. See Richards, Book Review, 24 N.Y.L. SCHOOL L. REV. 310 (1978).

27 The famous appeal to wash the law in cynical acid derives from Holmes, The Path of the Law, in COLLECTED LEGAL PAPERS 167-202 (1962).


29 H.L.A. Hart appears to acknowledge the existence of a critical morality that is not necessarily utilitarian; see note 14 supra. But, he does not explore the content of the morality
Correlative to the familiar structure of analysis of the decriminalization literature, general Anglo-American criminal law theory has focussed on certain pervasive structural features of the substantive criminal law, but has not considered in any depth, at least until George Fletcher’s recent book, the underlying question that is at the heart of much continental European criminal law theory—namely, the role of moral wrongdoing in the definition of criminal offenses. Of course, general concessions are made that the criminal penalty properly applies to morally wrong acts, but little critical attention is given to how moral wrongdoing should be interpreted as the necessary limiting predicate for the proper scope of the criminal sanction. Instead, advocates of decriminalization tend bizarrely to concede to opponents a conventionalistic definition of moral wrongdoing (in Lord Devlin’s striking formulation, what is morally wrong is what an ordinary man randomly chosen from the Clapham omnibus would intuitively dub disgustingly immoral), and then to present, as we have seen, utilitarian arguments about special enforcement costs. To concede what decriminalization advocates deem a mere tactical victory to opponents is unconditionally to surrender the war. A mark of the unhappy separation of legal and moral theory is that legal theorists have thus accepted a definition of morality which, for a moral theorist, is transparently inadequate.

The recent reintegration of anti-utilitarian moral concepts into legal theory enables one to reconsider these questions in a new

in his discussions of decriminalization. But see H.L.A. Hart, supra note 10, where Hart repeatedly insists that principles of fairness and equal liberty, independent of utilitarian considerations, are needed to account, for example, for the principles of punishment, id. at 72-73, and the forms of excuse in the criminal law, id. at 17-24. For a striking attempt by Hart to construct a nonutilitarian theory of natural rights from Kantian premises, see Hart, Are There Any Natural Rights?, in Society, Law, and Morality 173 (F. Olafson ed. 1961).


31 G. Fletcher supra note 3.

32 For a comparison of continental and Anglo-American approaches to criminal law theory, with a focus on the role of Kantian natural law moral theory in the former and legal positivist utilitarianism in the latter, see id., at 406-08, 467, 503-04, 512, 577, 696-97, 768-69, 780-81, 790.

33 See, e.g., J. Hall, supra note 30, at 386: “It is pertinent to recall here that the criminal law represents an objective ethics which must sometimes oppose individual convictions of right.”


and inspiriting way. One may now critically ask and investigate what should be the central issue in a sound theory of the substantive criminal law: the concept of moral wrongdoing and its role in the just imposition of the criminal sanction.

This Article will address this general question directly in a way in which even recent legal theorists of rights have not yet done so. George Fletcher, for example, whose work has stimulated many of the reflections herein, does not analytically explore the underlying concept of moral wrongdoing which he believes to be the foundation of criminal liability; rather he appeals to norms, defined in terms of "the mores of the relevant society at the time of the deed," that "contain a sufficient number of elements to state a coherent moral imperative."36 Fletcher, thus, appeals to a conventionalistic definition of moral wrongdoing, which belies the tenor of many of his specific discussions of the moral foundations of particular criminal law doctrines (turning, as they do, on Kantian ideas of respect for personal autonomy). In this Article, I shall suggest ways in which analysts of the substantive criminal law, like Fletcher, may deepen their self-critical understanding of the moral premises of their own analytic undertakings in ways which may indicate that certain of their analyses rest on insufficiently probing moral theory.

Because criminal law and constitutional principles in various ways overlap, such a moral theory also casts light on the ways in which the jurisprudence of rights may clarify moral principles that underlie various kinds of legal institutions. It is quite clear, for example, that the jurisprudence of rights directly challenges the existing state of constitutional theory and practice in the United States. It sharply repudiates the concessive majoritarianism of James B. Thayer's classic article,37 the value skepticism of Learned Hand,38 the jaundiced historicism of Alexander Bickel's later writings,39 and Herbert Wechsler's appeal to the apolitical and amoral ultimacy of neutral principles.40 In its place, the jurisprudence of rights takes seriously fundamental normative concepts of human

36 G. Fletcher, supra note 3, at 568.
37 Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).
rights, in terms of which the founders thought and the Constitution was designed, in a way in which later constitutional theory, based on utilitarian legal realist premises, does not and cannot. Not all human rights, however, are constitutional rights. The catalogue of human rights is extensive, including not only certain constitutional rights, and the correlative human rights for which international protection is justly sought, but the garden variety rights of personal safety and security at the heart of the criminal law and the civil law of torts, the rights of promisees enforced, to some extent, under the civil law of contracts and even, sometimes, by the criminal law, the rights of truth telling enforced by the civil and criminal law of fraud. On the other hand, certain human rights are convergently enforced by several legal institutions—for example, various rights enforced concurrently by the civil and criminal law, or the striking convergence, to some notable extent, of fundamental principles of criminal and constitutional law. One of the foci of our present analytic inquiry is to understand the common moral argument that explains this latter striking convergence—why it is that we perceive certain basic principles of criminal liability as of constitutional dimensions, for example, legality, the concurrence of mens rea and actus reus, proportionality, and privacy. I believe that this convergence rests on common moral principles of human rights which require that the criminal law must be compatible with and express respect for basic human rights.

This perspective on the criminal law challenges the validity of certain traditional antagonisms among students of the criminal law—for example, the opposition of liberal political theorists like John Stuart Mill and H.L.A. Hart to conservative lawyers like Stephen and Devlin drawn in terms of the former’s appeal to human interests and the latter’s retributive moralism. The account here proposed challenges such dichotomies, for it is liberal and rooted in concern for certain dignitary consequences (giving principled expression to the quite valid moral argument underlying Mill’s

---

41 See generally D. Richards, supra note 12.
43 I have in mind larceny by false promises. See People v. Ashley, 42 Cal. 2d 246, 267 P.2d 271 (1954); New York Penal Law § 155.05 (2) (d) (McKinney 1975).
On Liberty), and yet also rests on a deontological view of the non-utilitarian, ethical foundations of the substantive criminal law.

I. THE CONCEPT OF HUMAN RIGHTS

In order to understand the ethical foundations of the substantive criminal law and its connections to constitutional principles, one must take seriously the radical vision of human rights that underlies the Constitution and its view of the criminal law. One must begin with the idea of human rights as a major departure in civilized moral thought. When Locke, Rousseau, and Kant progressively gave the idea of human rights its most articulate and profound theoretical statement, they defined a way of thinking about the moral implications of human personality that was, in certain ways, radically new. The practical political implications of this way of thinking are a matter of history. The idea of human rights was one among the central moral concepts in terms of which a number of great political revolutions conceived and justified their demands. Once introduced, the idea of human rights could not be cabin'd. In American institutional history, the idea of human rights lay behind the American innovation of judicial review—the idea that an enforceable charter of human rights required a special set of governing

A conventional philosophical distinction drawn between types of normative theories of ethics is that drawn between teleological and deontological theories. Teleological theories are of the form that the concept of morality or ethics is analyzed in terms of principles that maximize some good (pleasure, utility, talent, perfection, or the like); non-teleological theories are deontological: they do not define the right in terms of maximizing the good. A classic form of teleological theory is utilitarianism, which defines moral right in terms of principles which maximize the balance of pleasure over pain of all sentient beings. Kant's theory, in contrast, is deontological, since it does not define the right in terms of maximizing any good (pleasure or otherwise). See J. Rawls, supra note 6, at 30, 40.


Cf. Richards, Sexual Autonomy, supra note 24, at 964-72.

The political revolutions of the seventeenth and eighteenth centuries witnessed such landmarks as the English Petition of Rights (1627), the Habeas Corpus Act (1679), the American Declaration of Independence (1776), the United States Constitution (1787), the American Bill of Rights (1791), and the French Declaration of the Rights of Man and Citizen (1789).
institutions that would, in principle, protect these rights from the incursions of the governing institutions based on majority rule.\textsuperscript{54} In our own time, the language and thought of human rights has been extended beyond the original civil and political rights to include a number of economic and social rights,\textsuperscript{55} and has, in the international sphere, been the central idea in terms of which colonial independence and post-colonial interdependence has been conceived and discussed.\textsuperscript{56} Obviously, the philosophical analysis of human rights is of central normative importance. Recent deontological moral theory, in particular, that of Rawls\textsuperscript{57} and Gewirth,\textsuperscript{58} has enabled us to understand and defend the concept of human rights against the familiar Benthamite criticisms.\textsuperscript{59} To be specific, these neo-Kantian moral theories focus on the explication of the concept of human rights in terms of two features: the capacities of personhood, sometimes called rational autonomy, and equality.

A. Autonomy

Autonomy, in the sense fundamental to the idea of human rights, is an empirical assumption about the capacities, developed or undeveloped, of persons as such—namely, that persons as such have a range of capacities that enables them to develop, want to act on, and in fact act on higher order plans of action that take as their object one's life and the way it is lived.\textsuperscript{60} Harry Frankfurt made this

\textsuperscript{54} Although the idea of judicial review is American in origin, it did have European antecedents. See Cappelletti & Adams, Judicial Review of Legislation: European Antecedents and Adaptations, 79 HARV. L. REV. 1207 (1966). For contrasts in different forms of judicial review, see M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (1971).

\textsuperscript{55} See, e.g., the Universal Declaration of Human Rights, Article 22 (right to social security); Article 23 (rights to work); Article 24 (right to leisure); Article 25 (rights to adequate standard of living and child care); Article 26 (rights to education); Article 27 (rights to participate in cultural life), in BASIC DOCUMENTS IN INTERNATIONAL LAW (2d ed. 1972). For a further elaboration of rights of these kinds, see International Covenant on Economic, Social and Cultural Rights, id. at 151-61. For a critique of viewing these kinds of claims as human rights, see M. CRANSTON, WHAT ARE HUMAN RIGHTS? (1973); C. FRANKEL, HUMAN RIGHTS AND FOREIGN POLICY (1978).


\textsuperscript{57} J. RAWLS, supra note 6.

\textsuperscript{58} A. GEWIRTH, supra note 8.

\textsuperscript{59} See Bentham, Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued During the French Revolution in 2 WORKS OF JEREMY BENTHAM 448 (J. Bowring ed. 1962).

\textsuperscript{60} See D. RICHARDS, A THEORY OF REASONS FOR ACTION 65-68 (1971).
point when he argued that the "essential difference between persons and other creatures is to be found in the structure of a person's will." Frankfurt correctly argued that contemporary discussions of personal identity are not properly discussions of the concept of a person at all, for many animals of lower species can have both predicates ascribing corporeal characteristics and states of consciousness whose unity is the problem of personal identity. Such animals are not, however, persons. The difference between persons, who happen to be also human, and animals is, Frankfurt argued, neither having desires or motives, nor engaging in deliberation and making decisions based on prior thought, for certain lower animals may have these properties. Rather, besides wanting and choosing and being moved to do this or that, persons, as such, also may want to have or not to have certain desires. As Frankfurt put it, persons are capable of wanting to be different, in their preferences and purposes, from what they are. Many animals appear to have the capacity for . . . "first-order desires" or "desires of the first order," which are simply desires to do or not to do one thing or another. No animal other than man, however, appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires.

The second-order desires and plans of action, constitutive of autonomy, mark the capacity of a person, as such, to develop, want to act on, and to act on plans of action that take as their object changes in the way one lives one's life. For example, persons establish various kinds of priorities and schedules for the satisfaction of first-order desires. The satisfaction of certain wants (for example, hunger) is regularized; the satisfaction of others is sometimes postponed (for example, delays in sexual gratification in order to develop and educate certain competences). Indeed, persons sometimes gradually eliminate certain self-criticized desires (smoking) or over time encourage the development of others (cultivating one's still undeveloped capacities for love and tender mutual response). Sometimes, the exercise of such capacities of autonomy is irrational

---

62 Frankfurt, supra note 61, at 7.
63 On the relation of the person to rational choice, including choices of these kinds, see D. Richards, supra note 60, ch. 3.
or a failure of competence or morally wrong, while in others it is rational or competent or morally desirable. Accordingly, the fact of autonomy explains the uniquely personal emotions which rest on the capacity of persons to take critical attitudes toward their lives (regret or shame or guilt, or, on the other hand, self-respect or pride or a sense of integrity).

In educating the exercise of autonomy against mistake or failure, humans call upon complex human capacities for language and self-consciousness, memory, logical relations, empirical reasoning about beliefs and their validity (human intelligence), and the capacity to use normative principles in terms of which plans of action can be assessed, including principles of rational choice in terms of which ends may be more effectively and coherently realized. The consequence of autonomy and these capacities is that humans have the capacity to make independent decisions regarding what their life shall be, self-critically reflecting, as a separate being, which of one’s first-order desires will be developed and which disowned, which capacities cultivated and which left barren, with what or with whom in one’s life history one will or will not identify, or what one will define and pursue as ends or stive toward as an aspiration. In brief, autonomy gives to persons the capacity to call their life their own. The development of these capacities for separation and individuation is, from the earliest life of the infant, the central developmental task of becoming a person.64

The idea of human rights crucially takes a normative attitude expressing respect for the capacity of persons, as such, for rational autonomy—to be, in Kant’s memorable phrase, free and rational sovereigns in the kingdom of ends,65 viz., to take ultimate, self-critical responsibility for one’s ends and the way they cohere in a life. Kant characterized this ultimate respect for the choice of ends as the dignity of autonomy,66 in contrast to the heteronomous, lower-order ends (pleasure, talent) among which the person may choose. Kant thus expressed the fundamental liberal imperative of moral neutrality among many disparate visions of the good life: the concern is not with maximizing the agent’s pursuit of any particular lower-order end, but rather with respecting the higher-order capac-

---

65 See I. KANT, FOUNDATIONS 51-52.
66 Id. at 53.
ity of the agent to exercise rational autonomy in choosing one's ends, whatever they are. The contemporary neo-Kantians, Rawls and Gewirth, have formulated this idea in different though equivalent ways. Rawls has deployed the idea of the veil of ignorance which has the consequence that the rational choices of persons, by which Rawls has defined the concept of morality, cannot take account of their particular ends, but must; rather, ask what things will enable rational persons, as such, to choose their ends, whatever they are. Gewirth has followed Kant more literally in arguing that the central normative concept is that of human action in general, versus any particular ends of human actions, which, on analysis, turns out to be rational autonomy. Rawls and Gewirth have both expressed in these different ways the same Kantian intuition: that the central focus of ethics is respect not for what people currently are or for particular ends, but for an idealized capacity which people, if appropriately treated, can realize, namely, the capacity to take responsibility as a free and rational agent for one's system of ends, in short, personhood.

If Rawls and Gewirth in these ways correctly give expression to the fundamental idea of personhood, Nozick clearly does not. For Nozick, the interpretation of autonomy is not in terms of higher-order, self-critical capacities, but ad hoc and impressionistic ideas of natural property in one's body, sentiments, and labor. Such ideas lack the focal explicatory significance of the Kantian interpretation of autonomy, confusing moral personality with privatized egoism. For purposes of fundamental ethical theory, one wants—in the mode of Kant, Rawls, and Gewirth—an explication of the most general features of personhood, as such, which is supplied correctly by these theorists in the form of an idealized description of capacities for self-critical choice of one's ends, as a free and rational being; Nozick, in contrast, has supplied a question-begging identification of the person with certain inalienable assets, which, in fact, are neither necessarily nor naturally associated with the morally fundamental idea of free and rational choice of one's ends.

The similar association of personhood with causation through ac-

---

67 See J. Rawls, supra note 6, at 136-42.
68 A. Gewirth, supra note 8, at 48-128.
69 R. Nozick, supra note 7.
tion, as by Epstein and Pilon, is no more defensible. Undoubtedly, the analysis of human action, as by Gewirth, may stimulate philosophical insight into the idea of personhood, but the morally fundamental idea is not action, but personhood—the capacity of persons self-critically to reflect on, organize, and take responsibility for their ends and life. From this latter, morally fundamental point of view, there is no ethical distinction in principle between moral imperatives forbidding actions or failures to act; both equally may fail to treat persons as equals in the ethically fundamental sense.

B. Treating People as Equals

As regards equality, the idea of human rights expresses a normative point of view that puts an equal weight on each person’s capacity for autonomy. Recent neo-Kantian moral theory alternatively has articulated the idea of equality in one of three ways: (i) equal concern and respect, (ii) universalizability, and (iii) equal parties to the social contract. These three alternative approaches are intended to articulate the same underlying concept: that the basic principles of political right must treat all persons as equals.

The notion of treating persons as equals is, of course, ambiguous. A fundamental way to distinguish among moral theories is to focus on how they differently resolve this ambiguity. For example, John Stuart Mill, following Bentham, argued that utilitarianism importantly treated people as equals in the sense that everyone’s pleasures and pains were impartially registered by the utilitarian calculus; thus, utilitarianism satisfies, Mill argues, the fundamental moral imperative of treating persons as equals, where the criterion of equality is pleasure and pain. The great attraction to humane liberal reformers like Mill of utilitarianism was precisely its capacity sensibly to interpret the basic moral imperative of treating people as equals in a way that enabled reformers concretely to assess...
institutions in the world in terms of human interests. Any alternative to utilitarianism must provide a coherent interpretation of treating people as equals which also enables critical moral intelligence concretely to assess institutions in terms of relevant consequences. The great challenge to anti-utilitarian moral theory is to explain why it better explicates the moral imperative of treating persons as equals in a way that also supplies coherent substantive principles of humane moral criticism of existing institutions.

From the perspective of neo-Kantian deontological moral theory, utilitarianism fails to treat persons as equals in the morally significant sense. To treat persons in the way utilitarianism requires is to focus obsessively on pleasure alone as the only ethically significant fact, and aggregating it as such. Pleasure is treated as a kind of impersonal fact and no weight is given to the separateness of the creatures who experience it. But, this flatly ignores that the only ethically crucial fact can be that persons experience pleasure, and that pleasure has moral significance only in the context of the life that a person chooses to lead. Utilitarianism, thus, fails to treat persons as equals in that it literally dissolves moral personality into utilitarian aggregates. In contrast, neo-Kantian deontological moral theory interprets treating persons as equals not in terms of lower-order ends persons may pursue (pleasure or pain, or talent), but in terms of personhood, the capacity of each person self-critically to evaluate and give order and personal integrity to one’s system of ends in the form of one’s life. The fundamental and ethically prior fact is not pleasure and the maximum impersonal aggregations thereof, but so expressing equal respect for the capacities of personhood that people may equally develop the capacities to take ultimate responsibility, as free and rationally self-critical beings, for how they live their lives. It is no accident that from Kant\textsuperscript{80} to Rawls\textsuperscript{81} and Gewirth\textsuperscript{82} this perspective has been supposed to justify human rights that are not merely non-utilitarian, but anti-utilitarian. Thus to express equal respect for personal autonomy is to guarantee the minimum conditions requisite for autonomy; ethical principles of obligation and duty rest upon and insure that this is so, and correla-
tively define human rights. Without such rights, human beings would lack, *inter alia*, the basic opportunity to develop a secure sense of an independent self, instead simply being the locus of impersonal pleasures which may be manipulated and rearranged in whatever ways would aggregate maximum utility over-all, for all individual projects must, in principle, give way before utilitarian aggregates. Rights insure that this not be so, a point Dworkin has made by defining rights as trumps over countervailing utilitarian calculations.\(^{83}\)

It is important to see that this deontological moral perspective, while it rejects as an ultimate moral principle the utilitarian maximization of the aggregate of pleasure over pain, is not incompatible with the relevant assessment of consequences in thinking ethically.\(^{84}\) The assumption that the Kantian interpretation of treating persons as equals is incompatible with assessing consequences is a blundering mistake.\(^{85}\) Consider, for example, how the neo-Kantian theories of Rawls and Gewirth mediate the relation between the moral imperative of treating persons as equals and the substantive critical moral standards in terms of which conduct and institutions should be assessed. Both Rawls and Gewirth have given expression to treating persons as equals in terms of variant interpretations of Kantian universalizability. Gewirth has followed Kant more literally: he has argued that ethical reasoning, as such, is marked by a certain phenomenology—namely, in reasoning ethically, an agent abstracts from her or his particular ends, and thinks in terms of what general requirements for rational autonomy the agent would demand for the self (so idealized) on the condition that the requirements be consistently extended to all other agents alike.\(^ {86}\) Rawls's argument is more abstract but to similar effect: we start not from the particular agent, but from the concept of rational persons who must unanimously agree upon, while under a veil of ignorance

---


\(^{84}\) It is crucial to distinguish the idea of teleological and consequentialist moral theories, Kantian moral theory is deontological, which means that it is non-teleological. See note 48 *supra*. Both teleological and deontological moral theories may be consequentialist, however, in the sense that the assessment of what conduct conforms to ethical principles crucially turns on the assessment of the consequences of acting on the principle. Teleological and deontological theories differ in terms of their criteria for assessing consequences, but not necessarily in the important relevance of consequences, as such.


\(^{86}\) A. Gewirth, *supra* note 8, chs. 2-3.
as to who they are, the general critical standards in terms of which their personal relations will be governed. For Rawls, the veil of ignorance performs the same function as Gewirth's abstraction of the agent from her or his ends (in thinking ethically, one respects higher-order capacities of personhood, not lower-ends which happen to be pursued); and, the contractual agreement is the functional equivalent of Gewirth's universalization (what all persons would agree to comes to the same thing as what any person, suitably idealized, would demand for one's self on the condition that it be extended to all alike). Now, importantly, both these theories appeal to consequences in arguing that certain substantive principles would be universalized (Gewirth) or agreed to (Rawls). Thus, Gewirth has argued that the universalizing agent would assess the necessary substantive or material conditions for rational autonomy and would universalize those conditions; the consequences of universalization thus importantly determine what would be universalized. Correspondingly, Rawls's contractors consider the consequences of agreeing to certain standards of conduct as part of their deliberations.

If Rawls and Gewirth are in such fundamental agreement, wherein do they differ? The main difference comes in Rawls's argument that the contractors of the original position, in the conditions of uncertainty (not knowing who they are, and thus how they will be affected by agreeing to certain principles), would find it rational to maximin, viz., agree to that set of principles which would make the worst off best off. Gewirth has resisted the thoroughgoing application of this strategy, on the ground that it too radically treats as morally arbitrary (through the veil of ignorance) differences between people not all of which can easily be regarded as ethically fortuitous and thus properly regulated by a principle like maximin which, in making the worst off best off, tends to be equalizing (since, in many cases, the way rationally to make the worst off best off is to abolish the worst off class altogether by mandating equality). Gewirth's objection to maximin appears to rest on his phenomenological procedure; he objects to the generality of Rawls's idea of ethically fortuitous circumstances of situation and nature because agents, in reasoning ethically in any particular context, find it unnaturally straining imaginatively to abstract from their situation in the radical way Rawls's procedure requires. But, Gewirth's

---

87 J. Rawls, supra note 6, ch. III. See also D. Richards, supra note 60, ch. 6.
88 J. Rawls, supra note 6, at 150-61.
89 A. Gewirth, supra note 8, at 108-09. Cf. id. at 331.
own procedure of abstracting from particular ends to the conditions of rational personhood, as such, is not, however, any less straining. Consistently carried out in its moving purity of principle, the Kantian interpretation of treating persons as equals requires that we acknowledge that the only ethically fundamental fact is persons' equality in having the capacity for sovereignty in the kingdom of ends; and any other difference among persons has moral weight only to the extent that the difference is accorded weight by principles that persons would accept as expressing basic respect for such equality. Rawls's procedure, while undoubtedly more abstract than Gewirth's, is to be preferred as the more adequate interpretation of the Kantian premises shared by both theories in that, for Rawls, following Kant, everything is fortuitous ethically except those aspects of character and action that are given significance by the free and rational and equal consent of persons. At best, Gewirth's procedure, whereby persons abstract from their situation by thinking of themselves in terms of their rational autonomy, may be viewed as a first approximation, by phenomenological description of an individual's ethical reasoning, of the procedure more completely and consistently realized by Rawls's method.

Despite such differences between Rawls and Gewirth, it is important to keep in mind the broad common ground they share. Even as regards their differences over maximining, it seems clear that Gewirth's insistence, over a wide range of cases, that each person, idealized in terms of rational autonomy, should demand for herself or himself whatever can be universalized to other persons converges with maximining, viz., insuring that each person equally has access to certain minimal conditions of well-being and self-respect. With respect to human rights, the consequence of both approaches would be a set of general principles of critical morality, some of which

---

*n* Cf. D. Richards, * supra* note 60, at 83-85, where I once made a similar contrast between R.M. Hare's universalistic prescriptivism and contractarian theory. See R.M. Hare, *Freedom and Reason* (1963); *The Language of Morals* (1952). Hare has recently argued that his procedure would yield a form of utilitarianism. See Hare, *Ethical Theory and Utilitarianism*, 4 Contemp. Brit. Phil. 113-31 (H.D. Lewis ed. 1976). The divergence between Hare's Kantian inspired theory, tending to utilitarianism, and Rawls's and Gewirth's, which are anti-utilitarian, appears to derive from the greater weight that Rawls and Gewirth give to Kant's concept of rational autonomy. In terms of my earlier claim of the relation of Hare's theory to ideal contractarianism, it seems to me that Gewirth's phenomenological procedure is even a closer approximation to contractarian theory, presumably because Gewirth starts from an idealized conception of rational autonomy close to the idea of moral personality on which Rawls's theory builds.


*n* For a contractarian derivation of such rights, see D. Richards, * supra* note 60, chs. 7-10.
would involve such fundamental interests that coercion would be justified in enforcing them. These principles, which we can naturally denominate the principles of obligation and duty, would define correlative rights. Consider the relevance of this account of human rights to the analysis of the moral foundation of the criminal law and related constitutional principles.

II. **The Moral Foundations of the Substantive Criminal Law**

It is an uncontroversial truth that the criminal law rests on the enforcement of public morality, viz., that criminal penalties, *inter alia*, identify and stigmatize certain moral wrongs which society at large justifiably condemns as violations of the moral decency whose observance defines the minimum boundary conditions of civilized social life. As we noted earlier, however, little critical attention has yet been given in Anglo-American law to the proper explication of the public morality in light of considerations of human rights to which constitutional democracy is in general committed. Rather, legal theory and practice has tended to acquiesce in a quite questionable identification of the public morality with social convention. We are now in a position to articulate an alternative account of the moral foundations of the substantive criminal law, which can illuminate various criminal law and related constitutional law doctrines and the proper direction of criminal law reform.

The substantive criminal law and cognate principles of constitutional law rest on the same ethical foundations: the fundamental ethical imperative that each person should extend to others the same respect and concern that one demands for one's self, as a free and rational being with the higher-order capacities to take responsibility for the form of one's life. Whether one uses Rawls's maximinizing contractarian hypothesis or Gewirth's universalization of rationally autonomous people, the consequence is, for purposes of the criminal law, the same. Certain basic principles are agreed to or universalized, as basic principles of critical morality, because they secure, at little comparable cost to agents acting on them, forms of action or forebearance from action that rational persons would
want guaranteed as minimal conditions of advancing the respon-
sible pursuit of their ends, whatever they are; furthermore, these
principles will be so fundamental in securing either a higher lowest
(Rawls)\textsuperscript{94} or the conditions of rational autonomy (Gewirth)\textsuperscript{97} that, in
general, coercion will be viewed as justified, as a last resort, in
going people to conform their conduct to these principles. Accord-
ingly, these principles are commonly referred to as the ethical prin-
ciples of obligation and duty, which define correlative rights.\textsuperscript{98}

One fundamental distinction between these principles of obliga-
tion and duty is that some apply in a state of nature whether or not
people are in institutional relations to one another, whereas others
arise because of the special benefits that life in institutions and
communities makes possible; I shall refer to the former as natural
duties,\textsuperscript{99} the latter as institutional duties and obligations.\textsuperscript{100} With
respect to natural duties, the principles include, at a minimum, a
principle of nonmaleficence\textsuperscript{101} (not killing, inflicting harm or gratui-
tous cruelty), mutual aid\textsuperscript{102} (securing a great good, like saving life,
at little cost to the agent), consideration\textsuperscript{103} (not annoying or gratuit-
tously violating the privacy of others), and paternalism\textsuperscript{104} (saving a
person from impaired or undeveloped rationality likely to result in
death or severe and irreparable harm). With respect to institutional
duties and obligations, the principles include basic principles of
justice\textsuperscript{105} which regulate such institutions (legal and economic sys-
tems, conventions of promise-keeping and truth-telling, family and
educational structure) and in appropriate circumstances require
compliance with the requirements of such institutions\textsuperscript{106} (for exam-
ple, respecting certain property rights). Now, all these principles of
obligation and duty—natural and institutional—are formulated in
quite complex terms; and priority relations are established among
them to determine how, in general, conflicting obligations should be
resolved and what the relative moral seriousness of offenses would

\textsuperscript{94} See note 92 supra.
\textsuperscript{97} See note 91 supra.
\textsuperscript{98} See note 93 supra.
\textsuperscript{99} Cf. D. Richards, supra note 60, at 92-95; also at ch. 10.
\textsuperscript{100} Id. at chs. 3-9; also at 92-95.
\textsuperscript{101} Id. at 176.
\textsuperscript{102} Id. at 185.
\textsuperscript{103} Id. at 189.
\textsuperscript{104} Id. at 192.
\textsuperscript{105} Id. at ch. 8; cf. J. Rawls, supra note 6.
\textsuperscript{106} D. Richards, supra note 60, ch. 9.
be (the infliction of death, for example, is a graver violation of integrity than a minor battery). I shall touch on some of these complexities in the discussion below of particular criminal law doctrines. The general nature of such principles and their derivation from the moral imperative of treating persons as equals, however, seem clear: Such principles secure to all persons on fair terms basic forms of action and forebearance from action which rational persons would want enforceably guaranteed as conditions and ingredients of living a life of self-critical integrity and self-respect; correlative, such principles define human or moral rights, whose weight as grounds for enforceable demands rests on the underlying moral principles of obligation and duty which justify such enforceable demands. Other moral principles are also agreed to or universalized, but they fall in an area, supererogation, which is not our present concern.

Because all the moral principles of obligation and duty are the proper objects of the use of force or coercion (an evil), ethical principles are agreed to or universalized that govern the distribution of this evil. Enforcement of such principles in the law takes place through the criminal law and the private remedies of the civil law (contracts, torts). While both the criminal and civil law rest on the moral foundations of the moral principles of obligation and duty, the grounds of enforcement differ in both cases: the criminal law rests on the punitive upholding of basic standards of moral decency, the civil law on moral principles of compensation. While some moral principles are enforced under both bodies of law (for example, the criminal and civil law of assault), others are enforced only under one body of law (for example, American law tends to prefer the civil law to remedy breaches of contract, where the promisee has the moral and legal right to extinguish or enforce the obligation). The concern here is only with the ethical principles relevant to the just

---

107 For attempts to formulate such complex principles which appear broadly convergent in substantive requirements, see id. at chs. 8-19; A. GWEIRTH, supra note 8, at chs. 4-5.
108 D. RICHARDS, supra note 60, at ch. 11.
109 The moral analysis of why some of the principles of obligation and duty are enforced by the criminal law and others are not would require, I think, investigation of the costs of publicly enforceable sanctions versus the kind of gain to be obtained in greater regulation of conduct by the relevant principles. In general, public sanctions are expensive and draconian and would, accordingly, be reserved for the more serious moral offenses; others would be left to private law remedies and to informal forms of moral blame and criticism. For present purposes, it suffices that is a necessary, though not a sufficient, condition of criminal punishment that there be a violation of underlying moral principles of obligation and duty. Cf. id. at chs. 7-10.
imposition of criminal sanctions, viz., the principles of punishment. Generally, at least four relevant principles regulate the use of criminal sanctions to enforce moral obligations and duties.

First, the Kantian interpretation of treating persons as equals importantly puts special constraints on the imposition of criminal penalties for violations of moral duties and obligations, namely, that sanctions be applied only to persons who broke a reasonably specific law, who had the full capacity and opportunity to obey the law, and who could reasonably have been expected to know that such a law existed. In this way, each person is guaranteed a greatest liberty, capacity, and opportunity of controlling and predicting the consequences of one's actions, compatible with a like liberty, capacity, and opportunity for all. Such a principle can be agreed to or universalized because it is a rational way to secure general respect for and compliance with moral principles at a tolerable cost. Because criminal sanctions are a form of humiliating stigma, persons in Rawls's original position or Gewirth's equivalent would limit the application of such sanctions in order to secure a higher lowest than that allowed by alternative principles; for, these conditions provide the fullest possible opportunity for people to avoid these sanctions if they so choose, or, at least, the fullest possible opportunity within the constraint that some system of coercive enforcement is justified to insure compliance with moral principles of obligation and duty. This principle forbids the application of criminal sanctions to an innocent who has not broken the law or to persons lacking the liberty (the severely coerced), the capacity (the insane, infants, involuntary acts) or full opportunity (those not reasonably apprised of the law) to regulate conduct by the relevant principles, even where the application of sanctions might have some deterrent effect in better enforcing moral principles; it also tends to render immune from criminal sanctions those unintentional actions that result from quite unforeseeable and unavoidable accident, which there was no fair opportunity to avoid. In general, forms of mental state (intent, knowledge, and an individualized standard of negligence) are required as necessary moral conditions of just punishment because the presence of these mental states insures that the person may fairly be said to have the capacity and opportunity to conform con-

110 See id. at 128-29; H.L.A. Hart, supra note 10, at chs. I-II.

duct to law; to the extent that intentional as opposed to unintentionally negligent actions involve easier or fuller opportunities to regulate conduct by principles, a higher gradation of sanction would, on this view, justly be applied to the former than the latter, other things being equal.

Secondly, given that the application of criminal sanctions is regulated by the principle of equal liberty, capacity, and opportunity, such sanctions must also observe two ethical principles of proportionality. The first principle rests on the purpose of the criminal law to enforce moral principles of obligation and duty: levels of sanctions must reflect the relative moral gravity of underlying moral wrongs. For example, since murder is morally graver than a minor battery, the level of sanction for murder must be greater than that for battery. This proportionality principle says nothing about the level at which sanctions should be set; it requires only that whatever sanctions may be justified on other grounds must reflect relative gravities of underlying moral wrongs. The second moral principle of proportionality is more substantive. Since, from the ethical point of view of treating persons as equals, persons agree to or universalize principles of just punishment whether they were on the giving or receiving end, rational persons so situated are concerned to place substantive upper limits on the level of sanction that could be applied for moral wrongs in general or certain moral wrongs in particular. For example, certain forms of torture, that are incompatible with respecting human dignity, are ruled out, absent very extreme circumstances. In addition, rational contractors or universalizers place upper limits on sanctions for certain wrongs: death, for example, is never acceptable as an appropriate sanction for a minor battery or theft; such an extreme sanction can not be rationally acceptable to persons who might be on the giving or receiving end, for the gains in moral conformity are incommensurate to the risks in punishment.

Thirdly, within the constraints of all the above principles, criminal sanctions must satisfy the underlying purpose of affording an effective symbolic statement of minimal moral standards of decency. Effectiveness in this context should be measured by many factors—general deterrence (whether the public example of punishment for a certain crime tends to deter people in general from committing that crime), special deterrence (whether the punishment makes the offender less likely to commit the crime again), atone-

---

ment and moral reform (whether the punishment leads the criminal to repent the wrongdoing and develop moral character). While theories of punishment commonly distinguish retributive and deterrence aims of criminal justice, I believe that these considerations are, within the constraints of the principles of equal liberty and proportionality, one: the justifying aim of criminal sanctions is to make a symbolic public statement about the importance of respecting certain basic human rights defined by moral principles of obligation and duty. There is, pace Kant, no necessary connection between this aim and any particular form or level of criminal sanctions, including prisons. From the point of view of treating persons as equals in which rational persons must agree to or universalize principles acceptable whether on the giving or receiving end, certain constraints are placed on criminal sanctions (including upper limits), but, from this point of view, there is no reason to accept intuitionistic notions of the intrinsic goodness of evil plus pain, or Kant’s concept of the abstract obligation to punish evil in the exactly same kind. Rather, the central rational aim of criminal sanctions, from this point of view, is to make the required effective public statement justified by the special moral force of the underlying moral principles of obligation and duty and correlative moral rights. Which sanctions make this statement most effectively is a matter of humane empirical research among alternative forms of sanction to identify which ones best communicate respect for the underlying values of human dignity, including, of course, forms of sanction that respect the moral personality of offenders themselves. One corollary of this approach is that levels of sanctions must be rigorously scrutinized to insure that the same level of effectiveness is not achievable with less severe sanctions, or less severe sanctions more certainly imposed. Any surplusage of sanctions, above the level necessary for their effectiveness, is a morally gratuitous cruelty, because it is the infliction of pain not necessary to a purpose which rational persons would reciprocally agree to or universalize.

113 Cf. the similar argument in D. Richards, supra note 12, at ch. VI; H.L.A. Hart, supra note 10, at ch. I.
115 See, e.g., G.E. Moore, Principia Ethica 214-16 (1960); W.D. Ross, The Right and the Good 57-58 (1930).
116 See note 114 supra.
117 Cf. Feinberg, supra note 94.
118 Elsewhere, I have called this the principle of effectiveness and economy in sanctions. D. Richards, supra note 12, at 244-45.
Fourthly, on the assumption that a generally just legal system exists, rational persons must agree or universalize that the use of coercion in enforcing moral principles of obligation and duty, justified in an institutional state of nature, must be restricted to the legal system, except for certain special cases discussed below (for example, self-defense). The reason for this has been a prominent point made by the contractarian tradition, especially Locke and Kant, viz., when each individual person, in an institutional state of nature, himself acts as an enforcer of moral duties, he is judge, jury, and executioner in each case, including his own, and this judgment will often be distorted by personal interest and bias, selfish envy, and vindictiveness. The great virtue of a just legal system, where the final appeal in the exercise of coercive power is to a group of impartial interpreters and executors of the law, is that the distortions of judgment and execution, found with an individual in the state of nature, are significantly reduced. This is simply to say that such legal institutions tend to be more just in their distribution of punishment: the persons who violate moral duties and obligation, which the law enforces, are more likely to be punished than in the state of nature, where distortions of judgment lead to applying coercion to the innocent, or applying coercion to the guilty to a degree that is out of all relation to the requirements of effective deterrence. For this reason, when a just legal system exists, coercion is justified in enforcing moral duties and obligations, in general, only when these requirements can be effectively enforced by law; those duties and obligations which cannot be effectively enforced by law must be, at best, left to informal forms of criticism and blame.

118 Cf. D. Richards, supra note 60, at 130-31.
119 See especially J. Locke, supra note 49, at chs. I-III.
120 On the grounds of the injustices of the state of nature, Kant supposed there to be a moral obligation for persons to leave the state of nature and enter civil society. See I. Kant, supra note 114, at 69-72.
121 For this purpose, I view both the criminal law and the remedies of the civil law as means of enforcement. Certain moral rights, for example, relating to keeping informal promises and the like, may not be appropriately enforced either by the criminal or civil law, on the ground that they relate to forms of personal relationship that are more effectively regulated, given the interests involved, by informal forms of blame and criticism. Cf. Hart & Sacks, The Invitation to Dinner Case, in The Legal Process 477-78 (Tent. ed. 1958). Many times, the moral interests thus protected will be of acute human significance, for example, personal interests against the betrayals of friends or lovers. The underlying quality of informal and spontaneous attachment of such relationships, however, is not compatible with the forms of coercive enforcement by law.
III. The Moral Theory of the Substantive Criminal Law

Theories should be judged by their explicatory fruits. Therefore, I will examine how the proposed account of the moral foundations of the criminal law may be deployed in clarifying the substantive criminal law and cognate constitutional law doctrines. I shall discuss *seriatim* the contribution this theory can make to understanding (a) decriminalization and the limits of the criminal sanction, (b) *actus reus* and the distinction between actions and omissions, (c) *mens rea* and excuses, including the novel idea of an excuse of socioeconomic deprivation, (d) legality, (e) the nature and place of justification, notably self-defense and necessity, (f) vexed issues relating to inchoate crimes, in particular, attempts, and (g) proportionality and the death penalty.

A. Decriminalization and the Limits of the Criminal Sanction

Our perspective on the moral foundations of the criminal law enables one to reinterpret contemporary debates over decriminalization and the limits of the criminal sanction in a striking way that confirms the main conclusions of liberal reformers like John Stuart Mill but does so on the basis of a deontological, anti-utilitarian moral theory deriving from Kant; this examination will demonstrate how the arguments for decriminalization naturally converge with arguments in support of the constitutional right to privacy.

There is an important converging strain in the moral theories of Kant and Mill, namely, the central role in ethics of equal concern and respect for autonomy. Liberalism rests on a certain view of the *person*, namely, that persons, as such, have the capacities I earlier described as the higher-order capacities self-critically to evaluate and order their first-order desires. Thus, Kant, who is the most profound philosophical theorist of liberalism, identifies personhood in the capacity of persons to be sovereigns in the kingdom of ends, to be *ends in themselves*, viz., to think self-critically about their ends and to take, as the central task of personhood, how to live their lives. When John Stuart Mill sought to explicate similar values as at the core of liberal political theory, he wrote of the central importance of people choosing plans of life for themselves, identifying per-

---

123 See J.S. Mill, supra note 44.
125 See I. Kant, supra note 66.
sons' relation to their lives as the highest creative task of humans: "Among the works of man, which human life is rightly employed in perfecting and beautifying, the first in importance surely is man himself."\textsuperscript{125} Mill's interpretation of autonomy supplements Kant's with a special concern with facilitating independence from custom and convention by which a person is enabled, in Mill's memorable phrase, "to fit him with a life"\textsuperscript{127} with concern for personal individuality.

As earlier suggested, we should interpret Kant's autonomy-based theory of ethics not in terms of his mysterious ideas of noumenal independence of casual law\textsuperscript{128} but in terms of a capacity for independence of domination by others and for self-critical control over our lower-order desires. The solid core of truth in Kant's theory, which Mill elaborates with his idea of independence of convention, is that persons, as such, have a natural capacity for self-critical rationality about their lives and how they are lived. Autonomy, so far from being miraculous evidence of our independence of casual law, is very much a natural capacity which we may, depending on our purposes, fulfill or frustrate in various ways. Despite their opposing deontological and utilitarian metaethics, Kant and Mill unite in their focal emphasis on giving weight to respecting and fostering this natural capacity. Kant's theory of ethics is deeper than Mill's in explicating the ethical requirement of treating persons as equals in terms of this capacity, whereas Mill, a utilitarian in his metaethics, ultimately interprets equality in terms of the capacity for pleasure or pain.\textsuperscript{129} For Kant, ethics is the point of view which requires that we regulate our conduct by principles which respect the equal dignity of each person in exercising this capacity.

The idea of human rights is\textsuperscript{130} a corollary of the Kantian interpretation of treating persons as equals in virtue of their autonomy. An

\textsuperscript{125} See J.S. Mill, supra note 44, at 59.
\textsuperscript{126} Id. at 68.
\textsuperscript{127} See I. Kant, Foundations supra note 51, at 64-83.
\textsuperscript{128} See note 77 supra. Mill appears to regard his analysis of autonomy as identifying an interest which a person would rationally give a higher weight than other forms of desire satisfaction, and thus the higher weight of this form of desire satisfaction accounts for the greater normative weight which the utilitarian principle would give to the cultivation of this interest. For his distinction between higher and lower pleasures, see id. ch. II. For Mill's statement about the rational attractions of autonomy, see J.S. Mill, supra note 44, at ch. III.
\textsuperscript{129} See part I of this article supra.
important feature of this perspective, as Dworkin has noted, is a neutral theory of the good: the ethical principles which define rights assure to persons, on fair terms to all, their dignified independence in designing a life as free and rational creatures, which is, accordingly, broadly neutral on the question of what is good for any particular person. To say that these principles entertain a neutral theory of the good, however, is not to say that they are blankly non-consequentialist. Clearly, the Kantian interpretation of treating persons as equals presupposes a certain view of human nature (for example, the natural capacity for autonomy); and, the content of ethical principles in general takes into account the kinds of interests rational persons tend to have (for example, not being killed or harmed; or, needs for food and shelter; or, the ingredients of the development of critical rationality). Such considerations, however, are compatible with many disparate visions of the good life. The idea of human rights, without begging the question of what is the good for any particular person, secures the minimum conditions which enable persons, with the dignity of freedom and rationality, to design their lives. Once rights are secured, persons are, to pursue Mill's aesthetic metaphor, to face the highest creative task of human life—to make a life. To this extent, rights embody a deontological concept: rights are defined independently of the good, and define the boundary constraints within which people on fair terms are free to define their own good.

This autonomy-based interpretation of treating persons as equals enables one to understand and defend, in terms of Kantian, deontological ethics, Mill's general right "of framing the plan of our life to suit our own character . . . without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong." Mill's right of personal autonomy, expressed in American constitutional law in the constitutional right to privacy, assumes as its background the moral principles of obligation and duty discussed earlier. Certainly, Mill does not argue that the right of personal autonomy legitimates a general right of amoralism or immoralism, i.e., not treating persons as equals. Indeed, the whole point of liberalism,

---

132 See notes 84-87 and accompanying text supra.
133 See J.S. MILL, supra note 44, at 6.
134 See note 24 supra.
correctly interpreted, is to make treating persons as equals the central tenet of political and constitutional morality. Mill's argument, rather, is that ethical principles, correctly understood, allow circumscription of personal autonomy only when the person's actions harm palpable interests of others; in particular, there is no appropriate ethical ground for interfering with personal autonomy on the paternalistic ground of advancing the interests of the agent alone.

The background of Mill's argument is, of course, Victorian moralism which Mill perceived as, without any reasonable ethical justification, interfering in people's personal lives, in effect, creating a tyranny of majoritarian convention which Mill believed to erode the foundations of autonomous personhood. Mill's argument against any legitimate ethical interference on paternalistic grounds is overstated; his own argument shows that he believed in a just scope for paternalism in the cases of children and "backward states of society" and even in certain cases of imminent harm to an unwary adult. Clearly, a principle of paternalism, circumscribed to cases of extreme irrationality or non-rationality likely to harm irreparably serious human interests (for example, life), is ethically justified. Mill has refused to formulate any such general principle, though he has invoked several specific applications of it, because he took seriously the extreme abuses of paternalistic (applied, for example, to women) as well as moralistic arguments of his period. Most forms of majoritarian incursion into people's personal lives could not, Mill believed, be justified by any ethical principle (including paternalism) which treats persons as equals. Accordingly, Mill desired to formulate a simple and not easily abused principle which roughly articulates that, outside the scope of principles which treat persons as equals, there is a general right to personal autonomy. Because paternalistic arguments may have appeared to him intrinsically prone to abuse, he has formulated his principle of noninterference overbroadly but with dramatic and cogent simplicity: The only warrant for interference with an agent is that the agent's actions

136 Id. at 97-98.
137 See D. Richards, supra note 60, at 192-95.
139 For an attempt to reconstruct the spirit of Mill's argument, reflecting his objections to the abuse of moralistic and paternalistic arguments, see Richards, Sexual Autonomy, supra note 24.
The general intention of Mill’s argument is correct and is clarified by the autonomy-based interpretation of treating persons as equals. A certain class of background ethical principles (namely, the principles of obligation and duty), which express the idea of treating persons as equals, does limit the scope of the right of personal autonomy. These principles, as suggested earlier, define minimal moral rights of social decency, which are the necessary moral conditions for the proper application of the criminal sanction. Accordingly, these principles, as Mill has clearly acknowledged, limit personal autonomy wherever countervailing rights are involved; but, once such rights are not involved, persons have a general right of personal autonomy. The source of this general right is the fundamental value of liberalism (shared by Mill and Kant), a focal concern with the capacity of each person, compatible with a like capacity for all, to address with dignity the central problem of personhood—how to live one’s life. The neutrality of this right, among a wide number of visions of the good life, arises from its source in the value of autonomy—with the capacity of persons for sovereignty in the kingdom of ends, not with any particular heteronomous end which may be adopted. The right of personal autonomy grounds a general prohibition on forms of coercive interference with this right, for, as Mill has clearly suggested, only by allowing people themselves to assume final normative responsibility in making these choices over the range of cases to which the right properly applies, where they bear the ultimate responsibility for the risks of success or failure, can one secure the desired respect for the basic higher-order capacities of the person to accept with dignity the responsibility for her or his life as a free and rational being. Such an affirmative right is clearly required by the autonomy-based interpretation of treating persons as equals. Autonomy is a natural capacity which may be encouraged or frustrated in various ways depending on one’s normative purpose. An autonomy-based ethics takes the normative attitude that the capacity is not only to be encouraged, but to be affirmatively defended—on the ground that in this way people better realize their capacities for free and dignified personhood. Mill’s fundamentally valid argument is that constitutional democracy, committed to the liberal interpretation of treating persons as equals, must affirmatively extend such a right in defense of those persons whose moral

\[\text{140 See J.S. Mill, supra note 44, at 6.}\]
\[\text{141 Id. at ch. III.}\]
freedom is illegitimately denied by forms of social convention which are not grounded in the ethical imperative of treating persons as equals. Mill is acutely sensitive, unlike Kant, to the degree to which social convention tyrannously blinds people to the moral freedom they in fact possess, disfiguring and distorting their capacity to take an attitude toward their lives which Mill likens to that of the creative artist with a willingness to explore, to try experiments in living, to take risks with one's talents, to be open and vulnerable to the impulses of creative design. Accordingly, an autonomy-based theory of ethics requires an affirmative moral right that people be protected from social conventions that are not grounded in treating persons as equals, so that people are encouraged to realize their moral freedom. For Mill, the gravamen of tyrannous convention was Victorian moralism, which he took systematically to violate the right to personal autonomy by its excessive criminalization and social condemnation of acts which, in fact, do not violate the moral rights of others; Mill took women to be a central class of persons whose moral freedom had, by unjust social convention, been disfigured.

While Mill has made his argument in support of a general right of liberal political theory, in the United States one can perceive this moral right as the ground for the legal right gradually developed, albeit inconsistently, by the Supreme Court as the constitutional right to privacy. The fundamental imperative of treating persons as equals, which explicates the ideas of human rights enshrined in the Constitution, requires that the scope of the criminal law must, in fact, rest on human rights expressive of the fundamental imperative, and that criminalization outside this proper scope must be invalidated on the ground of a right to personal autonomy. Accordingly, the Supreme Court has naturally appealed to underlying ideas of human rights as the unwritten Constitution to develop a constitutional right to privacy which affirmatively defends the moral right to personal autonomy.

Consistent with the clarification this account affords of constitutional rights, one may note, in conclusion, that it illuminates the

---

142 See note 126 and accompanying text supra. For "experiments in living," see Mill, supra note 123, at 56.
143 See note 138 supra.
145 See Richards, supra note 144.
general nature of arguments for decriminalization in a way efficiency-based arguments for decriminalization cannot. The gravamen of arguments for decriminalization is that the acts in question, on critical examination, are not immoral, and that they do not, in principle, fail to treat persons as equals in the ethically fundamental sense. A fundamental mistake of advocates of decriminalization is to concede the immorality of certain acts (for example, consensual homosexuality or prostitution), and then to argue for decriminalization on the grounds of enforcement costs. There is no defensible criterion for the immorality of acts or persons other than treating persons as equals. Consensual homosexuality, for example, does not violate this imperative; the criminal and social condemnation of it clearly does. Accordingly, criminal statutes, that prohibit consensual homosexual relations, unethically distort the moral freedom people in fact possess; such statutes are justly condemned as violations of the right to personal autonomy, and should be condemned as violations of the constitutional right to privacy.

In general, students of the criminal law, like George Fletcher, who otherwise urge the relevance of moral theory in understanding the substantive criminal law, err in not applying moral theory to the question of the proper scope of the criminal law. It is certainly true that not all unethical acts are criminal; even some acts violative of moral principles of obligation and duty are not criminalized. It is true, however, that no act is properly the subject of criminal penalties that is not, on critical examination, morally wrong; to the extent the criminal law does criminalize such acts, it is justly the subject of moral criticism and constitutional attack. Theorists of the criminal law, who lavish such theoretical concern for understanding the moral foundations of mens rea or the excuses and who justly criticize failures to conform to these foundations, should bring comparable energy to bear on the substantive scope of proper criminal liability. It is a mistake to argue that a state has no moral right to abolish mens rea, notwithstanding social consensus to the contrary, and yet also supinely accept the propriety of social convention as a measure of the morality that the criminal law may enforce.

———

144 See note 144 supra. For prostitution, see Richards, Commercial Sex, supra note 24.
145 See note 36 and accompanying text supra.
146 See notes 109 & 122 supra.
147 Cf. Hart, supra note 94.
There is no such distinction; we do not, as judges or lawyers or persons, at any point abdicate our moral responsibility for applying to ethical questions the kind of reasoning, treating persons as equals, that is alone properly ethical.

B. Actus Reus: Of Acts and Omissions

The moral theory of the substantive criminal law here proposed is in two parts: the moral principles of obligation and duty, and the four principles of justice that regulate the use of coercion in enforcing the former class of principles. The principles of justice play a role in clarifying the place of the actus reus requirement as a predicate of criminal liability, and the principles of moral obligation and duty explicate the proper interpretation of the action-omission distinction as a feature of this requirement.

The criminal law traditionally requires the presence of a voluntary act, or actus reus, as a necessary condition of criminal liability; and, constitutional principles appear to require it, in some form, as a necessary condition of constitutionally just punishment. The first principle of justice previously discussed—a greatest equal liberty, capacity, and opportunity—explains the moral foundations of this requirement of criminal liability and why, correlatively, it is constitutionally mandated. On the view here proposed, the criminal law is the way in which basic rights of moral decency, defined by ethical principles of obligation and duty, are enforced; since the values underlying these rights are of equal concern and respect for autonomy, people are only justly subject to such sanctions when each, compatible with like treatment for all, has been given a fair chance to avoid such sanctions. In short, persons may only justly be used as an example to others of the moral importance of observing basic decency to others when they can fairly be regarded as having been accorded the basic respect for their autonomy shown by the application of criminal sanctions only after a showing of the exercise or failure of exercise of capacities of choice and deliberation that could fairly have obviated the sanctions. The requirement of a voluntary act, as a principle of criminal law and of constitutional justice in punishment, is a minimal aspect of this requirement, for, without it, people would be subject to criminal sanctions

181 See W. LAFAYE & A. SCOTT, CRIMINAL LAW 177-82 (1972).
for statues or involuntary fits which bear no marks of personal responsibility.\(^{153}\)

The derivation of the moral principles of obligation and duty clarifies the proper interpretation of the action-omission distinction in the interpretation of \textit{actus reus}. In general, Anglo-American criminal law attaches criminal liability for omissions only in the presence of special circumstances of status (parent-child), contract, assumption of risk by having caused the danger or having begun to render aid, and the like;\(^{154}\) and recent moral theorists, like Epstein\(^ {155}\) and Pilon,\(^ {156}\) have suggested that this narrow limitation on criminal liability rests on a moral value, namely, that we bear responsibility only for what we cause by our actions, not, in general, for our failures to act. Both Anglo-American law and the moral theorists are wrong. From this point of view of treating people as equals, there is no morally fundamental distinction between actions and omissions;\(^ {157}\) in both cases, the morally relevant feature, which would be recognized as such by rational persons or universalizers whether on the giving or receiving end, is the small cost of compliance and the fundamental goods thus secured to others.\(^ {158}\) When the costs of compliance, even with moral imperatives forbidding actions, are disproportionately large compared with gains to others, either a defense by way of excuse (duress) or justification (self-defense) is recognized. Omissions, in moral principle, should be no differently regarded. In particular, as Kant well recognized,\(^ {159}\) a general moral duty of mutual aid, requiring supplying a great need to another (for example, saving life) when at minimal cost to the agent, would be universalized as a moral principle of obligation and duty. Accordingly, there is no argument of moral principle to support the general failure of Anglo-American law to recognize good samaritan duties in contexts to which the underlying moral duty of mutual aid applies.\(^ {160}\)

Surely, the technical objection regarding the difficulty of framing appropriate standards of criminal liability in this area is not ethi-

\(^{153}\) Cf. Richards, \textit{supra} note 152.


\(^{155}\) See Epstein, \textit{supra} note 73.

\(^{156}\) See Pilon, \textit{supra} note 73.


\(^{158}\) See D. Richards, \textit{A Theory of Reasons for Action} 185-89 (1971).

\(^{159}\) See I. Kant, \textit{Foundations}, \textit{supra} note 51, at 41.

cally decisive. The difficulties are, often, no greater in the area of actions. Yet, relevant moral distinctions, in the form of mitigation doctrines and forms of excuse and justification, have been gradually worked out to cover these difficulties in the definition of criminable acts. There is no good reason to believe that such doctrines could not appropriately be worked out for omissions. The failure to do so results in the failure of the criminal law to capture and express an important moral duty, and sometimes absurdly to go to the length of criminalizing reasonable and good faith conduct of heroic beneficence arguably beyond mutual aid.

The attempt to rest this error on moral foundations (autonomy as causal efficacy) rests on a confusion of respect for personal integrity with privatized egoism. The range of our moral obligations, however, is larger than our actions; it extends as well to those failures to act which fail to treat persons in the way we would want reciprocally to be treated were we in their position and they in ours. To limit the range of our moral duties to actions is a failure of moral reasoning and imagination. It has no moral basis, though it has, in our society, the force of a reigning ideology.

C. Mens Rea and Excuses

The defenses to criminal liability are naturally divided into defenses of justification and excuse. Defenses of justification are those which show that certain conduct, that is, prima facie, criminally wrong (for example, killing intentionally), is, in fact, justified (for example, on the ground of reasonable self-defense). Defenses of excuse, on the other hand, are based not on the claim that the conduct is justified, but on the claim that the conduct, albeit unjustified, is not blameworthy or culpable. The nature of the excuses ties up with

---

131 See e.g., G. Fletcher, Rethinking Criminal Law 602-06 (1978), where the difficulty is picking out which of a number of persons, aware of the need to help another at small personal cost, should be under the obligation to help. See also id. at 633-34. Surely, this special context of causal ambiguity would not debar specifying clear legal duties in other cases where such multiple liability does not obtain. Even in such cases of multiple possible aidors, legal rules could plausibly be worked out to allocate liability, for example, physical proximity, and the like.


133 See note 73 and accompanying text supra.

134 See sources at note 70 supra.

the general place of mens rea as a predicate of criminal liability, because one of the forms of excuse is to negative the culpable mental state (mens rea) associated with a particular actus reus. The moral theory of the criminal law here proposed clarifies both the place of mens rea and the excuses, and suggests how morally to analyze proposals to recognize novel excuses, like that of socioeconomic deprivation. Eventually, this discussion shall turn to the analysis of defenses by way of justification.

In general, the first principle of just punishment—equal liberty, capacity, and opportunity—justifies the general mens rea requirement as a predicate of criminal liability. As we earlier observed, forms of mental state (intent, knowledge, and an individualized standard of negligence) would be required as necessary moral conditions of just punishment because the presence of these mental states (mens rea) insures that the person may fairly be said to have the capacity and opportunity to conform conduct to law. Accordingly, forms of strict liability are disfavored in the criminal law: residual pockets of strict liability are contracting; and arguably, those that remain should be regarded as constitutionally suspect.

Similar considerations justify the place of the excuses as defenses to criminal liability—for example, the insanity defense and duress. If persons lack normal capacities to conform conduct to law as the product of mental disease or defect, they are not justly the subject of criminal penalties whose propriety rests, inter alia, on respect for the presence of capacities of autonomous choice and deliberation. Persons under extreme duress are justly afforded a defense on the ground that their action is not free (as the principle of equal liberty requires) and, concurrently, on the ground that conformity to law here requires an extreme sacrifice of basic interests (for example, a

146 See note 111 supra.
147 See e.g., People v. Hernandez, 61 Cal. 2d 529, 383 P.2d 673, 39 Cal. Rptr. 361 (1974) (good faith belief that consenting party was not underage held to constitute defense to statutory rape charge); Director of Public Prosecutions v. Morgan [1975] 2 W.L.R. 913 (House of Lords allows that belief in consent of rape victim, even though unreasonable, is defense to rape charge). On felony murder, see G. Fletcher, Rethinking Criminal Law 274-321 (1978).
148 See D. Richards, The Moral Criticism of Law 203-09 (1977). A vexing contemporary problem is the use of strict liability standards as a way of developing corporate responsibility which, otherwise, will be avoided by techniques of bureaucratic impersonality. See, e.g., United States v. Park, 421 U.S. 658 (1975). Arguably, the use of strict liability on the terms specified in cases like Park is, in effect, a standard of negligence sub silentio, applied in order to ease the prosecution’s burden of proof in cases where negligence, in the circumstances, seems patent.
realistic threat of death). This latter justifying element for duress introduces a nuance of defense by way of justification into the rationale of this excuse.

This view of the moral bases of excuses suggests that the recognition of novel excuses, *qua* excuses, should turn on relevant knowledge about capacities to conform conduct to law. For example, if one proposes, following Judge Bazelon, a novel excuse of socioeconomic deprivation, the moral analysis must turn on whether sociological theory justifies claims that, in general, persons with certain socioeconomic backgrounds lack capacity to conform conduct to law. In fact, given the significant numbers of people from such backgrounds who do conform conduct to law, it is very difficult to sustain, as an empirical proposition, the claim of incapacity.171

Sometimes, it is suggested one must reject Judge Bazelon's argument not on the ground of lack of evidence of incapacity of the claimed kind, but on the more general ground that such arguments rest on causal determinism, which is, in principle, inconsistent with traditional criminal law notions of personal responsibility, *i.e.*, with autonomy.172 This argument wrongly supposes that the autonomy-based interpretation of treating persons as equals requires the untruth of causal determinism. On the view here proposed, autonomy is a natural capacity which may be fostered or frustrated in various ways; an autonomy-based ethics fosters it, for example, by requiring the presence of capacities of autonomous choice and deliberation as a predicate of just punishment. This connection would be unintelligible if autonomy were incompatible with causal determinism. It is precisely because autonomy is a natural capacity subject to causal explanations that autonomy is justly made a predicate of criminal punishment, for there exist good empirical reasons of a causal kind for believing that the presence of criminal sanctions, when predicated on the presence of capacities of autonomy, better enables people to develop and exercise choice—to choose lives free of criminal sanctions, if they so choose, or to live criminal lives, if that is their design. Indeed, the very rationality of a system of criminal sanction requires that it be the case that the presence of such sanctions exercises some causal influence on the exercise of autonomy.173 Autonomy, then, is not inconsistent, in principle, with

---

170 See Bazelon, *supra* note 11.
171 See Morse, *supra* note 11.
173 Cf. the comparable criticism of philosophers who have adopted substantially the same
causal explanation in general, or with socioeconomic causal explanations in particular. There may be socioeconomic explanations of why certain people engage in criminal conduct, but it may also be true that the presence of autonomous capacities of choice and deliberation are part of the explanation (the trade-off between the fruits and risks of crime having been rationally undertaken).

There is another form of argument that can sustain socioeconomic deprivation at least as a doctrine of mitigation, if not excuse. The above consideration of the principles of just punishment assumed, in general, that the background socioeconomic institutions were themselves just. In Rawls’s terms, this would require that all persons have been guaranteed equal opportunity, and that wealth and status are distributed in a way that maximizes the long-term prospects of the worst-off class.footnote{174} Now, clearly, these principles would apply to the assessment of what T.H. Green dubbed “the question whether the social organization in which a criminal has lived and acted is one that has given him a fair chance of not being a criminal.”footnote{175} To the extent that background socioeconomic institutions are not just and certain classes of persons have not been guaranteed a fair chance of not being a criminal (crime, as a way of life, being for them all too rational), it appears not unreasonable that the background injustice from which they suffer should entitle them to some countervailing mitigation of punishment, at least as compared to a criminal from a class not subject to such an injustice. In the imperfectly just world in which we live, injustices in one institution may call for injustices in others so as better to realize justice overall, in this case, to compensate unjustly treated worst-off classes for making criminality a more sensible path for them than for others.footnote{176}

D. Legality

The principle of legality, requiring that a reasonably specific criminal law must exist making certain conduct criminal prior to the act, is, in the United States, a general constitutional principle of just punishment guaranteed by the ex post facto clausesfootnote{177} and

\footnote{175} T.H. Green, Lectures on the Principles of Political Obligation 190 (1901).
\footnote{176} For the important distinction between ideal and non-ideal theories of justice, see J. Rawls, supra note 174, at 8f., 245f., 351.
\footnote{177} U.S. Const. art. I, § 9; art. I, § 10.
general requirements of due process. This requirement is the last aspect of the substantive criminal law that is clearly justified by the principle of greatest equal liberty, capacity, and opportunity, frequently invoked above. In complying with legality, the application of criminal sanctions guarantees an aspect of specific, advance warning of criminality which allows maximum opportunity to avoid or incur sanctions, as the agent wishes.

Clearly, the principle of legality does not go the whole way of supplying advance warning; it is possible for a reasonably specific criminal law to preexist a criminal act of whose criminality the agent has no reasonable notice. The invocation of the maxim, ignorance of law is no defense, does not meet the injustice of punishment in such cases. In certain of these cases involving egregiously unjust instances of omission liability, the Supreme Court has invoked due process to invalidate criminal liability, on the valid ground that underlying autonomy-based values of fair warning forbid the application of the ignorance of law maxim. American law has recognized, however, nothing comparable to German law's general exculpatory doctrine covering all cases of lack of fair notice.

E. Justifications

The moral analysis of defenses of justification turns upon the deeper examination of the content of the moral principles of obligation and duty that lie at the foundation of the substantive criminal law. These defenses, in contrast to excuses, turn not on the lack of personal culpability associated with the equal liberty principle of justice, but on the relevant further specification of the underlying

---

178 See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (holding a vagrancy statute unconstitutionally vague); Bouie v. Columbia, 378 U.S. 347 (1964) (holding unconstitutional the application of a narrowly drawn trespass statute to conduct not fairly construed as within its terms).

179 See D. Richards, supra note 169, at 195-99.

180 See, e.g., Hopkins v. State, 193 Md. 489, 69 A.2d 456 (1950) (criminal charge upheld against defendant though he had reasonably relied in good faith on advice by the State's Attorney that his conduct was legal). Some states, following parts of the Model Penal Code recommendations in this area, would allow a special defense in cases of official advice by government officials. See N.Y. Penal Law § 15.20(2) (McKinney 1975). But, New York, for example, does not go so far as to recognize a defense in all cases of lack of reasonable notice of the legality of one's conduct.

181 Lambert v. California, 355 U.S. 225 (1957) (holding unconstitutional a criminal statute forbidding the omission to register that one has a criminal record within five days of residence in Los Angeles, on the ground that there was no fair warning thereof).

182 See G. Fletcher, supra note 167, at 737-55.
moral principles of obligation and duty which indicate that the conduct *prima facie* wrongful is, in fact, justified. It is here of interest to examine two such defenses, self-defense and necessity, since the interpretation of them has been supposed, often wrongly, to pose intractable problems for an autonomy-based view of moral, and thus criminal, wrongdoing.

In contemporary Anglo-American law, a successful self-defense justification typically observes requirements of necessity and proportionality between harm threatened and the force used to resist, and often observes, within limits, a duty of retreat. Sanford Kadish and George Fletcher have recently argued that these requirements deviate from the autonomy-based view of self-defense under German law, which, focussing on the moral value of resisting a wrongful or unprivileged invasion of personal integrity, ignores giving significant normative weight to the interest of the invader, whether culpable or not. Anglo-American law, in qualifying the defense by doctrines which weight the interests of the agent against those of the unjust invader, qualifies, it is argued, the value of autonomy with some independent idea of proportionality or quasi-utilitarian interest balancing. This attempt, by Kadish and Fletcher, to distinguish two irreconcilable elements in the Anglo-American interpretation of self-defense appears to rest on defective moral analysis of self-defense as a justification; for, all the elements of the Anglo-American conception can be seen to express the underlying moral imperative of equal concern and respect for autonomy.

Let us remind ourselves of the kind of argument that earlier led us from the Kantian interpretation of treating persons as equals to the moral principles of obligation and duty. From the point of view of an original position which expresses the idea of treating persons as equals, rational people would agree to or universalize certain coercively enforceable standards of conduct which, at little comparable cost to the agent, secure substantial interests of others, for example, a principle of nonmaleficence (not killing, harming, or inflicting gratuitous cruelty). For reasons of justice, once a central-ized legal system exists, the use of coercion to enforce these principles would be monopolized by the state. A principle of justified self-
defense would be agreed to or universalized, however, as an exception to non-maleficence and the prohibition of private coercion, in circumstances where such coercive force is necessary to preserve the substantial interests of an agent from an attack which he has not occasioned and where the use of force is both necessary and proportional to the harm inflicted; the duty of retreat might, within limits, be an application of necessity and proportionality (the agent can reasonably avoid the need for deadly force, for example). The requirements of necessity and proportionality appear to be reasonable qualifications on the scope of legitimate self-defense for they assure to rational persons, who may be on the giving or receiving end, the fair balance of interests of both parties: the substantial interests of the unjustly attacked to repel the attack by necessary force, and the interests of the aggressor by requiring necessity and a degree of proportionality which assures that the gain in protecting the substantial interests of the agent are not incommensurate with the risks to the aggressor.

It is undoubtedly true, as Fletcher’s study amply shows, that German criminal law theory has profited from a self-conscious deployment of Kantian autonomy-based ethics. But, its interpretation of self-defense fails to give proper weight to the additional requirement of equality or universalizability, of designing and acting on principles one would reciprocally accept whether on the giving or receiving end. From this point of view, an unqualified right of self-defense fails to accord to aggressors the modicum of respect that is, despite possibly wrongful or unprivileged aggression, their fair due.

That principles of self-defense, which violate proportionality, accordingly violate the residual moral rights of aggressors, is correctly reflected in constitutional attacks on cognate statutes that fail to incorporate such requirements—for example, arrest statutes that privilege the use of deadly force in apprehending a fleeing felon who did not use deadly force in his felony and who does not threaten to use deadly force. In upholding such constitutional attacks on the ground of the fundamental right to life of the felon, courts depend on the moral arguments here made, namely, that while wrongdoing justifies necessary and proportional steps of apprehension, wrongdoers retain their rights to security and integrity outside these limits.

156 The retreat rule standardly does not apply when one is in one’s home. See W. LaFAVE & A. Scott, supra note 151, at 396.

157 See, e.g., Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976).
The defense of necessity, or balance of evils, may be taken to be the most general of all justifications, of which other justificatory defenses are concrete specifications. The defense requires, in general, justification for *prima facie* criminal conduct when more evil is avoided than is done in so acting;\(^{188}\) self-defense, for example, may be regarded as a concrete specification of this principle, since the *prima facie* criminal wrong is here taken to be less evil than the evil (aggression) thus combatted. A classic case, in which the necessity defense was raised and rejected, is *Regina v. Dudley and Stephens*\(^{189}\) in which a prostrate cabin boy in a stranded boat in midsea was killed and eaten by his three companions, arguably resulting in saving three from starvation at a cost of one life, thus striking a favorable balance of evils. The lack of consent of the cabin boy, his vulnerable health and youth, the absence of a fair lottery, and the unclear likelihood of starvation of others—are all adduced as factors which complicate the moral ambiguity of the balance of evils in *Dudley*.\(^{190}\) Absent these factors, some claim exists that a necessity defense should be recognized even in such an extreme case.\(^{191}\)

The correct interpretation of the necessity defense has classically been taken to require the rejection of the relevance of Kantian ethics to understanding the criminal law, in favor of utilitarianism. A seminal statement of this position appears in Holmes’s influential work, *The Common Law*.\(^{192}\) There, in discussing the origins of the criminal law, Holmes considered the utility of Kantian ideas in accounting for penal liability. Many, he observed, suppose the preventive theory of punishment to be immoral because it gives no weight to moral desert: “In the language of Kant, it [the preventive theory] treats man as a thing, not as a person; as a means, not as an end in himself.”\(^{193}\) But, Holmes answered, “most English-speaking lawyers would accept the preventive theory without hesitation.”\(^{194}\) Society necessarily sacrifices individuals for the sake of

---

\(^{188}\) See W. LaFave & A. Scott, *supra* note 151, at 381-88.

\(^{189}\) 14 Q.B.D. 273 (1884).

\(^{190}\) Cf. United States v. Holmes, 26 F. Cas. 360 (3d Cir. 1842), in which, in order to save a life boat adrift in high seas from capsizing from overcrowding, Holmes assisted in ejecting passengers into the sea, who drowned. While Holmes was convicted of manslaughter, the court in instructing the jury indicated that the balance of evils may have justified the jettisoning if the choice had been done by lot.


\(^{193}\) *Id.*

\(^{194}\) *Id.*
the community, in Holmes's view, and the Kantian theory fails because it ignores these sacrifices. Holmes admitted that a person's "degree of civilization" is marked by how far one's life is guided by Kantian precepts, but he argued that full appreciation of these precepts is in excess of current human capacity.\textsuperscript{195} They would require of two strangers afloat at sea with a plank able to sustain only one floating between them, that the moral person not thrust the other off. And yet ordinary morality, Holmes pointed out, justifies self-preference. Kantian morality accordingly must be rejected as the moral measure of legal liability in favor of "a morality which is generally accepted," for "no rule founded on a theory of absolute unselfishness can be laid down without a breach between law and working beliefs."\textsuperscript{196} The preferred morality, for Holmes, is utilitarianism, requiring individual sacrifices for the community good that formed the basis, Holmes supposed, for the criminal law.\textsuperscript{197}

Does the acceptance of a necessity defense require the rejection of a Kantian analysis of the morality of the criminal law in favor of utilitarianism? Certainly, German legal theory builds on Kant's principled objections ever to killing the innocent in denying a justification in necessity cases like Dudley even with the removal of the complicating moral features of that particular case,\textsuperscript{198} but, strikingly, such continental, neo-Kantian theory\textsuperscript{199} affords a form of excuse of coercive circumstances, unfamiliar in Anglo-American law (which limits duress to coercion by other persons),\textsuperscript{200} which would excuse in necessity contexts where a reasonable person would find it impossible to resist the pressure or circumstances (for example, likely starvation of many). On the ground of the autonomy-based theory of ethics here developed, however, it is difficult to see why, in principle, a form of necessity defense, suitably circumscribed, is not an appropriate justification.

Certainly, from the point of view of an autonomy-based interpretation of treating persons as equals, the mere utilitarian balance of lives (saving, in Dudley, three lives at the expense of one) would not suffice to justify \textit{prima facie} immoral conduct (intentional killing): rational persons from an original position would not agree to or

\textsuperscript{195} Id. at 38.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} See G. FLETCHER, supra note 167, at 819.
\textsuperscript{199} Id. at 818-35.
\textsuperscript{200} See W. LAFAVE & A. SCOTT, supra note 151, at 374-81.
universalize a principle which, on such grounds alone, without any attempt at obtaining consent or a fair allocation of the risk of death, legitimated the sacrifice of possibly their basic interests, if they are on the receiving end. The rejection as a proper basis for justification of such utilitarian balances alone, however, is in toto caelo different from the acceptance of some justifying balance of evils in such a case where some fair procedure consensually allocates the risk of death, to the extent feasible. In extreme cases where such procedures are infeasible, the lack of such procedures and the exigency of the circumstances (for example, a car careening out of control which, turned in one direction, would kill one, and, in the other, three) justify the lesser evil.

Holmes’s critique of Kantian ideas is, accordingly, mistaken. It is not at all obvious that Kantian ideas may not be reasonably developed to justify a form of necessity defense. In general, Holmes’s defense of the prevention principle, like his general defense of objective liability in the criminal and civil law, is notoriously inadequate. It does not take seriously the previously discussed constitutionally mandated requirements for just punishment, which cannot be accounted for by utilitarian considerations of deterrence and prevention. Further, it is not at all clear, and was not even when Holmes wrote, that “most English-speaking lawyers” would accept prevention as the sole ground for criminal liability. Finally, the Holmesian critique of Kantian ideas as “a theory of absolute unselfishness” crudely confuses the idea of moral impartiality, which Kant tried to articulate, with notions of benevolence. In fact, utilitarianism is more closely allied with ideals of “absolute unselfishness” than is Kantian theory, for utilitarian principles readily allow, in a way which autonomy-based ethics does not, sacrifices of the individual for the common good. In general, as this article should indicate, autonomy-based ethics much more powerfully explicate the moral foundations of the criminal law than utilitarianism.

F. Inchoate Crimes: Of Attempts

The law of attempts, like that of conspiracy, defines an inchoate crime in the sense that one may be guilty of an attempt when the
target crime has not been consummated. A specially controversial feature of the law of attempts is that criminal attempt liability is possible when the consummated crime is, in fact, impossible.\textsuperscript{203}

Consider the controversial case of \textit{People v. Jaffe},\textsuperscript{204} in which the police had recovered stolen cloth and sold it to the defendant, a suspected "fence." The defendant clearly could not be convicted for the consummated crime of receiving stolen goods, for the goods were not at that time stolen (the consummated crime was impossible to commit). The issue in \textit{Jaffe} was whether, nonetheless, he could be guilty of an attempt to receive stolen goods, for the same reason that the pickpocket of a pocket in fact empty could be guilty of an attempt to commit a larceny which he could not possibly have committed: namely, that the agent intended to do something which was, in fact, a crime, and did everything possible to achieve that end (thus satisfying the \textit{mens rea}-intent-and \textit{actus reus}-proximity-requirements for attempt liability). The New York Court of Appeals reversed the conviction for attempt to receive stolen property, on the ground that \textit{Jaffe} involved legal impossibility. The California Supreme Court on similar facts reached an opposite result,\textsuperscript{205} and the New York criminal statute, consistent with the recommendations of the Model Penal Code, reversed the result in \textit{Jaffe}.\textsuperscript{206} On the Model Penal Code view, \textit{Jaffe} is, properly construed, a case of factual, not legal, impossibility. Under the facts as the agent believed them to be, he viewed himself to be receiving stolen goods and took steps believed appropriate to that end. In fact, he was not receiving stolen goods, so that the consummated crime could not be committed for the same reason that the pickpocket could not commit larceny (a crucial element of the \textit{actus reus} of the consummated offense—property to be stolen, in one case, stolen property, in the other—is lacking). In neither case does the agent act on the mistaken belief that what he intends to do is a crime (larceny and receiving stolen goods are crimes), so that there is no proper issue in either case of legal impossibility. No one contests that one cannot properly be guilty of an attempt to commit an act on the mistaken ground that the act is criminally condemned: neurotic or self-righteous beliefs as to one's criminality do not suffice for criminal liability in any

\textsuperscript{203} See W. LAFAVE & A. SCOTT, supra note 151, at 438-46. See also Hughes, \textit{One Further Footnote on Attempting the Impossible}, 42 N.Y.U. L. REV. 1005 (1967).
\textsuperscript{204} 185 N.Y. 497, 78 N.E. 169 (1906).
\textsuperscript{205} People v. Rojas, 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961).
\textsuperscript{206} N.Y. PENAL LAW § 110.10 (McKinney 1975).
form, for, otherwise, the basic principle of legality—that a reasonably specific criminal law must pre-exist the commission of a criminal wrong—would be undermined.

The above construction of *Jaffe* and related cases, as just forms of attempt liability, has recently been contested by two deep theorists of the substantive criminal law, George Fletcher and Hyman Gross. Fletcher argues that a fact situation like *Jaffe* would not properly be regarded as an attempt in ordinary language (since the stolen status of the goods would make no difference to his acquisition) and should not be punishable criminally because its punishment erodes the foundations of criminal liability in an objective *actus reus* and principle of legality, confusing a properly legalist prohibition of acts with an administrative concern with the dangerousness of agents. Hyman Gross in not dissimilar fashion argues that criminal liability should turn on the reasonable likelihood of harm and contests liability in cases like *Jaffe* on the ground that no harm appears likely to occur. Both theorists point up the anomaly that defender of attempt liability in cases like *Jaffe* hesitate to extend the doctrine, as they consistently should, to cases in which the agent intends to commit a wrong and does all possible to achieve the end, but by causally eccentric means (for example, use of voodoo).

The moral analysis of why we properly punish attempts clarifies why attempt liability justly attaches in contexts like *Jaffe* and related physical impossibility cases. I have argued that the general ground for criminal liability is, within the constraints of the principles of justice, to uphold the minimal standards of conduct defined by the moral principles of obligation and duty. Attempt liability is a natural way to effectuate this aim, assuring that appropriate moral stigma and punishment extends to forms of conduct which are intended to violate standards of decency and which are acted on to or near the point of believed consummation. It is wholly irrelevant to this moral aim whether or not the crime could have been, in the circumstances, consummated, for the moral aim is symboli-

---

207 G. FLETCHER, supra note 167, at 131-87.
210 Id. at 170-84.
211 See note 208 supra.
212 See G. FLETCHER, supra note 167, at 165-66; H. GROSS, supra note 208, at 218-23.
cally to uphold standards of decency which have here culpably been violated.

It is a mistake, I think, to suppose that such liability violates legality or objective actus reus, for there is no suggestion that the attempt is here to do something mistakenly believed to be wrong or that the intended act is not, in fact, wrong. In all cases of proper attempt liability, there is the requisite intent to violate minimal standards of moral decency and the agent has done everything he could do to achieve that end. The standard of proper criminal liability is here grounded in standards of moral accountability. In a case like Jaffe, it suffices for us to regard his conduct as an attempt that his belief that the goods were stolen is a relevant, even if not causally decisive feature, of his context; and we morally blame such conduct because it violates appropriate standards of decent respect for property rights. The ground of our concern is the culpable violation of objective norms of conduct, which the criminal law here appropriately reflects.

Causally eccentric cases of attempt liability should, on this analysis, be subject to prima facie attempt liability, for in this case, as in the others, appropriate standards of decency are violated; certainly, persons punished in such cases would have no moral right or reason to complain: They are being held to standards of decency culpably violated in which the impossibility of actual harm is as ethically fortuitous as any other attempt case. Undoubtedly, in some such cases, there may be available excuses (for example, insanity or mental deficiency). Certainly, the absence of dangerousness might justify, given compelling other claims on resources, the exercise of prosecutorial discretion not to target them to the extent one might attempt, where dangerousness converges with the other aims of criminal punishment. Punishment of them even in this case would not, however, assuming some showing of effective deterrence, violate anyone's rights. Certainly, in some cases, such attempts are properly punished. For example, in a religious community that believed in voodoo and the exercise of which had perceptible harmful effects on believers, abortive attempts might be properly punished to the full extent of other attempts.213

G. Proportionality and the Death Penalty

The considerations of just punishment earlier advanced suggested

---

two aspects of proportionality rooted in treating persons as equals: first, that the gradations among criminal sanctions reflect the relative gravities of underlying moral wrongs; and second, that upper limits be placed on the kind of sanctions in general or in particular associated with certain moral wrongs. Both these aspects of proportionality have been invoked in the interpretation of constitutional principles of just punishment under the Eighth Amendment.\textsuperscript{214} I turn here, however, to a case that is not resolved by such principles, namely, the propriety of the death penalty. Various arguments are made against the justice of the death penalty, for example, discrimination against racial and economic minorities, intrinsic lack of proportionality, violations of human dignity, and the like. While the discrimination arguments appear to be powerful, the proportionality arguments appear less so: the death penalty does not, in principle, violate the relative gravities principle; nor, does it contravene the upper limits constraint, so long as it can only be imposed for an equivalently grave kind of wrong (for example forms of intentional killing).\textsuperscript{215} I wish, however, to support a form of proportionality argument against the justice of the death penalty, though not one predicated on either of the principles so far discussed.

Let us begin with an implication of the earlier discussed principle of just punishment, namely, the four principles do not decide in the abstract the merits of particular sanctions, like the death penalty. The matter appears to depend on circumstances like whether it is required to secure effective conformity to the underlying moral principles of obligation and duty and whether it conforms to background principles of social and economic justice, like the difference principle. This result is to be contrasted with the opposing views of the implication of the contractarian conception in Beccaria and Kant. Beccaria supposed that the contractors would generally exclude the death penalty as a sanction,\textsuperscript{216} whereas Kant argued, to the contrary, that the death penalty would be imposed by moral persons.

\textsuperscript{214} For examples of the application of a relative gravities principle, see Weems v. United States, 217 U.S. 349 (1910); In re Lynch, 3 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (possible life imprisonment for recidivist indecent exposure held unconstitutional). For a recent example of the upper limit principle, see Coker v. Georgia, 433 U.S. 584 (1977) (death penalty for rape held unconstitutional).

\textsuperscript{215} See Coker v. Georgia, 433 U.S. 584 (1977), which violated this requirement.

\textsuperscript{216} Beccaria made an exception to his prohibition of the death penalty for cases of treason leading to unjustifiable anarchy, civil war, and revolution. See C. BECCARIA, ON CRIMES AND PUNISHMENTS 45-52 (H. Paolucci trans. 1963).
as the just and obligatory sanction in certain cases. It may be supposed that the maximining contractarian conception earlier deployed would lead to adoption of the Beccaria adoption, because institutions without the death penalty permit a higher lowest than one without it. This view represents a misinterpretation of the point of view of the original position. The contractors are concerned with the highest lowest position in an institution and the rational expectations of desire satisfaction over life of the person in that position. There is nothing in this conception which renders it incompatible with the death penalty’s raising the expectations of such persons, however, perhaps because they tend to be the victims of violent crime and the death penalty is required to lower the incidence of such crime.

Nonetheless, in contemporary circumstances, the death penalty appears to be an unjustly inappropriate criminal sanction. First, the general purpose of the criminal law is to secure general observance of moral norms of decency by the use of public sanctions which are effective and necessary. From the point of view of treating persons as equals, no one would agree to levels of sanction, especially the death penalty, that were not shown to be necessary to secure the moral desideratum. But, in fact, the evidence that the death penalty marginally deters better than less severe penalties appears to be weak, certainly not satisfying the kind of effectiveness evidence that is morally demanded. Second, given the classes of criminals against whom the death penalty tends to be imposed, there is reason to believe that it is precisely the worst-off classes who disproportionately bear the risk of the death penalty. In itself, this would not be conclusive against the justice of the death penalty: it still might be the case that the penalty is necessary and that victims of violent crime are the just victims of the situation.

See I. Kant, The Metaphysical Elements of Justice 101-02, 104-07 (J. Ladd trans. 1965). Kant argues against Beccaria that his distaste for the death penalty is mistakenly moved by a "sympathetic sentimentality and an affectation of humanitarianism." Id. at 105.

crime tend themselves to be from the worst-off class. There is, however, as we have seen, no good deterrence evidence of such kinds. Further, in view of background social and economic injustices, it appears that precisely the classes against whom the death penalty is disproportionately imposed tend to be those to whom, in T.H. Green's phrase, we have not given a fair chance of not being a criminal. Such injustice does not, I have suggested, entitle such deprived people to exculpation, but—in order to balance institutional injustices within the society—it certainly justifies mitigation. On this independent ground, the death penalty would be unjust, at least when used against these classes of people.

The argument against the death penalty, however, is more general and turns on the penalty itself: Namely, there is lacking the kind of evidence which alone could justify the moral rationality of such a sanction. In the absence of such evidence, there is no good argument to sustain it. The death penalty is in excess of appropriate moral principles of just punishment; it is, therefore, disproportionate to the criminal law's just moral aims and should, like any gratuitous cruelty, be morally and constitutionally condemned as a cruel and unusual punishment.

IV. CONCLUDING REMARKS

The substantive criminal law rests, I have argued, on a structure of moral principles that express ideas of human and moral rights rooted in an autonomy-based interpretation of treating persons as equals. Because these principles fundamentally define our conception of just punishment, they are often concurrently reflected in criminal law and cognate constitutional law doctrines. I have tried to explain how moral theory may both better explain these doctrines and also enable us to refine our critical moral intelligence regarding the proper normative direction of reform.

In conclusion, it is important to keep in mind the more general jurisprudential and theoretical significance of the kind of account here proposed. For example, despite many disagreements of detail with George Fletcher's important book, my approach here is broadly at one with his spirited and often profound opposition to the baneful effects of American positivist legal realism in understanding the

---

218 See note 175 and accompanying text supra.
220 For a criticism of recent Supreme Court death penalty decisions on these grounds, see D. Richards, The Moral Criticism of Law (1977), at ch. VI.
foundations of the substantive criminal law.221 Fletcher argues, and I agree, that we must bring to bear on understanding and criticizing legal doctrines convergent tools of theoretical analysis (comparative law, moral theory, legal history, and the like) that enable us perspicuously to represent the fundamental moral structures that underlie legal doctrines, their development over time, and the critical ethical standards on the basis of which we can take principled positions regarding the humane reform of legal doctrines and institutions. Fletcher further argues,222 and I agree, that investigation of these issues of principle is and should be theoretically prior to the common legal realist obsession with institutional competence.223 The principles underlying the substantive criminal law are enforced, for example, by legislators in defining criminal liability by statute, by judges in assessing the constitutionality of such statutes or in imposing sentences under them, by prosecutors in exercising prosecutorial discretion, by police in their investigative and other work, by administrative boards in exercising parole discretion, and the like. Before one can rationally assess issues of institutional competence relating to which principles are best enforced by what institution, one must get clear about the prior question of what the underlying principles are which these institutions have a common responsibility to enforce. If Fletcher and I are correct about the prior importance of the theory of substance over procedure, it has general relevance throughout the investigation of substantive doctrine in many areas of the law.

Such investigations are not idle. The account here proposed, for example, frontally challenges dichotomous distinctions among theories of the criminal law, in particular, liberal utilitarian reform (associated with John Stuart Mill and H.L.A. Hart) and Kantian, deontological moralism. I have argued that, correctly understood, the burgeoning jurisprudence of rights enables us to transcend such sterile divisions—to acknowledge the moral foundations of the substantive criminal law and yet, consistent with the best traditions of humane liberal reform, to develop and deploy sharper tools of ethical criticism in terms of the values through which we realize and express, on fair terms to all, our moral and rational dignity.

221 See G. FLETCHER, supra note 167, at 406-08, 467, 503-04, 512-13, 577, 695-97, 768-69, 780-81, 790.
222 Id. at 551-52.
223 The most glorious product of this obsession is Hart & Sacks, supra note 122.