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# GOOD GUYS AND BAD GUYS: PUNISHING CHARACTER, EQUALITY AND THE IRRELEVANCE OF MORAL CHARACTER TO CRIMINAL PUNISHMENT\*

*Ekow N. Yankah\*\**

## INTRODUCTION

In my second year of law school I had to move. This was difficult because I had to maneuver a large unwieldy van through the streets of midtown Manhattan. Unwilling to shoulder the load alone I inveigled a friend, a Yale Law School student, also Black, to help.

I was uneasy about navigating the truck about town. Charting the chaotic traffic was taxing on the nerves. My worst fears were realized when I felt a bump at the rear of the truck. I had been hit.

My first thoughts were practical: the amount of insurance coverage purchased for the truck, points on my license, the delay. The irate taxi driver, an Arab-American, appeared at my window and began to shout at my friend and me for causing the accident. Though not blameless, I hardly felt completely at fault and began to defend myself. Suddenly, with lights and a short burst of the siren, a police car materialized. Another, driving across our path, spotted its brethren and stopped to assist. Quickly the street was filled with flashing lights and audible police radios. My heart sank. I looked across the seat at my friend, and immediately saw the profile; two Black men, dirty from a day's worth of moving, in the city at night.

A police officer approached my door and began to speak. Interrupting him I unthinkingly said, "Sorry, officer, I was just trying to move tonight, but my friend and I had to stop by the law firm to pick up

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his bag." Though nervous, I was conscious of speaking in a measured, deferential voice. The taxi driver, in contrast, launched into loud accusations, his English easily understood but broken and marred by a heavy accent.

The police officer immediately chided the driver for interrupting and, turning to me, asked, "What happened here?" I muttered something about trying to pull out into traffic and trailed off. The cop nodded knowingly, as though I had said something sensible, and pronounced to the fuming driver, "Well, you must have hit him." The enraged driver tried to protest but the officer replied with a dubious proposition. "The paint is on the back of his truck so you must have been the one who hit him." Despite the driver's attempts to plead his case, the officer and each subsequent officer, casually dismissed him, rebuffing him with their own hastily drawn theory of the driver's fault. Each time I recall that evening, I remember the discomfort I felt watching the treatment of the driver. I remember knowing that there was nothing he could say to solicit the compassion of the men in blue. A judgment had been rendered: I was in the right and his protests would gain no sympathy.

I did not have to say much to explain my part in the accident. Once the police had decided I was "the good guy" and the foreigner was "the bad guy," the rest of their judgment about fault in the accident naturally followed. I had understood this on some intuitive level even as the police approached. It is near impossible to grow up as an African-American and not become keenly aware of the dynamics and necessity of social signaling, especially with the police. The need to position oneself as a good guy is understood.

Quite without thinking, the first few words out of my mouth had been aimed at signaling my position and status. The mildly apologetic words, the diction and meter, the use of the word "officer"; all indicated to the police that I was a fine, upstanding citizen. The explicit reference to my friend's position at a law firm was an important, though unconscious cue, to locate me within the realm of the "established." The foreign taxi driver could not engage in the same cue-giving exercises. His tone and accent prevented him from establishing a common front with the police.

This episode in my life now returns as a theory about criminal law. This article explores the problem of punishing character.<sup>1</sup> I argue that

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<sup>1</sup> The opening narrative illustrates intuitive reasoning about good guys and bad guys. Once an assumption is made about the relative virtue of the characters in a conflict, determinations of guilt, blame and punishment flow naturally. By differentiating between the good and the bad, we decide who is truthful and who untrustworthy, who is innocent and who blameworthy.

Criminal law is prone to the same dangers. The criminal law is drawn to assessing the underlying character of offenders. After this assessment, consequences of guilt and punishment follow naturally. Bad guys or bad characters deserve punishment based on their immoral character.

punishing offenders because they are bad people<sup>2</sup> is unjust in the same way that the Arab-American driver on the street was treated unjustly. He fit the profile of the bad guy and suffered as a result. This article reflects the danger of premising our justification of punishment on another's character. The end of my reflections will be to rediscover and demonstrate the critical importance of the act requirement in the criminal law.<sup>3</sup> I conclude with a plea to treat the criteria of criminal

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The image of bad guys also creates a distinction between criminals and other members of society. Many see criminals as possessing the sum of all the moral faults we condemn. The offender represents all our immoral temptations. Conceiving the criminal as an immoral other erects a complete separation, erasing the notion of the offender's common humanity. Absent this image of common humanity, punishment is freed of any constraints.

Measuring criminal punishment by immoral character does more than segregate the offender. Character judgments turn this separation from society into a permanent banishment. Judgments about the criminal become fixed, an image of permanent immoral character.

This image of immoral character is first found in Aristotle. Today's penal practices manifest this view of permanent immoral character defects in criminal offenders. Such practices include punishment regimes like "Three Strikes and Out," permanent disenfranchisement and other collateral punishments.

The drive to punish for character means the law must find a way of assessing character. In order to unearth a criminal offender's character, philosophers and theorists link criminal acts to underlying bad character. Early examples are found in the work of David Hume. Modern character theorists like Joel Feinberg, George Fletcher, Robert Nozick, Michael Bayles, Nicola Lacey, George Vuoso and Richard Brandt also propose that punishment should be for character defects revealed in criminal acts.

<sup>2</sup> Here "bad guys" is used as a colloquial moniker to denote people of immoral character. The allusion is to the cinematic criminal villain. In this sense bad guy is directly equivalent to bad character.

<sup>3</sup> For a basic treatment of the *actus reus*, see Meir Dan-Cohen, *Actus Reus*, in 1 THE ENCYCLOPEDIA OF CRIME AND JUSTICE 15 (Sanford H. Kadish ed., 1983). Dan-Cohen explores the importance of the *actus reus* as a bulwark against both punishing people based on their intrinsic undesirability and on basing criminal punishment on the underlying intentions of the accused. In discussing the temptations to move away from the act requirement, Dan-Cohen notes:

Certain attitudes or beliefs. . . might be the target of punishment because they [are] considered, in and of themselves, too repugnant to be tolerated. . . [O]ther developments, notably the rationalization of criminal liability as predicated on the defendant's dangerousness and culpability, have made modern law more hospitable to the idea of punishing . . . for mere intentions. The subjectivist view of culpability increasingly taken by the criminal law leads to the conclusion that external factors, including the accused's actual conduct, may be of great probative value as to what his intentions really were, but these factors no longer constitute the grounds for liability . . . .

*Id.* at 17. The author defines *actus reus* as not only a part of the total criminal offense, but also the portion of the offense on which criminal punishment is predicated. As Dan-Cohen points out, this facet of the *actus reus* contrasts with the impulse to base criminal punishment on status or permanent moral character:

[I]t could be argued to the contrary [of the status offenses] that punishment for a single act is justified only if it reveals something of permanence about the defendant's *character*. Indeed, when an act is strongly influenced by overwhelming external circumstances, thus reflecting little of the agent's own *moral character*, the criminal law tends to exculpate by means of various excuses . . . .

*Id.* at 21 (emphasis added). *But see* Douglas Husak, *Does Criminal Liability Require an Act?*, in ANTHONY DUFF, *PHILOSOPHY AND THE CRIMINAL LAW* (1998).

liability in a new liberal spirit.

### I. HEROES AND VILLAINS—MAINTAINING THE DISTINCTION BETWEEN THE GOOD AND THE BAD

Popular culture and common intuition make sense of the world through simple divisions. Our collective stories divide the world into good guys and bad guys. Everything from world wars to personal struggles are recast in this light. In this section I will explore communal myths about good guys and bad guys. These myths are retold in popular medium; film is a primary example. Eventually, these myths evolve to incorporate greater moral complexity. The theater of criminal law, however, maintains the simplistic distinction. The law assesses the respective virtues and vices of those before it in order to maintain this division. By holding on to heroes and villains, the law justifies punishment and suppresses the common humanity of criminal offenders.<sup>4</sup>

The simplistic understanding of the good guys and bad guys lies at the foundation of our culture, perhaps all cultures. Movies and comic books introduce the young to this basic conception of the way we live. Movies and other pop culture stories have traditionally been modern morality plays. Their structure has a binary simplicity. In the Westerns, a bank is robbed or an innocent town invaded. In the 1930s gangster movies, the bad guys are men of avarice. The crime boss is interested in beating the racket and outwitting the cops. He rules over the neighborhood with an iron fist. He orders his heavies to squelch and intimidate anyone who gets in the way. The scene of the gangster, handling the frail, old shopkeeper by the lapels—"You'll fall in line if you know what's good for you"—tells the viewer who is decent and who is not.

The good guys are committed by duty and honor to stop the bad guys. They must defend the good, the true, and the beautiful. Though the odds are always against them, they race to unravel the mystery, save the damsel and capture the villain. Most importantly, they are without moral flaw. Though they must put their own life in danger, they never hesitate or question their path. They simply understand that the world must be protected and the bad guys punished.

There could only be two endings for the bad guy. First, à la Bogart heavy, he could be undone by his own moral failing. His greed could lead him to death in pursuit of the treasure or his power lust to a deadly

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<sup>4</sup> Thinking of criminal offenders in the same way as cinematic villains reduces them to simple moral caricature. Without any moral complexity it becomes easy to disavow the humanity of the offender and to ignore any commonality. See *supra* text accompanying footnotes 16-21.

double cross.<sup>5</sup> More commonly, however, he would simply meet defeat at the hands of the hero. It was inevitable. The audience always knew the villain would lose because he was the villain. Even if it was not some distinct moral flaw that toppled him, he would fail nonetheless. His being the bad guy was enough to justify his failure and punishment.<sup>6</sup>

Films illustrate the classic division between the good guys and the bad guys. The frontier marshal in the white hat faces down "los banditos." By knowing who the good guy is we know who to cheer for and against. Lex Luthor is a bad guy. Superman is a good guy. Likewise, criminal trials replicate the structure we have known since childhood. Officer Fuhrman is a bad guy. Johnnie Cochran is a good guy.<sup>7</sup> We know who is good and just and who is evil and deserving of punishment.

#### A. *Film Noir: Undermining Moral Certainty*

Of course, these simplistic divisions cannot long stand up to the complexities of life or the change in dramatic styles. The recognition of moral complexity led to greater sophistication of moral judgment in film. Nineteen-forties film noir introduced a new type of protagonist, one who lacked any claim to moral superiority over movie villains in general and even his own enemies in particular. Humphrey Bogart's Sam Spade was no more noble than the greedy gangsters whose treasure he attempted to find.<sup>8</sup> In *Double Indemnity*, Fred McMurray helps the femme fatale murder her husband for the insurance proceeds<sup>9</sup>—hardly a pristine hero. A classic example of the noir character is found in Fritz Lang's *The Woman in the Window*.<sup>10</sup> Here, Edward G. Robinson plays a chaste college Professor, who, in pursuing a harmless flirtation, ends up killing Joan Bennet's enraged lover. The killing, though in self-

<sup>5</sup> *THE TREASURE OF THE SIERRA MADRE* (Warner Bros. 1948).

<sup>6</sup> The narrative structure in which the immoral antagonist is ultimately defeated, often by their immoral characteristic, is often found in fairy tales and classic myths as well. Furthermore, the evildoer is not exclusively male. In many children's stories the evil stepmother has become the archetype of the immoral villain. See, e.g., DELLA COHEN, *WALT DISNEY'S CINDERELLA: A READ-ALoud STORYBOOK*, (1999), adapted from JACOB GRIMM & WILHELM GRIMM, *CHILDREN'S AND HOUSEHOLD TALES* (1812); SNOW WHITE AND THE SEVEN DWARVES (1999), adapted from GRIMM & GRIMM, *supra*. For more sophisticated versions of myth and morality plays, the Greek myths are prime examples. See EDITH HAMILTON, *MYTHOLOGY* (1998).

<sup>7</sup> More to the point, by revealing Mark Fuhrman's repugnant racial slurs, the defense team in the O.J. Simpson trial recast the Los Angeles Police Department ("L.A.P.D.") as the villains and, by default, assumed the role of the good guys. This shifted the case to a trial of the L.A.P.D. rather than of O.J. Simpson.

<sup>8</sup> See *THE MALTESE FALCON* (Warner Bros. 1941).

<sup>9</sup> See *DOUBLE INDEMNITY* (Paramount Pictures 1944).

<sup>10</sup> See *THE WOMAN IN THE WINDOW* (Internat'l Pictures 1944).

defense, leads the harmless Professor to dispose of the body, lie to his friends and plot a murder in order to protect his carefully balanced world. Finally, in desperation, the Professor is driven to suicide. Though the film's ending reveals that the episode was a dream, the lesson is clear. Not only bad people become criminals, commit desperate acts or display moral weakness. These moral flaws exist in even the most upright among us. These characters cannot claim our loyalty for their superior moral virtue. Rather, their moral ambiguity renders them truer, more interesting. Today's films follow suit, introducing moral complexity by showing the humanity of even the most devious villains.

The moral ambivalence of film noir was its greatest contribution. By revealing film heroes to be as morally flawed as any villains, film noir undermined the cinematic morality play. The noir private eye did good because he had to, not out of any sense of moral duty. The damsel in distress becomes the femme fatale, as manipulative a character as the villains of old. Nor did film noir reassure us with a comfortable ending. In film noir, bad things as often happened to the protagonists as good things happened to the antagonists. As being good was no guarantee of success, neither was being bad a guarantee of punishment.

As film noir matured its moral ambivalence expanded. In later noir, the notion that the "good guy" was not so good inverted itself. Cinema began to focus on the idea that the bad guy was not so bad. In Terrence Malick's *Badlands*, a childlike young man and his girlfriend embark on a crime and murder spree throughout the country.<sup>11</sup> Yet throughout the movie one cannot help but be charmed by (or at least withhold condemnation from) the antagonist (protagonist?). His manner is much like a boy playing cops and robbers and one never feels he grasps the gravity of his killings. *Bonnie and Clyde* renders its title characters, bank robbers, stylish, glamorous and enviably cool.<sup>12</sup> The French film *Le Samourai* presents a still cooler murderer.<sup>13</sup> His icy demeanor and style makes the audience admire him more than the authorities. *Butch Cassidy and the Sundance Kid* illustrates a pair of thoroughly likable bank robbers.<sup>14</sup> The endearing early frame of Paul Newman bicycling his fellow robber's girlfriend around a sun-drenched yard not only charms the audience but stands in contrast to the moral condemnation found in earlier cinema. Most recently Anthony Hopkins's *Hannibal* has done the same by emphasizing the elegance and refinement of the title character, a cannibalistic murderer.<sup>15</sup> These

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<sup>11</sup> See *BADLANDS* (Warner Bros. 1973).

<sup>12</sup> See *BONNIE AND CLYDE* (Warner Bros. 1967).

<sup>13</sup> See *LE SAMOURAI* (1967).

<sup>14</sup> See *BUTCH CASSIDY AND THE SUNDANCE KID* (Twentieth Century Fox 1969).

<sup>15</sup> See *HANNIBAL* (MGM 2001).

sophisticated films have exploded the idea that there are singular good guys and bad guys who meet a just end.

Criminal law, however, continues to maintain the rigid dichotomy of good guys and bad guys. It is crucial that there be a clear allocation of virtue within the conflict. The state can impose punishment only if there is a clear dichotomy of good and evil. The state maintains the position of good guy. Placing the defendant within the realm of bad guys justifies the imposition of punishment.

Criminal law cannot recognize the moral ambiguity of film noir. If the criminal defendant's common humanity or the state's moral uncertainty were illustrated, the state would lose its moral right to punish. Witness the last minute loss of nerve in the scheduled execution of Timothy McVeigh.<sup>16</sup> The Federal Bureau of Investigation committed a blunder by failing to disclose 3000 pages of relevant material.<sup>17</sup> No one in the Justice Department or the general public thought this material might exonerate the confessed terrorist McVeigh, but the image of professional incompetence made the Justice Department feel uneasy about taking a life. Only the virtuous have the right to execute.<sup>18</sup>

Conceptualizing the state as good and the criminal as bad does more than justify our imposition of punishment. Imagining criminal offenders as a class of bad guys, cinematic villains who are living threats to all us, allows us to distance ourselves from them. This image severs our common bond of humanity with the criminal defendants.<sup>19</sup>

An image of criminals as bad guys creates a fundamental distinction between ourselves and the criminal defendants. Like the villains of old, the criminal can be seen as possessing all the moral faults and temptations we condemn. Thinking of the criminal as a full person, with redeeming qualities, would force us to rethink the way we punish. As the incarnation of evil, the criminal becomes the perfect "other."

Viewing a group of people as fundamentally different has always been a necessary first step in imposing mass harm. The Nazis could not

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<sup>16</sup> See David Johnston, *Citing F.B.I. Lapse, Ashcroft Delays McVeigh Execution*, N.Y. TIMES, May 12, 2001, at A1.

<sup>17</sup> See *id.*

<sup>18</sup> One illustration of the division of virtue between the State and the offender is found in the the law of search and seizure's exclusionary rule. This rule prohibits the State from introducing illegally attained evidence in a criminal prosecution. Further, under the "fruit of the poisonous tree" doctrine, the State may not use any evidence that was gathered as a result, or "fruit," of the original improperly attained evidence. The prohibition stems from the idea that when the State has also dirtied its hands, it loses its authority to condemn the offender. *Nardone v. United States*, 308 U.S. 338 (1939); see also *Wong Sun v. United States*, 371 U.S. 471 (1963).

<sup>19</sup> The complicated conception in film noir severs our common bond with the victim as well. Noir erases the easy dichotomy between villains and victims. We are left with various people and impulses to weigh. Some may be more sympathetic, some may deserve protection, but they are never unifacted good guys and bad guys. Noir films, by undermining the moral certainty of earlier cinema, in some ways preserved the humanity of all characters.



have systematically murdered Jews without first reconceptualizing them as sub-human. One of the important roles of the concept of race in securing subordination is establishing an inherent distinction between people. Conceiving the criminal as the "other" blunts our concern for him in meting out punishment. To the extent the criminal is viewed as fundamentally different than oneself, compassion is less likely.<sup>20</sup> One is not restrained by the notion that she may one day find herself in a similar position. Viewing criminals as the other means being able to erect a complete separation and erase all empathy.

B. *Good Guys and Bad Guys: The Motivation to Assess Character in the Criminal Law*

Until now the focus of this article has been on the colloquial distinction between good guys and bad guys. The purpose of this rhetoric has been to avoid technical philosophical jargon that as often obscures as enlightens. It is important, however, to ground the discussion in the contemporary literature. Criminal theory is replete with discussions describing criminal punishment as premised on the desire to punish bad people.<sup>21</sup> The key word is "character." The literature links criminal acts to underlying character defects. Bad character is compelling for the same intuitive reasons that bad guys suffer in popular culture.<sup>22</sup> Those with bad character get what they deserve.

There is an additional reason why questions of character have become increasingly important in the arena of criminal law. With the growth of inchoate crimes, criminal intentions need not be evidenced in either harm or manifestly dangerous conduct.<sup>23</sup> Instead, a nominally innocent act combined with some malicious intent is enough to create criminal liability. Consider the example of the would-be assassin who puts sugar in his intended victim's coffee cup.<sup>24</sup> He thinks that the

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<sup>20</sup> The lack of any empathy when viewing those marked to be punished is itself dangerous. Absent some sense of the offender's humanity there remains no check on the type of socially sanctioned cruelties such as those embodied in the Eighth Amendment. Historical examples, the Holocaust and Slavery, illustrate the horrific possibilities when the common humanity of groups erode.

<sup>21</sup> Criminal theorists display the underlying impulse to punish bad people by linking criminal acts to the fundamentally bad character of the criminal offender. For examples of the rich literature on character theory, see *infra* notes 55-68.

<sup>22</sup> Criminal law theorists are compelled to propose punishing bad character for the same reasons that society is attracted to punishing bad people. See *supra* note 1.

<sup>23</sup> The growth of inchoate crimes is illustrated in MODEL PENAL CODE § 5.01 (2003).

<sup>24</sup> For a discussion of impossible attempts and their relationship with the criminal mind, see *Booth v. State*, 398 P.2d 863 (Okla. Crim. App. 1964). But for an alternative view asserting that impossible attempts be should judged by a "rational motivation" test, see GEORGE P. FLETCHER,

white substance is arsenic and his intent to kill, but the observable act of putting sugar in coffee provides no evidence of the criminal intent.<sup>25</sup> If the act does not manifest the intent to kill, what alternative sources of evidence are there? If there is no overt act, and absent all standard modes of proof (confessions, for example), any prosecution must establish the intention by circumstantial evidence. Among these incriminating circumstances one stands out: the character of the suspect.<sup>26</sup> Bad people are likely to have bad intentions. If the prosecution can prove that the defendant is a bad person, if, in particular, he is a murderous person, the jury is likely to believe that he intended to kill.

These things point to the motivation of the criminal law to include assessments of character. To summarize, the first reason for maintaining a sharp distinction between good guys and bad guys is to vindicate the state's right to punish. The second reason is to overcome our natural human compassion. The entire practice of conviction and punishment requires this dual inference from the moral gap between the good and the bad. Only the virtuous can punish the wicked.

## II. THE IMPLICATIONS OF PUNISHING CHARACTER

Once conclusions about character are drawn, these judgments become fixed. Character too easily becomes a permanent concept. This means that criminals, those with poor character, are likely to be thought of as remaining criminal for life. The significance of that classification is that one cannot remove herself from it. Immoral character is conceived of as an inelastic concept. The desire to punish villains can be satisfied only by continuously punishing that class of immoral characters, creating a permanent criminal caste.<sup>27</sup>

To be sure, the argument is not that character never changes, or even that society views character as unfailingly absolute. If pressed, anybody might agree that a particular person can change his or her

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<sup>25</sup> See FLETCHER, *supra* note 24, at 161.

<sup>26</sup> Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1476-78 (1995). While Huigens locates the blameworthiness of an inchoate crime in the character of the offender there is no reason that there should not be an equally telling reciprocal relationship.

<sup>27</sup> The concept of punishing criminals for a fundamental defect of character leads to the image of a permanent immoral caste. While the same implications could follow from punishing solely for criminal acts, it is hard to imagine the same conception of permanent taint following from punishment premised on acts. Although offenders can be considered criminal based on acts alone, the concept of permanent membership in criminal caste follows from linking punishment to the enduring character of the offender. As this article will explore in following sections, a permanent view of intrinsic criminality does not naturally follow from punishment premised on acts. See *infra* text accompanying notes 156-229.

character. On the whole, however, character is typically viewed as a stable collection of traits. The conventional view is that a person's character is fixed.

The conventional view of character mirrors Aristotle's view, which conceived of immoral character as a permanent trait. Aristotle argued that every person chooses to develop good or bad character through autonomous actions. Once a person chose their character, however, he or she was not free to simply undo the choice.<sup>28</sup> The chosen character becomes fixed:

[People] are themselves by their slack lives responsible for becoming men of that kind, and men make themselves responsible from being unjust or self-indulgent. . . . Yet it does not follow that if he wishes he will cease to be unjust and will be just. For neither does the man who is ill become well on those terms . . . . So, too, to the unjust and to the self-indulgent . . . they are unjust and self-indulgent voluntarily; but now that they have become so it is not possible for them not to be so.<sup>29</sup>

Immoral character, in the Aristotelian framework, is something like becoming an alcoholic or diseased. One lives a life that leads to being diseased, but once one is sick one cannot simply chose to be well.<sup>30</sup> Premising criminal punishment on character means punishment becomes based on the idea of permanent immoral character.<sup>31</sup>

Current penal practices reflect the perception of criminals as a permanent caste of moral inferiors. The creation of a criminal caste leads to permanent ostracization. Modern penal law is often purposefully used as a method of stigmatizing and separating offenders. Punishments are used to reinforce stigmatization. The dominant, though not the sole, reason for many punishments is to further ostracize the offender. The "Three Strikes and Out" penalty, the permanent disenfranchisement of felons and other collateral sentences are all examples of ways in which character-focused punishment regimes create a permanent class of criminal lessers.

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<sup>28</sup> ARISTOTLE, *The Nicomachean Ethics*, § 1114a, in *THE BASIC WORKS OF ARISTOTLE* (Richard McKeon ed., 1941).

<sup>29</sup> *Id.*

<sup>30</sup> To be sure Aristotle focused on the voluntary nature of choosing bad character. It was the voluntaristic aspect that justified blaming those with character flaws. Further, for Aristotle, bad character was appropriate because each individual had a responsibility to be aware of their weaknesses and inclinations and guard against succumbing to their vices. *Id.* at §§ 1109-10a. For an excellent discussion of this dimension of Aristotle's philosophy, see Huigens, *supra* note 26, at 1446-48.

<sup>31</sup> To be sure, it is true that Aristotle focused on the voluntaristic nature of choosing bad character. It was this voluntaristic aspect that justified blaming those with immoral character. For Aristotle, blame was appropriate because each individual had a responsibility to be aware of their weaknesses and discipline themselves against succumbing to that vice. Nevertheless, once bad character evolves, the Aristotelian contention is that it remains fixed. *Id.*; see also *supra* text accompanying footnotes 82-85.

The concept of criminal offenders as permanently bad is reflected in the birth of penal statutes that have as their goal the lifetime warehousing of those decreed criminal. The draconian "Three Strikes and Out" sentencing regime is a prime example.<sup>32</sup> This warehousing is devoid of rational cost-benefit analysis. Nor is it connected to ideas about the proper retributivist desert of the offender.<sup>33</sup> Professor George Fletcher notes the disproportionality of the regime: "These measures could hardly be retributive, for they stand in clear disproportion to the gravity of the offenses that trigger their application . . . these sanctions can hardly be justified by utilitarian considerations. Of course, they achieve some measure of social protection, but at what cost?"<sup>34</sup>

The regime is premised precisely on the idea that after a third felony, the law need not inquire as to the proper measure of desert for the offense. The caliber of the felony, or indeed those preceding, are not to be examined. The regime shows a disregard for the desert of the offense itself. It reflects the growing hunger to imprison and forget, isolate and marginalize the criminal class. The sentencing regime has as its premise the notion that bad people will not change.<sup>35</sup>

The widespread American practice, accepted largely without controversy, of disenfranchising felons also reflects a conception of permanent taint.<sup>36</sup> In the vast majority of states felons serving jail time are prohibited from voting.<sup>37</sup> In some jurisdictions this disability is permanent.<sup>38</sup> Yet, disenfranchisement is difficult to justify under either a retributivist or utilitarian paradigm.

What then is the rationale for the disenfranchisement of felons? The ostensible rationale is that felons represent a threat to the voting process.<sup>39</sup> It is hard to imagine this threat phrased in a rational sense (e.g., ex-felons will be more likely to interrupt the honesty of the voting process). There is little to suggest that the masses of ex-felons are scheming to commit voting fraud. Surely adequate measures can be

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<sup>32</sup> George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1896 (1999).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> This is the case insofar as the "Three Strikes and Out" regime is premised on circumventing specific retributivist measurements. The statute explicitly ignores the calibration of criminal punishment to fit the particular felony by mandating a life sentence after the third offense. Extreme examples of this are the ever growing stories of people who draw a life sentence after three minor crimes. Nor can the regime be justified under principles of specific deterrence without being premised on the idea that those being imprisoned are and will remain bad, crime-prone people. Perhaps "Three Strikes and Out" could be justified under principles of general deterrence, but this would mean accepting the terrible cost of imprisoning huge numbers of people and using them as an example in hopes of some social benefit. *See id.*

<sup>36</sup> *Id.* at 1896.

<sup>37</sup> Fletcher, *supra* note 32, at 1897.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

taken to protect the integrity of the voting process.

Often felon disenfranchisement is justified as necessary to protect "the purity of the ballot box."<sup>40</sup> Here the purity of the ballot box is couched in nearly metaphysical terms. There is a sense in which the felon is conceived of as somehow tainting the voting process. The image is that of a person with a permanent mark of shame.

Though it may seem these arguments are fanciful, they are in fact both the common and reasoned arguments in favor of voter disenfranchisement.<sup>41</sup> Alternatively, some may argue a version of social contract theory. Here voting is seen as a revocable privilege. Once the offender has committed a crime he forfeits his place in the polity. The analytical problems of this argument aside, it is just this concept of banishment that is dangerous in character-focused punishment.<sup>42</sup> This view casts the criminal as permanently outside the political community, forever an unworthy participant in the democratic exercise.<sup>43</sup> This view smacks of the ostracization earlier noted. Disenfranchisement is used as a tool of permanent stigmatization. This stigma is not merely a contingent effect of pursuing another policy.

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<sup>40</sup> FLETCHER, *supra* note 24, at 1899.

<sup>41</sup> *Id.*

<sup>42</sup> The view of voting as a revocable privilege is rife with danger. Given its history, supporters of this view have an uneasy pedigree. An examination of the history of voting rights, both domestically and abroad, provides sufficient warning. The idea of voting as a privilege has been used historically to politically suppress different minorities. Antebellum American literature contains examples of those arguing that Blacks simply had not developed to the level where the government should grant the privilege of voting to them. These writers argued that Blacks would neither understand the vote, or the underlying political issues behind them and in any case were happier to have the burden of governance removed from their shoulders. The view of voting as a privilege also has importance in the rhetoric of oppressive regimes in their destruction of undesired minorities. The Nazis' gradual erosion of the civic rights of German Jews is an obvious and powerful example.

Secondly, this social contract theory ignores the way disenfranchisement inherently skews the supposed contract. Take a town where a simple civic ordinance, a curfew for example, is at stake. This town of, say a million, is almost entirely evenly divided on the subject. When the issue comes to vote the curfew is passed by a single vote. The first night of the curfew some opposing it, having difficulty or resentment in the new state of affairs, break curfew, are immediately arrested and stripped of the right to vote. This happens with startling regularity for a few months. A year later the next vote on the subject is taken. Some of the original curfew supporter, the day-timers, have since changed their minds. Because of the large number of people disenfranchised, however, the opponents, night-timers, are unable to repeal the law, despite their now having the majority of opinion. By taking away the right to vote, one power block has established a lock on control and a convention that can now be called the "social contract." Disenfranchising members of the unpopular positions can artificially create an enforceable social contract. This is analogous to many controversial issues in the Nation today, the war on drugs being one obvious example.

Lastly, the disenfranchisement of criminals reveals an intention to banish the criminal offender. Voting has long represented membership in the political community. The expansion of voting to a universal right has been an important mark of the growth modern liberal democracies. Disenfranchisement is the revocation of that membership.

<sup>43</sup> Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of Law*, 11 CAN. J. L. & JURISPRUDENCE 23 (1998).

Rather, the law is used purposefully to create a permanent mark of condemnation.<sup>44</sup>

It is tempting to give short shrift to the gravity of disenfranchisement. Many who have the right to vote do not exercise it at all and many who do rarely consider its weightiness. Yet mass disenfranchisement has grave effects. Disenfranchisement levels a heavy toll in African-American and other minority communities.<sup>45</sup> Nationwide, fourteen percent of African-American males cannot vote due to their criminal record.<sup>46</sup> In some states fully a quarter of African-American men are denied the ability to vote.<sup>47</sup>

Still, disenfranchisement is most important because it is symbolic of the felon's status as a member of a lower criminal class. Legal expressions can often be used as a way of defining who belongs to the polity and who is excluded.<sup>48</sup> Disenfranchisement condemns not only the criminal act but the criminal himself, a permanent stigma to denote his bad character. It places the felon outside of the society, outside of the community and outside of the state as a whole.<sup>49</sup> In Hampton's words,

[b]y granting each adult the right to vote, no matter what group they come from in society, democratic societies have institutionally committed themselves to political equality . . . the right to vote is owed each person insofar as each of us is the political equal of every other person.<sup>50</sup>

Disenfranchisement communicates to the ex-felon and society at large that the criminal is no longer a "political equal."<sup>51</sup> It is the legal equivalent of banishment.<sup>52</sup>

There are other legal sanctions that are used to reinforce stigma, humiliation and ostracization and to communicate second-class-citizen status to felons.<sup>53</sup> Collateral consequences are restrictions, often regulatory or administrative, that isolate or impair offenders permanently.<sup>54</sup> These include prohibiting ex-offenders from running for office, sitting on a jury, participating in government programs and restricting employment.<sup>55</sup> Collateral penalties systematically exclude

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<sup>44</sup> *Id.* at 36.

<sup>45</sup> See Fletcher, *supra* note 32, at 1900.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> Hampton, *supra* note 43, at 36.

<sup>49</sup> See *id.*

<sup>50</sup> *Id.* at 29-30.

<sup>51</sup> See *id.* at 30.

<sup>52</sup> See *id.*

<sup>53</sup> See Nora Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999).

<sup>54</sup> See *id.* at 155.

<sup>55</sup> See *id.* at 158.

the felon from civil, economic and social participation.

The imposition of collateral sanctions, again, implies permanent loss of full membership as a citizen. In the same way disenfranchisement excludes felons from the political community, collateral sanctions further marginalize ex-offenders. These sanctions even extend to the deprivation of social and welfare rights including welfare support programs, federal benefits, contracts and licenses, grants, and small business and educational loans.<sup>56</sup> In fact certain ex-felons are denied federal monies solely meant to assist with the purchase of food.<sup>57</sup> These benefits are often crucial in preventing vulnerable citizens from falling beneath an acceptable threshold. Social and welfare benefits evidence a communal commitment to honor the needs of citizens. Denying these rights demonstrates that this concern does not extend to the ex-offender. Once the criminal is deemed as having bad character, ostracization makes permanent his taint and blunts our human concern.

This exclusion extends to the ex-offender's access to employment. Employment is conceptualized as a pre-requisite for full membership in modern American society.<sup>58</sup> The work force has become the primary instrument of social incorporation, indeed social position is often predicated on participation in the work force.<sup>59</sup>

Ex-offenders, however, are excluded from a vast part of the workforce.<sup>60</sup> Ex-offenders are excluded from an array of professions, ranging from lawyer, bartender, nurse, barber, beautician and so on.<sup>61</sup> As Nora Demleitner notes, "the exclusion of ex-offenders from vast segments of the labor market as a result of government regulation of many professions parallels the effect of restrictions on the ex-offender's right to contract in the nineteenth and early twentieth centuries."<sup>62</sup> These restrictions and the denial of governmental programs combine to virtually bar the felon from large segments of the work force.<sup>63</sup>

None of these by themselves prove the point. It is, of course, possible to justify the "Three Strikes and Out" regime under an alternative theory. Perhaps there are other arguments for the disenfranchisement of ex-felons. Others may propose reasons for excluding felons from welfare, food programs and educational loans. Taken as a whole, however, it becomes apparent that all of these sanctions form a certain vision of the criminal. These punishments

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<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.* at 158.

<sup>59</sup> *See id.* at 155.

<sup>60</sup> *See id.* at 156.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 156.

point to one way of imagining the criminal offender. Not only does the criminal offender betray her immoral character but that character is permanent. The criminal's bad character places her into an inferior class of citizens. The offender is to be permanently locked away if possible. Her vote is taken away permanently, her claim to political equality denied. The criminal is barred from sitting on a jury, participating in government, sharing in social and welfare rights and taking full part in her economic wellbeing. A class system based on permanent moral inferiority makes the criminal a permanent lesser citizen.

The drive to punish people among us because they are fundamentally bad leads criminal theorists to premise punishment on underlying character. In order to do so, criminal acts are used to measure the underlying immoral character traits of the criminal offender. Once the immoral character is measured the assessment becomes ossified. The inferior moral character becomes a permanent trait. In the same way, the punishment that is premised on this character seeks to permanently segregate the offender from the remainder of society. This view of criminal as permanent outcast is an ever-growing part of our current criminal law.

### III. ASSESSING CHARACTER AS AN EMPIRICAL ISSUE.

If punishing character can lead to these extreme consequences, we must ask ourselves this basic question: How do we know that particular offenders have bad character? Are we just guessing or do we have some reliable method of assessing who the bad guys are? Scriptwriters can build the definition of character into their story lines. Real life is not so readily reduced to heroes and villains.

In this section I assume that determining character is an empirical issue and divide the methods of proof of character into two, the first either relying on specific acts or, in the absence of acts, inferring character from other circumstantial "evidence."

Relying on criminal actions is the more conventional and acceptable way of proving character. The link between action and character arises from the union of doctrine and desire. Our doctrines hold that we punish only for criminal action. But our desire is to condemn the criminals among us. This tension is resolved by linking bad acts to bad character. Bad acts are evaluated as providing evidence of bad character. A good example of this linkage is found in Hume.<sup>64</sup> Hume asserted that a person's actions were important only because they

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<sup>64</sup> DAVID HUME, *A TREATISE OF HUMAN NATURE* 411 (Shelby-Bigge ed., 1978) (1739).



were connected to the person's underlying character: "[a]ctions are by their very nature temporary and perishing . . . . And as it proceeded from nothing in him, that is durable or constant, and leaves nothing of that nature behind it, 'tis impossible he can, upon its account, become the object of punishment or vengeance."<sup>65</sup>

A long list of contemporary scholars subscribe to this same conceptual tie between action and character. Joel Feinberg writes, "a person's faulty act is registerable only if it reveals what sort of person he is in some respect . . . ."<sup>66</sup> Voluntary choice is a necessity only insofar as assuring "moral attributability" to the person's character.

The connection of bad acts to bad character is expressed by modern character theorists like George Fletcher. In *Rethinking Criminal Law*, Fletcher asserts that excuses in the criminal law function by blocking the inference of an act to the character of the actor.<sup>67</sup> The implicit claim is that this inference, from act to character, grounds criminal (and moral) culpability. For Fletcher, criminal punishment is only just to the extent it is based on the desert of the criminal offender:

An inference from the wrongful act to the actor's character is essential to a retributive theory of punishment. . . . (1) Punishing wrongful conduct is just only if the punishment is measured by the desert of the offender, (2) The desert of the offender is gauged by his character—i.e. the kind of person he is, (3) and therefore, a judgment about character is essential to the just distribution of punishment.<sup>68</sup>

The act is useful only to judge the offender's character. Fletcher continues, "the question becomes whether a particular wrongful act is attributable either to the actor's character or to circumstances which overwhelmed his capacity for choice . . . ."<sup>69</sup>

Robert Nozick also follows the contours of Fletcher's position. Nozick believes that a criminal offender is judged by the defect in character that his act betrays. The character flaw opens the offender to "moral instruction."<sup>70</sup> The criminal act is used as evidence to determine the moral qualities of the offender's character. Again exploring the matter of legal excuses, he writes: "[e]xcuses show an act is not to be attributed to a defect in character. . . . If we punish acts only that stem from some or another character defect, then it appears that the crucial component is the defect of character."<sup>71</sup> While Nozick places the actual

<sup>65</sup> *Id.* at bk. 2, pt. 3, sec. II.

<sup>66</sup> JOEL FEINBERG, *DOING AND DESERVING* 126 (1970).

<sup>67</sup> FLETCHER, *supra* note 24, at 800-04. For a fuller exploration of excuse as the inversion of inculcation, see Huigens, *supra* note 26, at 1437-38, 1444.

<sup>68</sup> *Id.* at 800.

<sup>69</sup> *Id.* at 801.

<sup>70</sup> ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 381 (1981).

<sup>71</sup> *Id.* at 383.

locus of punishment in the "flouting of correct values" it is clear that the action importantly reflects the person's character.

The critical facet of these theories is the attempt to deduce and locate culpability on underlying moral character from evidence of acts. Other theorists underscore the importance of this inference. Michael Bayles proposes that blame and punishment are not directly levied for criminal acts but only for the character traits they reveal.<sup>72</sup> Nicola Lacey asserts that moral blame is appropriate only for actions that reveal enduring personality traits, patterns or settled dispositions.<sup>73</sup> Richard Brandt suggests actions are blameworthy if they would not have occurred but for poor character.<sup>74</sup> George Vuoso argues that where an action results most decisively from one's character moral blame is appropriate.<sup>75</sup> Nor are these antiquated views of the nature of criminal punishment. Kyron Huigens makes this link most clearly, explicitly asserting that inculcation and criminal punishment are levied in condemnation of a defendant's practical reasoning and the character it reveals.<sup>76</sup> Recently Tadros reaffirmed the view that excuses, and in turn criminal punishment, are premised on the underlying moral character of the offender.<sup>77</sup> For these theorists, acts are important because they reveal poor moral character and therefore ground criminal punishment. Acts are important because they tell us who belongs to the good guys and who belongs to the bad guys.

This widely accepted thesis has its origins in Aristotle's view that the action is to be explained by appealing to the actor's underlying virtues and vices. But it is worth noting that Aristotle's theory of character itself leads us back to autonomous actions. In the Aristotelian view, the actor chooses his own character by engaging in a series of voluntary acts.<sup>78</sup> On this account, bad guys possess immoral vices

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<sup>72</sup> Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 LAW & PHIL. 5, 7-15 (1982). Bayles views character as so important that he exceeds even the Aristotelian view that character is limited to the bounds of that which a person can control, either in gaining them or acting upon them.

Blame and punishment are not directly for acts but for character traits. According to this view, 'character trait' is not, as in the Aristotelian view, restricted to traits which people can voluntarily control possessing or manifesting in behavior. Instead, it refers to any socially desirable or undesirable disposition of a person. Acts may or may not indicate character traits. If an act does indicate an undesirable character trait, then blame is appropriate; if it does not, then blame is inappropriate although measures to prevent such conduct in the future might be taken.

<sup>73</sup> NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 65-68 (1988).

<sup>74</sup> RICHARD B. BRANDT, *ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS* 465-74 (1959).

<sup>75</sup> George Vuoso, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661, 1672-74 (1987).

<sup>76</sup> Huigens, *supra* note 26, at 1437-38.

<sup>77</sup> Victor Tadros, *The Character of Excuse*, 21 OXFORD J. LEG. STUD. 495 (2001).

<sup>78</sup> ARISTOTLE, *supra* note 28, § 1113b.

because they have voluntarily chosen them.<sup>79</sup> This means that people remain responsible for their own moral features. A person could, gradually, choose to become self-indulgent or not.<sup>80</sup> To become just or not. The sum of these freely chosen vices compose an actor's "state of character."<sup>81</sup>

It is not clear, however, that the desire to punish the wicked is informed by a voluntaristic conception of character. When Timothy McVeigh is condemned as evil, the condemnation focuses not on the voluntaristic origins of his actions, but rather, on his character. In the alternative approach toward assessing character, actions appear to have little relevance. The most common alternative to inferring character from specific actions is the reliance on stereotypes. And so it was in my encounter with the "foreigner" who rammed into my truck as I pulled out into the street.

The examples of inferring character from stereotypes are everywhere. Women are irrational, ergo this woman is irrational. Germans are rigid, therefore this German is rigid. African-Americans are lazy, therefore this African-American is lazy. What stereotypes share is the attempt to determine traits and assess character by direct generalization, without evidence of acts.

There are related but more subtle ways to infer character. Both verbal and non-verbal cues are often used to infer a person's character. When the police officer approached me, I instinctively understood that he would be searching for signals that would locate me within his evaluative landscape. With none of the obvious indicators used to signal good character available, clothing, social position or obvious wealth, I was hypersensitive of the assessment the officer would seek to make. My language, my diction and meter, spoken without accent or slang, were meant to signal my civic uprighteousness to the officer. Lest there be any doubt, the reference to working at a law firm reinforced his knowledge of the social and economic position of both my friend and myself.

The cab driver, in contrast, could not readily marshal the same verbal indicators. His position as a cab driver, his accent, his skin color, none of these cues conveyed the message that he was the "right kind of person." The police officers immediately branded him an outsider.

This manner of attempting to assess character is clearly unreliable. It is rife with prejudice and discrimination. Even in non-legal spheres, in personal moral assessment, the use of stereotypes, social indicia and other informal methods of judgment are typically fed by harmful social images. Whatever the harm may be when an individual attempts to

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* § 1114a.

<sup>81</sup> *Id.* § 1114b.

infer character directly in personal roles, these inferences are personal failings. If an individual decides to withhold friendship from another on the basis of inaccurate or hasty conclusions about the other's character the harm is private. When these decisions have non-private consequences, like preclusion from jobs or housing, the effects become a matter of public concern. In any case, it is clear that we often premise rewards and punishments, both personal and communal, on attempts to assess character.

Let us be clear on the contention. The character view of law holds, at its heart, that a person is punished for criminal acts by virtue of what they reveal about their character. In turn, criminal punishment is a proxy for punishing immoral character. This view is reinforced by our desire for moral simplicity in leveling criminal punishment and is evidenced in our growing urge to construct, maintain and punish a permanent class of immoral felons.

Yet criminal punishment is an ill-conceived proxy for punishing character. First the epistemic difficulties in discerning character may be insurmountable. More fundamentally, punishing for immoral character is illegitimate and in tension with the ideals of equality in the liberal state. We ought not seek to punish for immoral character in and of itself. More demanding still, we should not allow character to become constitutive of the way in which wrongs are defined or to play a part in deciding whether a legal excuse is merited.<sup>82</sup>

#### A. *From Acts to Character: The Epistemological Flaws in Assessing Character*

Assessing the character of a person in real life is obviously far more complicated than assigning accepted labels of heroes and villains in film and in literature. Inferring character from criminal actions is unreliable and relying upon a single criminal act particularly uncertain. Often two identical acts spring from vastly different character traits. One man may steal to feed his family; another out of entirely malicious motives. Though the acts appear identical the respective characters are different. The act tells us nothing about the character.

Moreover, even the same action may communicate little objectively about underlying character. To some, a soldier who refuses an order will seem to display cowardice or insolence. To others, he may seem brave in standing up to his commanding officer, especially if the orders are factually or morally suspect. Further, there is no guarantee

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<sup>82</sup> I am thankful to Dr. J. Horder in noting the earlier equivocations in the implications of my central critique.

that a person's actions are linked to the traits with which we intuitively associate them. Professor Michael Moore notes the extreme example of Bulstrode in *Middlemarch*, who compensates for his greediness with overtly generous behavior.<sup>83</sup> There is little to assure us that the criminal law is capable of overcoming these ambiguities in its effort to perceive the character of criminal offenders.

This tension echoes the classical Dualist debate, with its Cartesian roots, in criminal theory. The Dualist debate centers on an observer's (in)ability to determine a person's mental intent even in a singular action. Dualism, to simplify its different strands, holds that the intent of a criminal offender (or any actor for that matter) can merely be inferred from observable actions. Some have written convincingly that the Dualist position ignores the constitutive nature of intent and some actions (that is, some actions cannot be described without explicitly referring to intent).<sup>84</sup> Yet even if this is true for singular actions it certainly becomes more attenuated when another's total moral character is the subject of inquiry.

This aside, the critique goes deeper than the classical Dualist debate. There, criticism remains focused on the proper interpretation of observable actions. The assumption has been that a person's actions are indeed driven by his or her character and we merely needed to correctly recognize the behavior. Modern behavioral science, however, increasingly indicates that the idea that a person's actions are merely a manifestation of her internal character is naive.

Behavior is affected by both psychological (internal) and situational (external) factors. Hence, it may be impossible to confidently estimate a person's character from her behavior. This psychological critique undermines the clear path many would draw between character and acts. As Andrew Lelling notes, "character theories of excuse cannot accurately assign blame because they ignore situational details, and thus rely on character analysis that explains only a fraction of the behavioral story."<sup>85</sup>

Acts, then, may not stem from a person's internal character. The situational details of an event explain as much about how a person

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<sup>83</sup> Michael Moore, *Choice, Character, and Excuse*, in CRIME, CULPABILITY AND REMEDY 29 (Ellen Frankel Paul et al. eds., 1990).

<sup>84</sup> Anthony Duff, *Acting, Trying and Criminal Liability*, in ACTION AND VALUE IN CRIMINAL LAW 83-93 (Gardner and Horder eds., 1993); see also ANTHONY DUFF, INTENTION, AGENCY, AND CRIMINAL LIABILITY ch. 6 (1990).

<sup>85</sup> Andrew E. Lelling, *A Psychological Critique of Character-Based Theories of Criminal Excuse*, 49 SYRACUSE L. REV. 35, 39 (1998). Lelling elucidates:

The complex mixture of psychology and environmental variable that drives human behavior preclude[s] a theory of responsibility based on assessments of "character" . . . Scientific psychology supports the conclusion that individual acts are as much the product of external, situational details as they are the results of internal character traits.

*Id.*

behaves as any internal traits. The reason we conventionally believe that people (including ourselves) have steady character traits, Lelling explains, is that we typically find people in a consistent set of situations.<sup>86</sup> Indeed, the perception of our own good character may suffer a rude blow if we were trapped in vastly different situations.

If acts only partly stem from character then the attempts of the criminal law to find out who the good guys are and who the bad guys are break down. The conception of character as the internal drive is weakened. Further, to the extent that external situations may change, the picture of bad people manifesting their vices steadily over time is undermined.

Most character theorists respond to the psychological critique of character controlling action rather elliptically. They construct a theory of character that measures an act as blameworthy only "to the extent" it reflects a person's character. Lacey, recognizing the artificiality of inferring character from a single act, asserts that criminal punishments ought to be imposed only where the act reflects the "settled disposition" of the actor.<sup>87</sup> Single acts, she proposes, may provide some evidence, but do not always indicate settled dispositions.<sup>88</sup> Thus only actions that are "truly representative" of the actor's character ought to be considered.<sup>89</sup>

Vuoso also attempts to construct a sophisticated model of character theory that accounts for the indeterminacy of assessing character from acts. Vuoso argues that only "actions which are the result of a process of normal or undisturbed reasoning (the result of one's normal or undisturbed beliefs and desires), will generally reflect on the actor's character."<sup>90</sup> For Vuoso it is only actions that are "determined by one's character" which are relevant.<sup>91</sup> Actions, he proposes, are determined by one's character where the "character" is the causal factor that figures most prominently in an accurate account of how that action came about.<sup>92</sup> Vuoso instructs, somewhat circularly, "if an action is caused

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<sup>86</sup> *Id.* Importantly, Lelling does not limit his critique to obvious examples such as duress and necessity (these are just the kind of excuses that character theorists claim work by denying attributability to character). Rather Lelling's claim is that, broadly, many situational factors may affect or control a person's actions. These factors may determine the law abiding or violating nature of a person's actions quite apart from our conventional notions of their character.

<sup>87</sup> LACEY, *supra* note 73, at 66.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 68. To be fair, Lacey does point out that actions which may seem merely unusual for an actor will still, despite their being unusual, reflect the actor's settled disposition. *See id.* This may mean that she views only extraordinary (seizures, etc.) or non-attributable actions (duress, etc.) to not "reflect a person's character." If that is the case then her position begins to largely reflect that of traditional character theorists and the "settled dispositions" becomes a recasting of the basic assumptions of character theory.

<sup>90</sup> Vuoso, *supra* note 75, at 1672.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

by the agent's character, it is clear that it reflects on his character."<sup>93</sup>

The problem with each account is that it tells us little about how to discern the relationship between acts and character. To say that actions are only relevant to the extent "they reflect character," or "character causes them" is to beg the question. This is especially so in light of the cognitive psychological critique that character is reflected a great deal less by action than commonly believed.

There is an alternative move that one can make in order to save character theory. One could argue that whatever the overall moral state of the offender's character the law may only punish the offender *to the extent he revealed his bad character*. This would be measured simply by the crime committed.<sup>94</sup> Because the law would then need only observe the portion of bad character evidenced by the crime the uncertainty of determining the offender's total character is eliminated.

The problem with this argument is that it collapses character theory into act theory. If the law only need judge the actor's character to the exact extent revealed by the crime, then the focal point of punishment remains with the act. To truncate character theory in this manner is to abandon it entirely.

The contention is that the law cannot accurately assess character. Observation of acts tells us little objectively about underlying character. Identical acts may spring from different characters or be subject to different interpretations. Secondly, character may not drive action in a way that allows easy inferences from act to character.

If the law cannot be accurate in its assessment it becomes impossible to premise punishment on character. For punishment to be based on character the law must be able to measure character at least accurately enough to "measure the just desert of the offender."<sup>95</sup> The epistemological challenges illustrate that the law is unable to do so. To the extent one is unable to determine character from actions, character theory is indeterminate. Though the impulse to find and punish the bad guys remains it is impossible to truly determine who the bad guys are.

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<sup>93</sup> *Id.* at 1674. Brandt, exploring this link, proposes:

Is a person's motivation in any way related to his traits of character? . . . We cannot say that every kind of motivation is an expression of character . . . but many kinds of motivation are. In fact, any kind of motivation on account of which an action can be accounted reprehensible or morally admirable is of this kind. It is plausible to suggest, in our definition of "reprehensible," that something can be reprehensible only if it would not have occurred but for defect of character.

BRANDT, *supra* note 74, at 468.

<sup>94</sup> This would recall the manner of arguing articulated by Professor Fletcher. See FLETCHER, *supra* note 24, at 800-02.

<sup>95</sup> *Id.*

## IV. ASSUMING THAT CHARACTER IS DETERMINABLE

It is tempting to seek refuge in the epistemological uncertainty of immoral character. Yet still the most important question remains. Is empirical uncertainty the only reason not to punish for character? Is the only reason for the state to avoid creating a caste of permanent moral inferiors our uncertainty about who belongs in the caste?

For the purpose of our moral inquiry let us leave aside the empirical issues of inferring character. Suppose that we know who the virtuous and wicked are. Imagine the following thought experiment. Suppose we are in possession of a perfect virtue meter that reveals the relative virtue and vice of every person. Now that we have defeated our empirical uncertainty, ought the state distribute punishment based on the relative moral worth of each individual?

In this section we will examine the growth of legal equality even in the face of certainty concerning empirical inequality. That is to say, we will look at examples where the ideal of equality was advocated by those who felt, with the certainty of our hypothetical virtue gauge, that those being considered equal were of lesser worth. They could say that those weighed were considered factually (or empirically) unequal. That we now take issue with their measurements is not the focus.

A word of clarification about what we mean by moral equality. Moral equality refers to premising a person's right to equal treatment on a factual comparison of the merit of two individuals. Here, we have been discussing the comparison of differing moral character. In a different example, we might determine that two people are equally entitled to equal government pay because of identical scores on a civil servants exam. Our belief in their right to equal pay does not come from an *a priori* belief in their equality as persons or state subjects (as it might were the example, say, welfare benefits). Rather it stems from their empirically proven equal merit vis-à-vis the exam criteria. Our current issue concerns premising punishment on moral inequality. Like the scores on the civil servants exam we now inquire about the relationship between a person's score on the virtue meter and their right to political equality. Even if we know some people have morally superior characters, how should this affect our vision of equality?

The question, then, will be whether moral equality is the appropriate basis of political equality. Political equality, broadly stated, is the notion that the state owes each of its citizens equal respect and consideration.<sup>96</sup> In the narrower field of criminal law, political equality describes equality before the law. Further, most liberal political

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<sup>96</sup> Ronald Dworkin, *In Defense of Equality*, 1 SOC. PHIL. & POL'Y 24 (1983).



theories reject the notion that equal respect is based on the quality of the citizen's moral character.<sup>97</sup> Equal standing before the state instead becomes a fundamental principle and, as such, is difficult to justify. It can be seen as an *a priori* political belief.<sup>98</sup> Ronald Dworkin notes that this principle of equality is a value that precedes and cannot be based on virtue or moral merit.<sup>99</sup> Most importantly, Dworkin asserts, "It seems unlikely that it can be derived from any more general and basic principle of political morality."<sup>100</sup> Political equality presumes that the law will consider each citizen's interests to be of equal value.<sup>101</sup>

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<sup>97</sup> Wojciech Sadurski, *Theory of Punishment, Social Justice and Liberal Neutrality*, 7 L. & PHIL. 351, 371-72 (1988/89). The author states:

[I]f we rest our political theory on a theory of the good (a conception of the morally good life, a prescription for a good moral character, etc.) which a state should enforce over other, competing theories of the good, then the criminal offender, in acting contrary to this conception, harms himself. . . .

But the liberal theory rejects perfectionism as a theory about the range of state coercive powers. . . a liberal state assumes a neutral stance between the competing conceptions of the good; it abstains from enforcing one set of criteria of the morally good character over another. . . . This does not mean, naturally, that the state has to be neutral as between non-harmful and harmful (in the sense of postulating harm to others) moralities.

*Id.*

<sup>98</sup> Dworkin, *supra* note 96, at 24.

<sup>99</sup> *Id.* at 35. Dworkin examines why a person's claim to equality cannot depend on the moral virtue of the citizen:

[It is] hard to conceive how any of us could think that it matters more, from any kind of objective standpoint, how his life goes than anyone else's, if . . . each of us thinks that the course of his own life has intrinsic importance. You might want to say, for example, that it is more important how your life goes because you are a more virtuous person. But your convictions about the importance of how your life goes are too deep—too fundamental—to permit this . . . [It is] important how your life goes for some reason that . . . precedes your virtue. If so, then you cannot say that it is more important how you live for any reason drawn from your merit or the merit of your life, and no other kind of reason can plausibly distinguish you from anyone else who has a life to lead.

*Id.*

<sup>100</sup> *Id.* at 31. Of course, other scholars have forwarded different grounds on which a view of the most basic equality can be based. Prominent among them is a religious (Judeo-Christian) basis of equality wherein God creating all men in his image is the underpinning for basic equality. See GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION* (2001).

<sup>101</sup> To be sure, there is a vast debate over the very value of the term equality in philosophical literature. Some scholars, most notably, Professor Peter Westen, have argued that the language of equality is largely empty and confusing. See PETER WESTEN, *SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE* (1990); see also Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604 (1983) [hereinafter Westen, *Reply*]. Westen argues that debates over "equal" treatment are in fact only debates about equality in rhetoric and are in fact debates concerning substantive rights and legitimate criteria.

To illustrate the point Westen uses the examples of a state where a height requirement in police recruiting leads to a disproportionately male police force. Westen claims that the true argument does not concern equality as such but rather the legitimacy of height as criteria for police officers. If height is a legitimate criteria, then each citizen is treated equally in light of

Ideals of political and legal equality have not expanded merely because it was thought that those compared were actually equal in merit. Rather the fidelity to equality has been evidenced most strongly when those compared were seen as unequal. Three examples will illustrate this point. First will be the decision of the American Founders to advocate an ideal of legal equality which prohibited titles of nobility. Their fidelity to equality existed notwithstanding their belief in the inferiority of the many. Likewise, the expansion of political equality to the former slaves was supported by Lincoln and other abolitionists despite their belief that Blacks were beneath Whites.

By contrast we will see what happens when legal equality is premised on actual equality between people. The prime example of this will be *Plessy v. Ferguson*.<sup>102</sup>

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their respective height; if it is not, then the state is treating its citizens unequally.

Alternatively, one could conjure up a state were the citizens have been given the peaceable right to assemble but this right is in fact allowed only to the majority and denied to minority citizens. Here, again, the argument is not about the notion of equality but rather about the substantive right to assemble peaceably.

Other scholars have argued against Westen's claim about the emptiness of equality. For a small portion of these debates, see Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Anthony D'Amato, Comment, *Is Equality a Totally Empty Idea*, 81 MICH. L. REV. 600 (1983); and Jeremy Waldron, *Jurisprudence and Political Theory: The Substance of Equality*, 89 MICH. L. REV. 1350 (1991).

In this article I take the position of the above scholars that equality as a concept is not an empty idea. For example, Professor Waldron points out that equality may be valuable as a range variable. A range variable tells us the set of criteria that one may weigh in making a decision. For example, while height may be important to enable police officers to be easily seen, for a society to advocate tall officers for the very purpose of reinforcing a masculine ideal of power. This would be outside the range of permissible considerations. Waldron, *supra*, at 1359-1360.

Secondly, I believe equality has an independent weight to it quite outside of the substantive right. As Professor Greenwalt points out, where people are treated unequally the harm may not simply be in the denial of the substantive right. Rather the harm can be perceived as "magnified" solely due to the inequality. Two examples, one fanciful, the other more serious illustrate the point. Consider if the government handed out a single attractive T-shirt to each citizen. At the last moment, due to supply problems, the government decided it could only give each white citizen a T-shirt. I could well imagine my being outraged, as an African American, despite the fact that my dresser is currently overloaded with T-shirts. It would certainly not be the substantive right to a T-shirt that would bother me; rather it would be the racial inequality evidenced by the program.

One of Westen's arguments makes the point in a more serious manner. If the government enforced the right to peaceable assembly in a racially discriminatory manner I imagine it would be offensive not simply because of the substantive right but also because of the discriminatory treatment. Here I must disagree with Professor Waldron who proposes that while one could image the victim of this system being offended by the inequality, it would be the substantive right that carried the weight of the offense. Waldron, *supra*, at 1356. I view these as two totally separate harms and indeed, could imagine being more offended at the discrimination than the lack of the substantive right.

<sup>102</sup> 163 U.S. 537 (1896).

A. *A Principled Equality: Equality Ungrounded by Empiricism*

Historical examples illustrate the importance of an idea of equality that does not depend on empirical proof of equality. Witness the commitment to abolishing titles of nobility in the American constitution. The United States Constitution prohibits the granting of titles of nobility by the government. The passage reads: "No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign state."<sup>103</sup> The clear purpose was to prevent the federal and state governments from granting titles and establishing an American elite. The Founders wanted to prohibit the segregation of the population into a group of permanently privileged and inferiors. Though now an unquestioned part of our culture, doing so was not a forgone conclusion at the time.<sup>104</sup> There were places in the newly formed colonies where the populace had turned away from democracy to secure a stronger government.<sup>105</sup> In Jamestown, the people had turned to a dictatorial government to ensure strong command.<sup>106</sup> Other colonial charters allowed for the granting of titles of nobility.<sup>107</sup> After independence, some leaders wanted to install George Washington as a king.<sup>108</sup> Questions as to whether to address the President as "His Excellency," "His Highness, the President of the United States and Protector of their Liberties"<sup>109</sup> or "His Most Benign Highness"<sup>110</sup> arose. Some called for the establishment of a European style American aristocracy.<sup>111</sup> Others, of course, wished to install themselves as the nobility.<sup>112</sup>

To be sure, the establishment of an American nobility was unlikely.<sup>113</sup> Americans were largely opposed to the idea of establishing a European style aristocracy.<sup>114</sup> The opposition to this system was

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<sup>103</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>104</sup> Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense and Titles of Nobility*, 8 S. CAL. INTERDISC. L. J. 577 (1999).

<sup>105</sup> Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983).

<sup>106</sup> *Id.* at 257.

<sup>107</sup> Silversmith, *supra* note 104, at 577.

<sup>108</sup> Karst, *supra* note 105, at 258.

<sup>109</sup> Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100, 112 (1984).

<sup>110</sup> Karst, *supra* note 105, at 258.

<sup>111</sup> Delgado, *supra* note 109, at 111.

<sup>112</sup> *Id.* at 112.

<sup>113</sup> *Id.* at 111.

<sup>114</sup> *Id.* It is true that Americans did not break away, wholesale, from European institutions. The common law system of estates was based in many ways on the European feudal system. Yet

rooted not simply in a sense of hostility towards the institution of the Monarchy. Rather, the opposition was grounded in a deep allegiance to a vision of republican government.<sup>115</sup> Witness the words of James Madison in considering the prohibition of titles of nobility. Madison saw this prohibition as “the corner stone of republican government.”<sup>116</sup> If the government, Madison forwarded, was to remain a republican one, that is a government “of the people,” then titles of nobility had to be prohibited.<sup>117</sup> This devotion led to the Constitutional prohibition on the granting of titles.<sup>118</sup>

Still, whether or not there were questions about establishing an American nobility, empirical doubts alone could not have carried the day. After all, the initial American political equality was not complete. The American elite at the time had little doubt in the superiority of certain people. Slavery was only the most obvious example. There were numerous other distinctions in Revolutionary America. To the Founders it was obvious that the landless, for example, were not properly fit to participate in government.<sup>119</sup>

Those early Americans did not doubt the intrinsic superiority of some portions of the population to the masses. Indeed, much of the disagreement over the form the government was to take was based on the Founders’ certainty of the general populace’s inferiority.<sup>120</sup> Whatever the basis of equality under the law, the Framers certainly did not think it would amount to equality of the populace.<sup>121</sup> Marci Hamilton notes that the framers

brought a jaundiced view of the people’s ability to rule to the Constitutional Convention. . . . Indeed . . . an utter disrespect for the people, who they characterized as “blind,” uninformed, and

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on the whole, Americans rejected the European systems that would have replicated power hierarchies.

<sup>115</sup> *Id.*

<sup>116</sup> Delgado, *supra* note 109, at 111.

<sup>117</sup> *Id.* A republican government describes a government where despite the lack of direct democracy, i.e., a referendum on every issue of governance, the populace is governed by elected representatives. Here, Madison is making a broader distinction between a republican government meaning a government ruled by the populace by way of election and an aristocracy where a designated elite, the nobility, maintain control over the government.

<sup>118</sup> *Id.*

<sup>119</sup> J. K. Cogen, *The Look Within, Property, Capacity, and Suffrage in Nineteenth-Century America*. 107 Yale L.J. 473 (1997). Note Cogen’s observation that, “[w]hen the Federal Constitution was ratified in 1788, nearly every state required some form of property ownership in order to qualify for the vote.” This requirement was often conceptualized as related to the internal worth of the citizen to cast a vote. Men who did not own property were seen as will-less, lacking in judgment, “violent” and “corrupt;” the lack of property showed that a man was “indolent or vicious.” In short, ownership of property was seen as a sure way of judging the worth of a man’s character. *Id.* at 480.

<sup>120</sup> Marci A. Hamilton, *Delegation and the Constitution: Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 813 (1999).

<sup>121</sup> *Id.*

ignorant . . . . [T]he debates at the Constitution . . . strongly suggest that the Constitution rests on the presupposition that the people are not fit to rule by themselves.<sup>122</sup>

The Founders could not be said to believe that men were in fact equal. Madison said as much when he wrote, "there can be no doubt that the bulk of mankind are unequal, and . . . must and will be governed by those with whom they happen to have acquaintance and confidence."<sup>123</sup> Yet still they encoded a commitment, if incomplete, to notions of political equality.<sup>124</sup> The franchise in earlier America, some estimate, extended to fifty to seventy-five percent of adult white males.<sup>125</sup> Those early Americans believed, if in a limited sense, in the ideal of equality.<sup>126</sup> The prohibition against titles of nobility separating the superior and inferior segments of society and the building of a widespread franchise were reflections of that ideal. Their fidelity to equality superceded their certainty about the inequality of men in fact.

The most obvious example of the expansion of political equality is the gradual inclusion of the former slaves. Again, the diffusion of democratic principles was based on political rather than moral equality. The Thirteenth Amendment passed in 1865 prohibited slavery or involuntary servitude.<sup>127</sup> Three years later, the Fourteenth Amendment would grant citizenship to all persons born or naturalized in the United States.<sup>128</sup> This amendment further prevented each state from making or enforcing any laws that would "abridge the privileges or immunities" of each citizen.<sup>129</sup> Lastly, the Fifteenth Amendment in 1870 prohibited the denial of the right to vote on account of race or color.<sup>130</sup>

Most proponents of freeing the slaves and black suffrage did not believe in the equal social and moral status of the black slaves. Lincoln, for example, was able to forward ideas of white supremacy even while advocating political equality between the races. While he believed in the political equality of Blacks, Lincoln did not support the idea of interracial marriage, Black jurors and much we now naturally consider part of being an equal citizen.<sup>131</sup> Even in the famous Lincoln-Douglas

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<sup>122</sup> *Id.* at 813.

<sup>123</sup> Letter from James Madison to Edmund Randolph, in 10 THE PAPERS OF JAMES MADISON 355-56 (Robert A. Rutland et al. eds., 1977).

<sup>124</sup> Karst, *supra* note 105.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> U.S. CONST. amend. XIII, § 1.

<sup>128</sup> U.S. CONST. amend. XIV, § 1.

<sup>129</sup> *Id.*

<sup>130</sup> U.S. CONST. amend. XV, § 1.

<sup>131</sup> Westen, *Reply*, 81 MICH. L. REV. at 626. It is possible that Lincoln may have changed his mind by the time of Gettysburg. This, however, would be speculative. Moreover, it is besides the point. Lincoln's position in the Lincoln-Douglas debates illustrates that he was comfortable supporting a vision of (limited) political equality for the black slaves without maintaining the view that blacks and whites were evaluatively equivalent.

debates Lincoln made clear his opposition to black suffrage.<sup>132</sup> Certainly very few believed that Blacks were equal, on the whole, to Whites. Lincoln, like most Whites of his time, was convinced of the natural superiority of the white race.<sup>133</sup>

Nor was the Congressional passage of the Amendments premised on an image of true equality of the races.<sup>134</sup> It is clear that the motivation to establish political equality among the races could not have stemmed from a belief in the actual equality of both.

To be sure, there were abolitionists who believed in a richer equality between the races. Some believed that Blacks were not only entitled to political rights but were, in fact, morally equivalent to Whites. This version of equality was typically rooted in a deep religious conviction about the equality of men before God.<sup>135</sup> But not all those advocating a political vision of equality between the races held the view of a God-given equality between the races. Still, those proponents of the rights of slaves continued to call for greater equality between the races.<sup>136</sup> For them, equality needed no basis in the actual equality of the races, God ordained or otherwise. Rather, it was a legal equality, premised on the *a priori* belief in political equality that they sought to achieve.<sup>137</sup>

#### B. *Precarious Equality: Empirically Premised Equality*

Historically, then, important advances in our concept of political

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<sup>132</sup> *Id.*

<sup>133</sup> Karst, *supra* note 105.

<sup>134</sup> *Id.*; see also John P. Roche, *Equality in America: The Expansion of a Concept*, 43 N.C.L. REV. 249 (1965). Further, Professor Fletcher notes that the passing of the Fourteenth Amendment was due in large part to the desire to punish the South for its participation in the war. Consequently, section three of the Fourteenth Amendment aimed to erase the political power of former Confederates by keeping them from office (lustration laws). Section four canceled any monies owed the Confederacy and outlawed compensation for the freed slaves. Additionally, President Johnson sought in a number of ways to use the lustration laws to destroy the power of wealthy southern land owners. Lastly, there was, of course, a political purpose for the Republican party insofar as the amendments promoted a large group of intensely loyal voters. See FLETCHER, *supra* note 100, at 86-87. Professor Fletcher does believe that despite this, a deeper tenet of equality, premised on a sense of equality before God, pervaded and drove the expansion of political equality following the Civil War. See *id.* at 101-11.

<sup>135</sup> FLETCHER, *supra* note 100, at 101-11.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* Some modern scholars have argued that, in fact, Lincoln had no genuine belief in equality. This interpretation of the Emancipation Proclamation views the document as a product of irresistible political forces; a compromise Lincoln could not avoid. To whatever extent this is true Lincoln still had to couch the terms of the Emancipation Proclamation in compelling rhetoric. Whether Lincoln actually believed it, he was able to evoke a rhetoric of equality that did not depend on the equality in fact of both races. Lincoln was able to see that treating people as equal under the law did not depend on their being morally equal.

equality have been achieved despite presumed certainty of moral and social superiority of classes of people. Even where there was uncertainty the principle of political equality did not rest on this indeterminacy. Indeed, where principles of equality have been premised on factual equality the result has often been shameful. A contrasting example, the infamous *Plessy*, illustrates that the principle of political equality cannot depend on notions of empirical equality. Even in the face of presumed certain moral and social inferiority, preserving political equality is an important independent value.

*Plessy* provides an explicit illustration of premising legal equality on factual equality.<sup>138</sup> The case centered around whether a Southern Black, despite a statutory prohibition, would be permitted to ride in the same train car as his White counterparts. In a decision that scarred American jurisprudence, the Supreme Court found that nothing in the Constitution prevented distinctions between the races, giving birth to the "separate but equal" doctrine.<sup>139</sup> The majority held that the Constitution merely prevented legal handicaps based on race but that "mere[] legal distinction[s]" were not equivalent to legal handicaps.<sup>140</sup> Obviously, the justices failed to recognize the manner in which the distinctions created "badge[s] of inferiority."<sup>141</sup>

But for our purposes *Plessy's* importance stems from its attempt to premise legal equality on distinctions of social and moral merit. The majority noted that the law could not prevent the recognition of factual differences between the races.<sup>142</sup> The danger lay in the phrasing of the argument. Even while creating this doctrine, the majority ostensibly reaffirmed the political equality of the races. It was the natural and social differences between the races, however, that allowed for legal distinctions between the races.<sup>143</sup>

It was only Justice Harlan, in dissent, who recognized the true challenge of the case. Harlan recognized the badge of inferiority that attached when the state enforced separation between the races. Moreover, Justice Harlan understood that true political equality could never be based on natural or factual proof of equality.

Harlan recognized that a caste of political unequals could not be justified by the existence of actual differences between the two races. But his belief was not based on doubt about the proposed differences. Harlan himself professed to believe in the inherent superiority of the White race. Harlan commented:

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<sup>138</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>139</sup> *Id.* at 544.

<sup>140</sup> *Id.* at 543.

<sup>141</sup> *Id.* at 551.

<sup>142</sup> *Id.* at 544.

<sup>143</sup> *Id.* at 551-52.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage . . . ."<sup>144</sup>

This superiority, however, could not undermine a commitment to political equality before the law: "But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here."<sup>145</sup> Harlan understood that political equality does not depend on empirical equality.

Though our examples have been wide ranging, they all shed light on our original thought experiment concerning a perfect virtue gauge. We know that the Founders did not believe that all men were equal in fact. They were certain that some people were superior to others. Still, they forwarded an ideal of legal equality of persons. They prohibited the creation of a separate noble class not because of empirical uncertainty but because of political principle.

The same applies to Abraham Lincoln and the expansion of equality for the former slaves. For Lincoln, legal equality was not based on an empirical claim concerning the equality of the Black race. In fact, Lincoln and his contemporaries were certain of the actual inferiority of the Black race. Nonetheless, he and others advocated a version of equality for the slaves premised on a vision of political and legal equality. Both examples illustrate how certainty concerning normative equality was ignored in order to affirm legal equality.

By contrast, when legal equality is premised on factual equality we have seen distasteful consequences. In *Plessy*, the Court established a doctrine that allowed Black Americans to be subjugated to a lower class. It premised the legal distinction between the races on differences of merit between the races. In *Plessy*, the Court, certain of the empirical inequality in merit between the races, did not ignore the differences but used it as the foundation of legal (in)equality.

The virtue gauge places us in the same position as Abraham Lincoln and the Founders before him. The virtue gauge turns us, in a real way, into Justice Brown with *Plessy* before us. A gauge that measures a person's moral fitness may allow us to be certain of the moral and social inequality of certain persons. We now have to decide if we are to base the legal equality of the morally lacking group on their moral inequality or if we are committed to a principle of equality that rises above empirical inequality. Virtue gauge or no, we must affirm the principle of legal equality. The only other alternative is to construct a political theory that recognizes political equality only where people are morally equal.

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<sup>144</sup> *Id.* at 559.

<sup>145</sup> *Id.*



A principle of equality can only be affirmed if equality is not premised on empirical measure. Even were there an aristocratic class that was definitively nobler in America it would remain offensive to create a modern nobility. It would be ridiculous to attempt to marshal convincing evidence of the inferiority of Black Americans compared to White Americans. The findings would be obviously irrelevant to our commitment to equality. By the same token, it ought to be evident that a virtue gauge is equally irrelevant. Determining, even with certainty, the moral defectiveness of criminal offenders does not eviscerate their right to legal equality. A liberal legal theory is based on the idea that every citizen is entitled to equal respect of the state.<sup>146</sup> Even if we knew hardened criminals were morally defective, our commitment to political equality would supersede this. Whatever the basis of our punishing criminal offenders, it should not be because they are our moral inferiors.

### C. *The Separation of Moral and Legal Equality*

Clearly, political equality (and subsequently legal equality) has not been based on moral and social equality. It may strike the reader, however, that this argument only condemns basing legal equality on certain types of criteria. It may be the case that legal standing ought not be based on, say, racial, social or intellectual equality. Moral equality, though, may be a different kettle of fish entirely.

Even if other types of measures are an illegitimate basis on which to ground legal equality, might not moral standing be different? After all, do we not intuitively expect, even encourage, the state to take the totality of a person's moral standing into account in the criminal law? In punishment particularly moral standing does not immediately strike one as an illegitimate criteria in the way that race and wealth do. Why shouldn't moral merit trump political equality?

Dworkin has already asserted that the principle of political equality necessarily precedes moral equality.<sup>147</sup> Could punishment be a special case? Examining a legal paradigm based on the moral status of its citizens reveals its inadequacy. Let us return to our thought experiment wherein we have a perfect moral gauge. We subject two individuals, about whom we have our suspicions, to the meter. Subject A, the gauge reveals, is a man of unimaginably poor character. Hateful, mean, lustful and cruel. Subject B, amazingly, is yet still worse. He poses every vice in even greater quantity and is also in addition a coward.

Being men of despicable moral standing, both men would like to

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<sup>146</sup> Dworkin, *supra* note 96.

<sup>147</sup> *Id.*

kill their respective spouses for insurance proceeds. Yet, despite his greater moral decrepitude, B is unable to do so. His cowardice gets the better of him. A, though not as immoral as B, is able to execute his plan and so his wife comes to an untimely demise.

Despite B's greater immorality, it is A and not B we imagine subject to criminal punishment.<sup>148</sup> That B is more immoral does not open him to criminal sanctions. Nor does certainty about their relative moral status change our inclination. The example simply illustrates that legal entitlements are superior to moral merit. It is easily noted that our punishing A and not B is succinctly explained by the act requirement or the harm principle. But this answer begs the question. Why the act requirement? It cannot be simply to evidence bad character, the virtue gauge is conclusive on this point. If one's intuition is that only A ought to be punished it is because the act requirement grounds the recognition that criminal punishment cannot be premised on poor character. It must be because moral merit is subjugated to legal equality.

A more subtle point needs to be addressed here regarding the pervasiveness of character assessment in our criminal law. Benjamin Sendor raises one of the most common justifications for considering moral character in criminal punishment.<sup>149</sup> While he agrees that character theory is flawed insofar as it seeks to make immoral character a criteria of guilt, he believes that character is a legitimate consideration in punishment.<sup>150</sup> But here Sendor is careful to make an important distinction. He notes that the character of a criminal defendant is relevant only insofar as it reflects the offender's tendency toward recidivism.<sup>151</sup> The distinction is an important one. It recognizes that in fact it is not moral character in any true sense that is censured. Here, the character as engine image is used once again as a proxy for the consideration of future dangerousness.<sup>152</sup> It is not an idea of moral character or merit that is weighed. It is not the defendant's character per se but rather either his future dangerousness or cumulative harm that

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<sup>148</sup> It is not enough to say that the mere fact that A commits the crime proves he is more immoral. We can imagine a world in which B simply never has the opportunity to kill his wife or A commits the murder first and we must now distinguish their fitness for punishment.

<sup>149</sup> Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 N.D. J.L. ETHICS & PUB. POL'Y 99, 126-33 (1996).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 127. Sendor explains:

A defendant's character clearly is an appropriate factor for the purpose of specific deterrence. If a review of the defendant's record shows that he is an inveterate recidivist—that he has a strong and enduring inclination to break the law—then that fact shows that previous intervention by the state has not deterred him from criminal activity and that more severe punishment is warranted in order to deter him from future criminal conduct.

<sup>152</sup> *Id.* at 131. Sendor also notes that repeated criminal violations may increase an offender's desert. Again it is not the defendant's character that grounds his increased desert but rather the cumulative harm of the defendant's crimes that increased his desert.

increases his desert.<sup>153</sup> Where the offender's dangerousness can be separated from his moral stature, character again becomes irrelevant as a basis of political equality.<sup>154</sup> About this there will be more to be said later.

If moral merit is illegitimate grounds on which to premise punishment, then too are the moral measures revealed by the virtue gauge. Moral merit cannot trump a vision of legal and political equality. As the prior section has shown, the superiority of legal equality does not depend on empirical difficulties about the certainty of moral measurements. In the same way that intelligence, social merit and race do not affect our commitment to legal equality, neither does moral merit count. Even where empirically certain, armed with our powerful virtue gauge, our duty to treat all equally remains.

## V. CRIMINAL PUNISHMENT AND ACT THEORY

This article began with a story that illustrated the impulse to divide the world into good guys and bad guys. We saw how there is an intuitive drive to dole out our blame and punishment on the premise of the good guy/bad guy distinction, whether it be in fairy tales, old movies or the law. That the law attempts to divide the world into good and bad guys is shown in the efforts of Character theorists to use criminal acts to divine immoral people. Knowing they are bad guys justifies punishing them and quells our compassion. We decide who is bad, then punish, imprison and marginalize them permanently.

It turns out, however, the world is not made out of simply divisible good and bad guys. Film noir and modern cinema recognize this. In the real world it is harder still to discern who are the good and the bad. Actions may spring from different character traits. Further, they may only partially reveal character. Simply observing actions does not tell who is good and who is bad.

But it is more than empirical uncertainty that prevents us from punishing people because they are bad. Even were it possible to determine the good and the bad, this would be inadequate grounds for political exile. Treating people as legal equals cannot depend on the

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<sup>153</sup> *Id.*

<sup>154</sup> One cannot deny that an offender's dangerousness can seem difficult to separate in practice from views about his character. I do not pretend that the answer to this question is obvious. But two things bear keeping in mind. First, there will be instances where future dangerousness and character come apart presenting the philosophical question with which we started. The robber who suddenly comes into a great deal of money has not improved his moral standing but may no longer represent a future danger of robbery. Secondly, even where character and future dangerousness seem inextricably linked, it remains of value to remind ourselves that punishment remains focused on dangerousness and not the offender's immoral character.

assurance that one group is actually as good as another. The resistance to creating legally recognized groups of superiors and inferiors has endured even when the populace was certain that one group was superior. So it was when the Founders prohibited titles of nobility and when the former slaves were emancipated and later given the right to vote. The right to be treated as legal equals survived even though there was certainty that the emancipated slaves were, as people, inferior.

These examples illustrate that legal equality should not be based on who we are. In the same manner one cannot premise legal inequalities on race, religion or intelligence, legal equality is inappropriately based on moral merit. Yet, it is obvious that some people will have their legal status altered. There are people who have their wealth sanctioned, their liberty restricted and, in extreme cases, their lives extinguished. Our fidelity to equality is not so unassailable that we are unable to abridge the liberty of some individuals through the mechanisms of the law.

On what then, does legal equality depend? How and why do some lose their full gambit of rights? On what is the loss of legal equality based? What is needed is a constructive theory of punishment that addresses our preceding critiques. A theory that besides curing the empirical problems of punishing character protects a vision of fundamental equality between the punished and society. We need a theory of punishment that avoids concepts of permanent moral inferiority leading to the ossification of different castes.

If desert is not measured by character then to what do we turn to premise punishment? The alternative is to focus criminal punishment not on what an act reveals about the actor's character but on the act itself. In this section we will turn from our criticisms of Character theories of punishment and explore act-based theories instead. Though slightly out of order, we will note how act-based theories address the preceding critiques of character theory. We will note how Act theories of punishment cure the empirical indeterminacy of character theory. Further, Act theories of punishment short-circuit the tempting distinctions between good people and bad people. By focusing on acts we avoid ready assumptions that character is fixed in an Aristotelian manner. This undermines the permanent exclusion and caste creation of Character theories of punishment. Most importantly, act-based theories of punishment, by refusing to premise punishment on an actor's moral merit, preserve the value of equality before the law.

#### A. *Act Theory and Criminal Punishment*

The major alternative to Character theories of punishment are act-based theories. Instead of premising punishment on underlying

character—on who the criminal is—act theory instead focuses on the criminal action—what the offender does.<sup>155</sup>

The focus of punishment in this paradigm is to sanction the actor for having autonomously committed a wrong.<sup>156</sup> The modern incarnation of act theory can be found in the work of Hegel. Hegel limited the locus of criminal punishment to the criminal act.<sup>157</sup> The commission of a criminal act, an act that violates the legally protected interests of another, is the event that justifies the bringing to bear of state sanctions onto an individual.<sup>158</sup> The commission of the act logically and necessarily implied the state's right (and need) to punish the offender.<sup>159</sup> The criminal act, the willed coercion of another, compels the punishment.<sup>160</sup> As Hegel puts, colorfully, in a note, "the Eumenides sleep, but crime awakens them; thus the deed brings its own retribution with it."<sup>161</sup> The act, not what it reveals, grants the state moral authority to assert jurisdiction over a citizen's life.<sup>162</sup>

Likewise, Oliver Wendell Holmes, Jr. recognized that the state's right to punish was based on a criminal act. Holmes, in fact, deliberately eschewed the idea that law is interested in a citizen's underlying character. Holmes asserted that the law is not interested in how God will ultimately view each person. Instead, Holmes concluded that the theatre of the law is concerned with acts, external conduct that must be regulated.<sup>163</sup> To be sure, Holmes thought that community morals played a place in criminal punishment but limited their role to determining the borders of the hypothetical reasonable man.<sup>164</sup> These morals, he was sure to insist, are not the grounds on which punishment is determined:

[I]t is already manifest that liability to punishment cannot be finally and absolutely determined by considering the actual personal unworthiness of the criminal alone. . . [it] is often assumed, that the condition of a man's heart or conscience ought to be more

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<sup>155</sup> For a highly sophisticated view of choice theory, see generally MICHAEL MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (1993). For other modern views of choice theory, see JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 69-71; 191-92 (2d ed. 1995); Moore, *supra* note 83, at 31-40; and Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976).

<sup>156</sup> Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 727 (1992).

<sup>157</sup> G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Allen W. Wood trans., Cambridge University Press 1991) (1821).

<sup>158</sup> *Id.* at 60.

<sup>159</sup> *Id.* at 120.

<sup>160</sup> *Id.* at 128.

<sup>161</sup> *Id.* at 129.

<sup>162</sup> Sendor, *supra* note 149, at 121-22. Though Professor Sendor recognizes that the criminal act is the premise of State sanction he refers to it as a "threshold" event.

<sup>163</sup> OLIVER W. HOLMES, *THE COMMON LAW* 49 (1881).

<sup>164</sup> *Id.* at 50-51

considered in determining criminal than civil liability, it might almost be said that it is the very opposite of truth . . . .<sup>165</sup>

Instead it is the external act that is the focal point on which punishment is based. The measure of the underlying character could not be a consideration in the measure of criminal punishment:

It is only intended to point out that, when we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we . . . find the tests of liability are external, and independent of the degree of evil in the particular person's motives or intentions.<sup>166</sup>

Hegel and Holmes each realized that criminal punishment is an exercise of the state's political power. The use of that power demands justification. Importantly, it is a political, not a purely moral justification that is needed. In law, that one may be morally deserving of punishment does not suffice to ground the state's power to punish. The first inquiry in the liberal state concerns the state's very right to punish.

Where character is taken to be the basis of criminal sanction criminal law becomes proxy for punishment of one's immoral status. Where the law is primarily concerned with the judgment of an individual's virtue there is no built in reason not to punish for moral status alone. Again to assert that the law only sanction one's practical reasoning is to beg the question of why action is required to justify state punishment and prevent the punishment of immorality alone. In other areas, the law has recognized that the state must be restrained from doing so. State power cannot be justified on one's status (moral or otherwise) but rather is based on an act. Yet both law and scholarship have had difficulty coming to terms with the distinction between leveling punishment for acts as opposed to status. One clear example of this can be witnessed in the struggle to understand the *Robinson* doctrine, which attempts to clarify just this distinction.

The *Robinson* doctrine emerges from *Robinson v. California*.<sup>167</sup> In that case a Los Angeles police officer stopped Lawrence Robinson on the street. After noticing needle marks and other indicia of drug use the officer arrested Robinson pursuant to a California statute that criminalized the status of being a drug addict.<sup>168</sup> The Supreme Court reversed the conviction declaring it "cruel and unusual punishment" to directly criminalize Robinson's status.<sup>169</sup>

Though the Supreme Court in *Robinson* clearly struck down

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<sup>165</sup> *Id.* at 49-50.

<sup>166</sup> *Id.* at 50.

<sup>167</sup> 370 U.S. 660 (1962).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 667.

criminal punishment premised on a status alone, the Court itself, lower courts and commentators have experienced great difficulty in examining why this ought be true. The doctrine has been supported alternatively with the "status one cannot change," "involuntariness" of the status and the "pure status" rationales.<sup>170</sup>

The first two rationales, however, fail to lay a truly compelling foundation. That punishment ought not be invoked on someone because they occupy a status they cannot change or acquired the status involuntarily is plainly insufficient. While this thinking may coincide with moral intuition, voluntariness does not explain why state punishment for status is unacceptable.

Let us indulge in one last cinematic example. In the movie *Trainspotting*<sup>171</sup> a group of young heroin addicts decide to go clean. For the band it is an extraordinarily painful proposition. Another mate of theirs, though lacking their conviction, also decides to give up heroin merely to taunt the others with how easy it is for him. Though his friends experience tortuous withdrawal symptoms, for him forgoing the drug is a casual decision. Finally, when the group is overcome by their compulsion and return to the habit, he cheerfully joins, as casually as he quit.

If each member of the group were later imprisoned under the same statute invalidated in *Robinson*, clearly all of their convictions would be invalidated. Similarly, were it known that Lawrence Robinson began his drug habit knowing that he would become addicted, the doctrine ought still apply.<sup>172</sup> Though voluntariness may figure into moral calculations of blame, the question here is one of political justification.<sup>173</sup>

Despite agreeing with the prohibition on punishing status, many, and certainly the Court, maintain the belief that state retains the power to punish violations of drug laws.<sup>174</sup> In any case, few think that the prohibition on punishing status extends to exempting all acts that may stem from a status.<sup>175</sup> The Court's analysis clearly indicates that the

<sup>170</sup> Julliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J. L. & SOC. PROBS. 293 (1996).

<sup>171</sup> See *TRAINSPOTTING* (Miramax 1996).

<sup>172</sup> See *Robinson*, 370 U.S. at 687 (White, J., dissenting) (insinuating that the decision may well turn on the voluntariness of addiction).

<sup>173</sup> In the later *Powell* decision, Justice White points out the problem with prohibiting punishment of involuntary status but permitting the punishment of the acts they compel:

If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. . . [it] is like forbidding criminal conviction for being sick with the flu or epilepsy but permitting punishment for running a fever or having a convulsion.

*Powell v. Texas*, 392 U.S. 514, 548 (1968).

<sup>174</sup> *Robinson*, 370 U.S. at 664.

<sup>175</sup> Smith, *supra* note 170, at 330.

prohibition on punishing for status cannot be located in the voluntariness of the status.<sup>176</sup> Rather, the prohibition on punishing status is exactly conceptualized by the Court as grounded in the need for an act that justifies the state's political power.<sup>177</sup> The Court's language is explicit: "The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, had engaged in some behavior, which society has an interest in preventing . . ."<sup>178</sup>

Clearly, neither the voluntariness of the status chosen or the inability to remove oneself is sufficient rationale for the *Robinson* doctrine. The more compelling reason for prohibiting punishment under the *Robinson* doctrine is simply that the exercise of legal jurisdiction requires an act.<sup>179</sup> Criminal acts, committed within a state's jurisdiction, are the very basis on which the state's power is premised. Simply being a drug addict, voluntarily or not, without committing an act does not justify state punishment.

The question again centers on whether an act is appropriately punishable. The reason one cannot be punished for being Jewish, whether or not one voluntarily converted, is that being Jewish provides no basis for punishment. There is no action appropriate for state punishment. Likewise, the state cannot look to premise punishment of criminals on the very status of being immoral. Simply being immoral does not provide a basis on which the state's power may be premised. There is no Hegelian act which awakens the Eumenides. The state's authority is both premised and contained by the act. Choice theorists need not look underneath the criminal act to inquire further about the moral makeup of the criminal offender.<sup>180</sup>

Act-based theories of punishment are also critical in protecting the liberty of citizens from state interference.<sup>181</sup> Merely being a bad person is not enough to invite punishment. Nor is the general goal of social or moral education. Though punishment may be for an act that evidences poor character or flawed moral reasoning, state power is not premised on that character or flawed reasoning. The state needs a greater justification for imposing punishment.<sup>182</sup> Act theory preserves the

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<sup>176</sup> *Powell*, 392 U.S. at 532-33.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 533.

<sup>179</sup> To be sure, the act requirement here is not, as some have suggested, a shoring up of the requirement of proof. Smith, *supra* note 170, at 312-13.

<sup>180</sup> Pillsbury, *supra* note 156, at 719, 727.

<sup>181</sup> DRESSLER, *supra* note 155, at 70.

<sup>182</sup> *See id.* Hart also saw freely chosen acts as the locus of criminal punishment for different reasons. Hart felt focusing on choice was essential in preserving the fairness of law. Choice theory protected the capacity to control one's actions and predict the outcomes of those actions are important goods that the law must incorporate. When it is unclear if one can control becoming a bad person one is presumed, except in extraordinary cases to be able to conform their



delicate balance between the liberty of the citizen and the state's need to moderate action.<sup>183</sup> Imposing sanctions only for chosen acts evidences society's commitment to individual freedom.<sup>184</sup> By limiting the state's power to punish to the criminal acts, act-based theories reinstate the fundamental divide between political punishment and moral blame. By recognizing the irrelevance of moral character to criminal punishment, criminal law rediscovers the ideal of the liberal state.

### B. *Act-Based Liability the Repair of Empirical Uncertainty*

It is worth noting that act-based theories of crime respond to our previous critiques of character theory. act-based theories both eliminate the empirical uncertainty of Character theories and undermine the creation of permanent castes.

Primarily, an act basis of criminal punishment eliminates the empirical uncertainty previously explored. Legal punishment premised on the criminal action would no longer face the indeterminacy of inferring an actor's total moral character through her actions. As previously noted, the law has no accurate way of weighing a criminal actor's moral standing. Therefore the law properly restricts its concern to the more readily determined choices and conduct of offenders.<sup>185</sup>

By focusing on criminally liable autonomous choices the law recognizes the difficulty of truly measuring a person's character.<sup>186</sup> Further, profoundly difficult questions concerning the extent to which character can be thought to truly dictate action would be less critical.<sup>187</sup>

### C. *Criminal Acts: Good Guys/Bad Guys and the Destruction of Permanent Castes*

Moreover, focusing on criminal acts alone blurs the all too easy distinction between good guys and bad guys. Act theory, we noted, focuses only on the prohibited actions of the offender and does not

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own actions to the law. By punishing only for the exercise of that ability choice theory presents all with a fair chance to avoid criminal sanction. Punishing uncoerced choices serves the law's duty of preventing social harm while allowing individuals the maximum ability to control their own destinies. See also George Mousourakis, *Character, Choice and Criminal Responsibility*, 39 C. DE D. 51, 61-62 (1998).

<sup>183</sup> Sendor, *supra* note 149, at 120-21.

<sup>184</sup> DRESSLER, *supra* note 155, at 70.

<sup>185</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 860-61 (George Chase ed., 3d ed. 1905) (1765-69).

<sup>186</sup> DRESSLER, *supra* note 155, at 70.

<sup>187</sup> Lelling, *supra* note 85.

explore underlying moral character.<sup>188</sup> As a result, the law need not assume that the act is a result of or evidences bad character. Consequently, act theory sheds the notion that good people do only good and only bad people do bad things.<sup>189</sup>

Because we no longer have to assume that every criminal act is the result of bad character we are left with the unsettling truth that good people sometimes do bad things; that not all criminals are intrinsically different and bad people. The blurring of bright line heroes and villains recalls our original discussion of film noir. Like Fritz Lang's Professor Wanley, we realize that criminals are not so easily separated into "them" and "us."<sup>190</sup>

The lesson is illustrated by Moore's recounting of a real life murder case.<sup>191</sup> Richard Herren managed to overcome tremendous socio-economic obstacles growing up in East Los Angeles to become a Yale graduate student. There he fell for Bonnie Garland, an undergraduate, and became heavily committed to her and their relationship. After some time she sought to end the relationship gently and Richard felt misled and hurt by her behavior. One night when spending the weekend at her parents house, Richard killed Bonnie. Though he intended to commit suicide afterwards, he did not. As Moore points out, no matter Richard's generally good character, focusing on his choice leaves no doubt that he is culpable.<sup>192</sup>

Moore persuasively addresses the contention that Richard indeed had poor, even murderous character, that was merely hidden.<sup>193</sup> If every bad action, even in light of the Character theorist's more general view of character, simply reveals a latent defect then character theory again becomes a different label for choice theory.<sup>194</sup> Unless character is used to describe a broader "underlying moral character" or "settled disposition" of a person rather than attaching to any action the person

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<sup>188</sup> Pillsbury, *supra* note 156.

<sup>189</sup> This is the Aristotelian version of character earlier explored wherein character serves as the fundamental engine that drives peoples actions. See ARISTOTLE, *supra* note 28. See also Moore, *supra* note 83, at 47-48; Sendor, *supra* note 149, at 111-14; Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses, and the Model Penal Code*, 19 RUTGERS L.J. 671, 697 (1987).

<sup>190</sup> THE WOMAN IN THE WINDOW, *supra* note 10.

<sup>191</sup> The following recount can be found in Moore, *supra* note 83, at 52.

<sup>192</sup> *Id.* at 52-53. Alternative explanations that rely on character to erase responsibility prove unpersuasive. The metaphysical objection that it was not *really* Richard that killed Bonnie (the act was so out of character, the argument goes, it can be conceptualized as having been committed by somebody else) is, according to Moore, held hostage to a very problematic theory of personal identity. It cannot be that as persons we are only responsible for actions we like. Further, the radical conclusion that actions that reveal a different character truly reveal a different person, essentially a separate identity that shares the same body is non-viable in a system of criminal punishment.

<sup>193</sup> *Id.* at 53.

<sup>194</sup> *Id.*

actually commits character theory "collapses into choice theory."<sup>195</sup>

Premising criminal liability on acts leaves us with a more subtle, and in some ways tragic, world. We must reach the disturbing conclusion that we are faced with a young man who on the whole possessed good character but committed an atrocious act. We must face the fact, in the same way film noir insisted, that people of good character do and are responsible for awful things. The world, after all, is not made up simply of good guys and bad guys.

#### D. *The Act Requirement and the Destruction of Caste*

Earlier we noted how premising criminal punishment on concepts of bad character naturally leads to a fixed and permanent view of a criminal caste. Imagining every criminal as possessing an inherent immoral makeup drives us to permanently exclude the offender from society. It is not surprising then that limiting our focus to the criminal act leads us in the opposite direction. Punishing criminal offenders for their acts as opposed to who they are undermines the notion of the offender as an untouchable pariah. To punish for permanent immoral character is to refuse to engage with the offender; where one is irredeemable, conversation has little purpose. By contrast, punishing the criminal's act embodies a respect for the criminal's rational capacity.<sup>196</sup> In Hegelian terms the punishment responds to the will. The punishment respects the criminal's autonomy by holding him or her responsible.<sup>197</sup> The criminal has chosen and consented, by the criminal act, to incur the punishment of the state.<sup>198</sup> In this way, Hegel viewed the criminal as not merely deserving punishment but as having the right to be punished.<sup>199</sup>

By recognizing the offender's autonomous act the Hegelian focus on criminal acts undermines the separation between offender and society. In the words of Dubber, "Hegel . . . affirms the offender's membership in a community with all other members of society because the offender shares with them her rationality."<sup>200</sup> Recognizing the rationality of the offender and engaging with their autonomous choice brings to the fore the commonality between the judge and the ones judged.<sup>201</sup> Punishing the criminal act intimates that the offender is a

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 126.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 127.

<sup>199</sup> *Id.* at 126.

<sup>200</sup> Markus D. Dubber, *Crime and Punishment: Rediscovering Hegel's Theory of Crime and Punishment*, 92 MICH. L. REV. 1577, 1612-13 (1994).

<sup>201</sup> *Id.* at 1603.

person whose choices are worthy of respect and not simply some disgusting moral creature to be punished simply for being such. Again, Dubber points out the Hegelian focus on criminal acts addresses a modern society "which has come to deny its commonality with those of its members who have been accused or convicted of a crime."<sup>202</sup> In this sense punishment is used to reaffirm a common bond between the punishers and the punished.<sup>203</sup>

Concentrating punishment on criminal acts disassembles the notion of a fixed caste in another important manner. A criminal act lacks the element of permanence that leads to exclusion. Examining the Hegelian model illustrates why this is so. In the Hegelian dialectic, punishment is not only logically compelled by crime but serves to negate the original crime as well.<sup>204</sup> Punishment, Hegel makes clear, is that which cancels the original crime.<sup>205</sup> In this, punishment is unlike compensation.<sup>206</sup> Punishment renders the actual criminal act null and cancels its existence.<sup>207</sup>

This metaphysical sentiment is captured in popular moral intuitions when society focuses on the criminal act alone. Focus on acts leads us to discuss a criminal's right to "pay her debt to society."<sup>208</sup> The idea here echoes perfectly the Hegelian notion. Once the crime is punished the criminal, rather than being permanently tainted, is restored. Sendor elucidates the comparison between the character and the act-based concepts of criminal law.<sup>209</sup> After the crime has been punished, it ought not matter

"if the defendant appears to have a bad character for law abidingness . . . [he] should be free from state intervention . . . . The traditional metaphor used to account for this rule is that by completing his punishment . . . a defendant has 'paid his debt to society'. If so, the ledger has been cleared and the state has not authority to intervene in his life, to consider whether he still has bad character."<sup>210</sup>

Considering punishment the nullification of the criminal arms us with a powerful argument against the permanent exclusion and political disenfranchisement that follows from character views of criminal law.

Notice the contrast. In the Aristotelian "character" model consideration of bad character naturally leads to a concept of fixed and

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202 *Id.* at 1588.

203 *Id.* at 1580.

204 HEGEL, *supra* note 157, at 120-130.

205 *Id.*

206 *Id.* at 124.

207 *Id.* at 128.

208 Fletcher, *supra* note 32, at 1896.

209 Sendor, *supra* note 149, at 123-24.

210 *Id.* at 123.

permanent immoral character.<sup>211</sup> In the Hegelian "act" model, concentration on acts naturally leads to the idea of cancellation and nullification of the offender's act.<sup>212</sup> Punishment for acts undermines the impulse to create a permanent caste. After punishment the crime is canceled, the criminal restored.

## VI. STATE JUDGMENT AND THE MORALITY OF HATRED

Perhaps the preceding analysis misses the point entirely. In abstract philosophical analysis the case for act-centered retribution may be compelling. Translated into practice, however, it may be unattractive, or worse, miss one of the fundamental points of criminal law. After all, do we not expect the state to measure and prefer the actions of the law abiding to that of the criminal? Do we not want the state to level moral condemnation at the very people who attack, rape and murder innocents? Ought not the state evidence our moral contempt?

Besides its inherent plausibility, this position resonates with important positions outlined by Professors Kyron Huigens and John Gardner. Drawing on Aristotle, Huigens proposes that criminal law cannot properly function without rejecting the illegitimate ends and flawed practical reasoning of those who commit criminal acts.<sup>213</sup> In adjudicating a conflict between two citizens, the criminal law cannot defer the question of the good; that is, of the legitimacy of each actor's vision of the good. Inculpation then is necessarily an inquiry into the legitimacy of a criminal action and the moral soundness of that actor's reasoning.<sup>214</sup> This inquiry is, in turn, an inquiry into the actor's moral character.<sup>215</sup> Further, the demand that others exercise sound moral (indeed virtuous) reasoning is a necessary part of the political exercise which demands that each person conduct herself with due regard for the employment of rationality.<sup>216</sup> Engagement in this reasoning as it is reflected in the necessary enterprise of human politics and adjudication is in itself a necessary element in realizing the full worth of man's development, the full engagement of Aristotle's quality of human rationality, the *Ergon*.<sup>217</sup>

Huigens presents an elegant argument for the consideration and

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<sup>211</sup> See ARISTOTLE, *supra* note 28.

<sup>212</sup> See HEGEL, *supra* note 157.

<sup>213</sup> Huigens, *supra* note 26, at 1430, 1446-47.

<sup>214</sup> *Id.* at 1436-37.

<sup>215</sup> *Id.* at 1448-49.

<sup>216</sup> *Id.* at 1469.

<sup>217</sup> *Id.* at 1444-45.

assessment of virtuous moral character into the body politic in general and criminal law in particular. What he fails to properly weigh, however, are the special moral duties of the state which make illegitimate the particular form of inculcation and blameworthiness that are quite appropriately part of our personal moral assessments. Unlike private individuals, who must exercise their moral capacity in assessing and judging the moral fitness of those around them, the state owes each of its citizens a duty of equal respect. This duty of equal respect extends even to one who holds a shallow conception of the good or refuses to engage in the pursuit of their own greater realization. After all, one's lack of virtue may exist quite without abridging other's rights. Nor is the mere indeterminacy of one particular vision of the good a reply, for the singular pursuit of money, power or sex at the cost of all else must surely be recognized as a shallow conception of a fully realized human life. Further, were one to withdraw from the enterprise of constructing a fully realized life at all (deciding to spend one's life counting the number of bricks in Manhattan) we must again admit the paucity of some conceptions of the good. Still, where one's moral character is inferior to another's but where it does not result in abridging other's rights, a person may demand of the state equal respect for their own autonomously formed conception. This special duty of political morality restrains the state from inquiring into the full measure of one's character.

Huigens ignores that the moral good realized from the private endeavor to engage in political life may be importantly asymmetrical. The pursuit of and full development of one's human capacities may require the engagement in the enterprise of human politics. Further, though the state and society as a whole can only remain vital where the enterprise is pursued, the state may be restrained from requiring the engagement of this virtue. Still, if the state is to respect its duty of equality, it is restrained from imposing on a citizen even that version of engagement in the political enterprise through which that person's rationality is fully realized.

On the other hand, Gardner notes that straining to fit the criminal law into one of its classical philosophical rubrics ignores one of its basic rationales. Criminal law, Gardner posits, exists in large part to displace the unfettered violence that vengeful private individuals (and their family and friends, etc.) would seek if it did not exist.<sup>218</sup> The criminal law, if it is to quell the vendetta, it must replace with words, symbols and punishment the moral fire and anger citizens feel towards those who

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<sup>218</sup> John Gardner, *Crime: In Proportion and in Perspective*, in *FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH* 31-32 (Andrew Ashworth & Martin Wasik eds., 1998).

have wronged them.<sup>219</sup> The law itself must evidence moral punativeness in order to monopolize or surrogate private hatred. Replacing private hatred and moral condemnation is in large part the point of criminal law.<sup>220</sup>

Gardner recognizes the inherent tension in which the legal apparatus is placed. While the law must attempt to subsume the vendetta it cannot become identical with it. Criminal law must stop short of institutionalizing the hatred it seeks to replace. Unlike private individuals, who may justifiably hate those who have hurt them, the state owes a strong duty of humanity to all, including criminal offenders.<sup>221</sup> The state must stop short of vengeful excess and affirm the humanity of victim and offender alike. Nor can the state allow the offender to be cast away, becoming forever a pariah.<sup>222</sup>

The tension to at once symbolize private moral anger while heeding the state's political duty to treat each citizen with equal respect has become greater in recent times. As cruel and humiliating punishment has become removed from public view greater pressure has been put on the trial to become the symbolic rite of public scorn. This heavy symbolic burden, difficult at any time, has become almost impossible as the legitimizing rituals of law become increasingly disregarded.<sup>223</sup> As a result, the criminal law as a dam to private morality comes under strain from all sides.

In the face of this it is little wonder that we feel a collective impulse towards greater character condemnation not less. We harbor a private, justified moral anger towards criminal offenders. When the symbolism of the criminal trial seems unsatisfying we wish to inject more personalized moral outrage into our criminal sentences. Increasingly, we seek to capture our moral outrage of the criminal in supplemental sentences, isolating the offenders and casting them out of society.

Yet, the state is duty bound to resist clamoring for revenge. Private citizens may rightfully hate; the state may not. Private citizens may seek personal moral condemnation and revenge while the state, duty bound to respect each of its citizens equally, must not succumb to the call to condemn and marginalize the character of any, including offenders. To the extent the state departs from this and indulges in the public vengeance it fails to fulfill its duty to affirm the humanity of all citizens.<sup>224</sup> Though difficult, we are forced to realize that the state is

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<sup>219</sup> *Id.* at 33.

<sup>220</sup> *Id.* at 31.

<sup>221</sup> *Id.* at 48.

<sup>222</sup> *Id.* at 34-35.

<sup>223</sup> *Id.* at 50.

<sup>224</sup> *Id.* at 35, 51.

bound by duties of political morality and the justice the victims desire may not be the justice that the courts may provide.<sup>225</sup>

Lastly, our impulse to foster state-sponsored moral condemnation ought to be tempered by the terrific cost. Where the state sponsors the condemnation of an offender's moral character it collaborates in the creation of an immoral caste. Criminal offenders, as explored above, become forged into an image of permanent immorals, to be continuously shunned. When this image interacts with other stereotypes of race and class the danger becomes greater still. These are the dangers avoided by our adherence to the principles of equal respect for all.

#### CONCLUSION: THE LEGAL LANDSCAPE UNDER AN ACT REGIME

Over the course of this article we have explored the differences between legal concepts of punishment based on a criminal offender's underlying moral character and punishment based solely on unfettered choice of an offender. I have argued that it is wrong to view criminal punishment as based on the underlying character of the offender. Character-based theories are empirically uncertain, lead to the creation of moral castes and violate the principle of legal equality. By contrast, act-based theories of punishment avoid empirical uncertainty, undermine the concept of permanent immoral character and preserve the value of equality before the law.

To this point I have been concerned with how we view those we punish. The argument has remained mostly philosophical. The concern has been the intellectual flaws in character theory and the importance of protecting conceptual values and ideals of equality. Though these values are of the utmost importance it bears reminding that the way we imagine criminals has real world effects.

To conclude our consideration let us examine the real world effects of changing the way we view those we punish. This means exploring the changes that an act-based theory demands of us. Moving away from character theories of the law means erasing the legal penalties that are based upon and meant to reinforce the image of criminals as permanently stained.

The most dramatic of these legal sanctions is current growth of the "Three Strikes and Out" punishment regime. This regime entirely forgoes the deliberative processes of establishing punishment calibrated on the criminal's retributive desert.<sup>226</sup> The regime assumes that the appropriate retributivist reply to any three felonies is permanent

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<sup>225</sup> *Id.* at 49.

<sup>226</sup> Fletcher, *supra* note 32, at 1896.



incarceration. Yet, we know from the ever-growing anecdotes that not every person who commits three felonies deserves a lifetime in prison. Given the proliferation of offenses that fall under federal felony statutes this inference is unwarranted. Surely, the stories of offenders imprisoned on a bounced check as a third felony hardly qualify for life sentences. Most importantly, the very construction of the regime shows a refusal to even consider the individual desert of each offender. Abandoning character views of punishment means the law can no longer throw masses in prison premised on the view that they are irredeemably immoral people.

The permanent disenfranchisement of felons is yet another sanction that expresses the marginalization of those we punish. As we saw, arguments that imagine criminals as a threat to "the purity of the ballot box" are based in a view of the criminal as metaphysically contaminated.<sup>227</sup> Erasing this image undercuts the rationale and leaves little reason for felon disenfranchisement. Disenfranchisement then would be appropriate only for those crimes where the retributivist desert would call for permanent loss of voting rights.<sup>228</sup> The widespread use of political banishment merely as a sign of permanent condemnation dissolves when character is removed. Once the criminal has paid his debt to society, his voting rights, and with it the indication that he is "the political equal of every other," must be restored.<sup>229</sup>

Similarly, the collection of collateral sanctions that are markers of the permanent subjugation of ex-felons naturally fall from the legal landscape under an act paradigm of criminal punishment. Sanctions that deprive ex-felons of social and welfare benefits as well as exclude them from a vast segment of the workforce would all need to be re-examined in light of the specific retributivist desert of each act. It is improbable that many of these sanctions would withstand such scrutiny and impossible to think the wholesale imposition of them can be justified solely under a retributivist scheme. How, after all, could being denied the ability to borrow money for education be a proper punishment for a long ago robbery? Further, the permanent nature of these sanctions, driven by the impulse to systematically and permanently exclude ex-offenders from society can no longer be supported.

This is the challenge of premising criminal punishment on acts and not character. It is a difficult challenge. Being human, we are given to

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<sup>227</sup> *Id.* at 1899.

<sup>228</sup> One can imagine crimes where disenfranchisement fits the specific retributivist desert of the crime. In the same way repeated violations of the Motor Vehicle Code may warrant the revocation of a driver license so too repeated violations of, say, voting laws may compel revocation of a person's voting privileges.

<sup>229</sup> Hampton, *supra* note 43.

making moral judgments about others' character. We base a great deal of our personal affections, admiration and blame on these judgments. We harbor cravings for a simple world where there are good guys and bad guys; a world where we know that good people do good and that the bad are punished.

When we translate our personal blaming practices into the criminal law, however, things go horribly awry. We begin to assume that those who are punished are unifaceted bad people and that the awesome power of the state should, replicating the personal sphere, make them pay for being bad people. We ignore the critical difference between what is legitimate in personal moral judgment and political morality. We ignore the nagging truth that the state ought not permanently segregate and punish people because they are bad. When we premise punishment on character we give in to our thirst to get the bad guys. Though it is only too human, it quickly allows us to forget the common humanity of those we punish.