

## REVIEWS

### Human Rights and Criminal Punishment

David A.J. Richards†

*Punishment, Danger and Stigma: The Morality of Criminal Justice.* NIGEL WALKER. Barnes & Noble, Totowa, N.J., 1980. Pp. xi, 206. \$22.50.

The theory of criminal justice is the classic battleground between utilitarianism and natural rights, the two moral philosophies that have dominated modern Western thought.<sup>1</sup> Their antagonistic approaches are epitomized in the works of Jeremy Bentham and Immanuel Kant. Bentham argued that criminal law can only be just if it satisfies the utilitarian principle of maximizing the aggregate pleasure of all individuals governed by it.<sup>2</sup> In contrast, Kant measured criminal justice not by the teleological aim of maximizing goods, but by the nonteleological—the deontological—criterion of whether it sets forth standards that free and rational persons would, as equals, impose on themselves.<sup>3</sup>

The antagonism of these views is manifested in several ways. Bentham criticized the extension of the criminal law to govern activities that do not harm others, arguing that punishment of victimless crimes secures no good and thus violates the principle of utilitarianism.<sup>4</sup> In contrast, Kant defended the use of the criminal

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† Professor of Law, New York University.

<sup>1</sup> See Richards, *Rights, Utility and Crime*, in 3 *CRIME & JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 247 (M. Tonry & N. Morris eds. 1981), where the themes summarized here are developed fully.

<sup>2</sup> J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (2d ed. London 1823) (1st ed. London 1789).

<sup>3</sup> I. KANT, *THE METAPHYSICAL PRINCIPLES OF JUSTICE* (J. Ladd trans. 1965).

<sup>4</sup> Bentham, *Offences Against One's Self: Paederasty* (pt. 1), 3 *J. HOMOSEXUALITY* 389 (1978); *id.* (pt. 2), 4 *J. HOMOSEXUALITY* 91 (1978). John Stuart Mill shared Bentham's antipathy to punishment of victimless crimes. See J.S. MILL, *ON LIBERTY* 75-118 (A. Castell ed. 1947).

law to uphold moral values.<sup>5</sup> Furthermore, although both Bentham and Kant supported the criminal law's classic structural doctrines of personal culpability, legality, and proportionality, Kant based his support on the moral value of treating persons as autonomous ends,<sup>6</sup> while Bentham regarded these doctrines as means for maximizing deterrence.<sup>7</sup> Moreover, while Bentham viewed deterrence as a cornerstone of punishment,<sup>8</sup> Kant refused to acknowledge its role in a system of just punishment, emphasizing instead in-kind equivalence—the death penalty for murder, for example.<sup>9</sup> Finally, Kant acknowledged no room for discretion in punishment; his equivalences were mandatory, intended to ensure equal treatment without caprice.<sup>10</sup> In contrast, Bentham emphasized the importance of discretion in reforming the individual. His works gave a secular rationale for the emerging institution of prisons.<sup>11</sup>

The nineteenth century debate over criminal justice can fairly be characterized, I think, in terms of the alignment of the defenders of existing institutions with Kantian deontology<sup>12</sup> and of the advocates of liberal reform with utilitarianism. Although John Stuart Mill combined utilitarianism with a remarkable sensitivity to Kantian values of autonomy in his classic argument for decriminalization,<sup>13</sup> attempts to reconcile natural rights with utilitarianism were a rarity as long as utilitarianism remained the dominant moral paradigm by which liberal reform articulated its claims.

In one of the most important contributions to the philosophy of punishment in this century, H.L.A. Hart argued that a sound theory of criminal justice requires the combination of elements from both natural rights and utilitarianism.<sup>14</sup> Hart, however,

<sup>5</sup> I. KANT, LECTURES ON ETHICS 162-71 (L. Infield trans. 1963).

<sup>6</sup> I. KANT, *supra* note 3, at 35.

<sup>7</sup> J. BENTHAM, *supra* note 2, at 170-77. For an exposition and incisive critique of Bentham's argument, see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 17-24 (1968).

<sup>8</sup> See J. BENTHAM, *supra* note 2, at 170-77.

<sup>9</sup> I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101-07 (J. Ladd trans. 1965).

<sup>10</sup> *Id.* at 101-04, 107-08.

<sup>11</sup> See 1 J. BENTHAM, WORKS (J. Bowring ed. Edinburgh 1843). Bentham's panopticon was one statement of the ideal form of prisons. See M. FOUCAULT, DISCIPLINE & PUNISHMENT 195-228 (A. Sheridan trans. 1979). See generally D. ROTHMAN, CONSCIENCE & CONVENIENCE 43-201 (1980) [hereinafter cited as CONSCIENCE]; D. ROTHMAN, THE DISCOVERY OF THE ASYLUM 79-108 (1971) [hereinafter cited as DISCOVERY].

<sup>12</sup> See, e.g., F. BRADLEY, ETHICAL STUDIES 58-126, 160-206 (2d ed. 1962); J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 135-78 (R. White ed. 1967); J. STEPHEN, *Punishment and Public Morality*, in 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 90-93 (1883).

<sup>13</sup> J.S. MILL, *supra* note 4, at 55-74.

<sup>14</sup> H.L.A. HART, *supra* note 7.

worked within Mill's framework; in contrast, John Rawls in *A Theory of Justice* decisively shook the previously unchallenged dominance of the utilitarian paradigm itself.<sup>15</sup> Rawls's book is an anti-utilitarian attempt to reconstruct Kant's moral philosophy to provide a better structure for a liberal theory of political, social, and economic justice. His book fostered what Hart has called a major shift in social thought from utilitarianism to a paradigm of rights.<sup>16</sup> Although post-Rawlsian rights theorists disagree among themselves in defining an adequate theory of rights,<sup>17</sup> they are united in their attempt to articulate a rights-based alternative to utilitarianism and to elaborate its implications for practical conceptions of just institutions.

Although Rawls does not focus on criminal justice, rights theorists naturally have extended their inquiry to the criminal law.<sup>18</sup> The traditional antagonism between utilitarianism and natural rights over criminal justice must now be reconceived. The reconceptions are illustrated by reference to the four disputes between Bentham and Kant noted above.

First, it no longer appears inevitable that arguments for decriminalization must be conducted in efficiency-based, utilitarian terms. Rather, neo-Kantian arguments of respect for personal autonomy have been deployed to question Kant's own often unreflective moral casuistry and to argue that many forms of criminalization violate human rights.<sup>19</sup> Second, Hart's argument that utilitarianism cannot account for the importance of structural principles of just punishment has been reinforced by rights-based considerations of respect for personal freedom.<sup>20</sup> Third, recent neo-

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<sup>15</sup> J. RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>16</sup> Hart, *Between Utility and Rights*, in *THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAIAH BERLIN* 77-98 (A. Ryan ed. 1979).

<sup>17</sup> See, e.g., A. GEWIRTH, *REASON AND MORALITY* 63-103 (1978); R. NOZICK, *ANARCHY, STATE AND UTOPIA* 26-53 (1974).

<sup>18</sup> See, e.g., G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

<sup>19</sup> See, e.g., Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979) [hereinafter cited as *Commercial Sex*]; Richards, *Constitutional Privacy, the Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327 (1981); Richards, *Drug Use and the Rights of the Person: A Moral Argument for the Decriminalization of Certain Forms of Drug Use*, 33 RUTGERS L. REV. 607 (1981); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979).

<sup>20</sup> See generally Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979). Compare G. FLETCHER, *supra* note 18, at 296, 352.

Kantian thought has parted company with Kant by accepting the relevance of general deterrence considerations in assessing just punishment, thereby embracing the utilitarian concern for assessing the propriety of sanctions in terms of their effectiveness.<sup>21</sup>

Finally, neo-Kantian theorists recently have given a striking reinterpretation to Kant's attack on discretion and his insistence on in-kind, equivalent punishments. Amplifying Hart's criticisms of the role of individual therapy in criminal justice,<sup>22</sup> they have challenged the morality of "reforming" individuals and the abuses of discretion in sentencing, probation, and parole that have resulted in attempting to give expression to the reform objective.<sup>23</sup> Although these critics do not embrace Kant's conception of commensurate punishments, they argue that the therapeutic objective and the discretion it demands do violence to the fundamental values of proportionality and evenhandedness.<sup>24</sup>

In *Punishment, Danger and Stigma*,<sup>25</sup> Nigel Walker assesses the proper goals of criminal justice both in terms of philosophical theory and by consulting the best available empirical evidence connecting theory to results. Walker, an English criminologist, writes skeptically of what he calls the "rhetorical,"<sup>26</sup> inflated, and imprecise claims made by the new moralists who, in the ways suggested above, attempt to introduce neo-Kantian moralism into the assessment of criminal justice. His arguments are always intelligent, and the range of his review of the analytic alternatives will refresh any serious student's reflections on the purposes of criminal justice. Nevertheless, Walker is unconvincing in his attempts to refute the claims he regards as rhetorical. The most serious points of difficulty arise in his accounts of decriminalization, retribution, individual reform, protection, and the rights-based arguments regarding prisoners' rights.

## I. DECRIMINALIZATION

Walker's discussion of decriminalization is grounded on the

<sup>21</sup> See generally N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); A. VON HIRSCH, *DOING JUSTICE* (1976).

<sup>22</sup> H.L.A. HART, *supra* note 7, at 158-85.

<sup>23</sup> M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 3-49 (1973); N. MORRIS, *supra* note 21, at 28-57; A. VON HIRSCH, *supra* note 21, at 98-140.

<sup>24</sup> N. MORRIS, *supra* note 21, at 1-57; A. VON HIRSCH, *supra* note 21, at 11-18, 98-140.

<sup>25</sup> N. WALKER, *PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE* (1980).

<sup>26</sup> Walker repeatedly uses this word. See *id.* at 99, 100, 113, 166, 183, 185.

premise that Mill's arguments regarding the proper scope of criminal sanctions are indefensible and that any alternative theory of the moral grounds for criminal sanctions cannot be sustained.<sup>27</sup> He consequently opts for a functionalist view of the social order similar to that defended by Lord Devlin.<sup>28</sup> This argument is stronger, Walker argues, than is usually supposed and is not necessarily tied to Devlin's unfortunate use of it in defending the criminalization of consensual homosexuality—a use that Walker deplors.<sup>29</sup> Neither of Walker's premises can be sustained, however, and his functionalist theory rests on weak ground.

Mill's principle of liberty states, *inter alia*, that criminal sanctions are only appropriate where conduct inflicts harm on other persons,<sup>30</sup> and that sanctions are not appropriate solely to protect a mature adult from harms to self<sup>31</sup> or to vindicate feelings of offense against unpopular conduct.<sup>32</sup> Walker suggests that Mill's requirement of harm to others is too indeterminate,<sup>33</sup> but his own recitation of various forms of decriminalization justified on that basis<sup>34</sup> demonstrates that its implications can be understood and implemented. It is, of course, notoriously difficult to square Mill's principle of liberty with his doctrinal utilitarianism. If recent neo-Kantian theory can show that liberty is achieved not through utilitarianism but through a rights-based approach, it may also clarify not only the connections of liberty to concepts of just punishment, but the sense of basic harms to the person that liberty, correctly interpreted, contemplates.<sup>35</sup> Walker concludes that Mill's argument has "emotional appeal" in excess of "the strength of [its] reasoning,"<sup>36</sup> but he fails to recognize the remarkable contribution that Mill's essay made to liberal thought—that the identification of wrongs to the individual is frequently shaped by an unreflective public opinion whose moral views lack rational basis. Mill is surely correct that democracy's respect for the individual requires protec-

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<sup>27</sup> *Id.* at 7-10.

<sup>28</sup> See P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

<sup>29</sup> N. WALKER, *supra* note 25, at 18.

<sup>30</sup> J.S. MILL, *supra* note 4, at 9.

<sup>31</sup> *Id.* at 9-10.

<sup>32</sup> *Id.* at 90-91.

<sup>33</sup> N. WALKER, *supra* note 25, at 8.

<sup>34</sup> For example, suicide, euthanasia, gambling, drinking, drug use, abortion, and private homosexuality. *Id.*

<sup>35</sup> See generally D. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION* (1982).

<sup>36</sup> N. WALKER, *supra* note 25, at 9.

tion of individual rights against sometimes tyrannical majorities,<sup>37</sup> and his principles for limiting criminalization are at the least a powerful first approximation of the kinds of constraints for which this respect calls. Subsequent writers have struggled to give these constraints a more precise and workable definition,<sup>38</sup> a process that continues in the work of recent rights theorists.<sup>39</sup> These attempts to provide a stronger basis for Mill's argument suggest, if anything, the enormous intellectual power of his vision.

Walker also questions Mill's refusal to support criminalization of self-inflicted harms.<sup>40</sup> In particular, he disputes Mill's argument<sup>41</sup> that the remedy for self-destructive behavior lies not with the criminal law, but with early forms of compulsory education that can prepare individuals to take charge of their lives. The argument is, Walker claims, "utopian, perfectionist and penologically out-of-date."<sup>42</sup> To be sure, Mill's radical antipaternalism has been questioned even by such liberals as Hart<sup>43</sup> who are otherwise sympathetic to his position. Yet even if Mill's extreme form of anti-paternalism cannot be sustained, there remains merit in the argument that paternalistic justifications for criminalization should be regarded with moral skepticism when their underlying perceptions appear to reflect not a fair-minded assessment of the rational structure of an individual's life, but moral assumptions that cannot reasonably and independently be sustained.<sup>44</sup> Mill's suggestion that it is the task of liberalism to encourage forms of rational independence so that people may choose for themselves among pluralistic conceptions of the good life<sup>45</sup> is not grounded on utopianism, but on minimal respect for the individual. It is not perfectionist, but reflective of fair-minded toleration for the diverse ways people may structure their lives. It is not "penologically out-of-date," but, if anything, more consistent than Walker's views both with the modern therapeutic emphasis on the need for voluntary submission to behavioral change and with the increasingly recognized evil

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<sup>37</sup> J.S. MILL, *supra* note 4, at 1-14.

<sup>38</sup> See, e.g., H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963).

<sup>39</sup> See the works cited in notes 18-19 *supra*.

<sup>40</sup> N. WALKER, *supra* note 25, at 10.

<sup>41</sup> J.S. MILL, *supra* note 4, at 106-10.

<sup>42</sup> N. WALKER, *supra* note 25, at 10.

<sup>43</sup> H.L.A. HART, *supra* note 38, at 30-34.

<sup>44</sup> See, e.g., Richards, *Commercial Sex*, *supra* note 19, at 1263-71.

<sup>45</sup> J.S. MILL, *supra* note 4, at 55-74. Cf. Richards, *Human Rights and Moral Ideals: An Essay on the Moral Theory of Liberalism*, 5 *SOC. THEORY & PRAC.* 461 (1980).

of compulsory therapy based on moral condemnation.<sup>46</sup>

Walker's other premise, that the criminal law does not rest on moral enforcement,<sup>47</sup> is no better sustained. The claim that something is not properly criminal just because it is immoral does not contradict the more modest argument that the important institutions of the criminal law associated with condemnatory stigma (namely prisons) are used properly only where the conduct in question is morally wrong. Walker assumes that enforcement of "the protection of health, the collection of revenue and the defense of the realm"<sup>48</sup> through criminal sanctions rests on a functionalist rather than a moral basis, but he fails to recognize that principles of justice, which these institutions reflect, are moral principles.

The problems with the functionalist theory are well-rehearsed in Hart's eloquent response<sup>49</sup> to Lord Devlin's invocation of a similar theory in criticizing the Wolfenden Report's recommendation to decriminalize consensual adult homosexuality.<sup>50</sup> Functionalism views the criminal law as the means of enforcing the values and practices necessary for the stable preservation and evolution of a society. Devlin's motive is to weave certain moral premises so deeply into the fabric of society that any change would treasonably destroy it.<sup>51</sup> Walker's motive is positivistic. He aspires to a value-free theory of the criminal law and argues that the functionalist account, which is not wedded to *a priori* conceptions of moral values, fits this purpose better than the substantive moral accounts of Mill or recent neo-Kantian moralists.<sup>52</sup> Yet his emphasis on smooth social functioning and assimilation of the individual to society fails to consider the complexity of social change and, most fundamentally, begs the central question of whether and to what extent an existing or evolving society is morally just.<sup>53</sup>

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<sup>46</sup> See MORRIS, *supra* note 24.

<sup>47</sup> N. WALKER, *supra* note 25, at 18.

<sup>48</sup> *Id.* at 19.

<sup>49</sup> H.L.A. HART, *supra* note 38, at 16-17; Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967).

<sup>50</sup> COMMISSION ON HOMOSEXUAL OFFENCES AND PROSTITUTION, REPORT OF THE COMMISSION ON HOMOSEXUAL OFFENCES AND PROSTITUTION, CMD. No. 247 (1957) (Wolfenden Report). These recommendations were enacted by Parliament in 1967. See Sexual Offences Act, 1967, ch. 60.

<sup>51</sup> P. DEVLIN, *supra* note 28, at 12-14. Of course, Millian tolerance also could be identified as a basic English value, so that intolerance itself might be denominated treasonable.

<sup>52</sup> N. WALKER, *supra* note 25, at 20-21.

<sup>53</sup> In a remarkable passage, Walker points to the decision by colonial administrators in Africa to prohibit witchcraft as an example of the moral concerns implicated by social engineering. Criminalization of witchcraft raises complex issues of the balance between respect

## II. RETRIBUTION

Walker discusses the role of stigma in the criminal law in the context of retributive arguments.<sup>54</sup> He identifies three different interpretations of retribution. Punishers believe in punishment solely because it is deserved; reducers believe in distributive constraints on just punishment, but view retribution as a utilitarian tool to reduce criminal behavior; and denouncers believe that punishment makes an important statement to the offender and society.<sup>55</sup> Walker associates punishers with the Kantian ideal of mandatory penalties, although he concedes that they do not necessarily espouse Kantian in-kind commensurability.<sup>56</sup> Denouncers, he argues, are either crypto-reducers—whose aim is to educate the public not to be criminals—or crypto-punishers—whose aim is desert, not only education.<sup>57</sup>

These distinctions are useful, but they fail to address a crucial theme in much retributive thought: the moral foundations of the substantive criminal law. In addition to ignoring the principles of just distribution of criminal sanctions, the distinctions fail to identify the appropriate grounds for punishment. The only such grounds are violations of minimal moral standards of decency respecting individual rights to integrity, security, and justice—rights so basic that they are properly enforced through coercion if necessary.<sup>58</sup> Some denouncers, to use Walker's label, have correctly described the criminal law and its ceremonies as symbolic vindicators of these moral standards.<sup>59</sup>

This account demonstrates something Walker leaves unclear: the importance for denouncers of the publicity of the criminal sanction. Because the criminal law is that aspect of an organized and developed legal system whose moral object is a publicly known structure of values based on respect for persons, its ceremonies and sanctions must publicly express these values.

At this point, denouncers may part company with Walker's punishers, for a notion of mandatory desert as an end in itself

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for indigenous cultures and the need to change society; speaking in terms of "justified modalities" of social change, Walker concludes the move was unjust. *Id.* at 21.

<sup>54</sup> He discusses the issue again in an excellent chapter on forms of unjust stigma inflicted on criminals in excess of their official penalties. *Id.* at 142-63.

<sup>55</sup> *Id.* at 25-30.

<sup>56</sup> *Id.* at 38.

<sup>57</sup> *Id.* at 32-37.

<sup>58</sup> See generally Richards, *supra* note 20.

<sup>59</sup> N. WALKER, *supra* note 25, at 30.

plays no more necessary a role in this conception than do Kantian equivalences. For the denouncer described above, the point of criminal sanctions is to express and uphold public standards of decency, but the question of when and what sanctions are thus effective will depend on factual issues that cannot be decided *a priori*.<sup>60</sup>

Nonetheless, certain constraints on general forms of criminal sanctions follow from this perspective. First, because sanctions must reflect the gravity of offenses and the culpability of offenders, they must be proportioned among themselves to reflect these underlying moral judgments. Second, substantive constraints must be imposed on the upper end of the spectrum of sanctions to limit the severity of sanctions grossly incommensurate either in general<sup>61</sup> or in particular;<sup>62</sup> at the lower end, sanctions cannot be so trivial that they communicate no sense of the underlying wrong.<sup>63</sup> These constraints of proportionality and commensurability, however, leave a broad area for empirical judgments about the effectiveness of the sanctions themselves.

Walker would characterize this form of denunciation as crypto-reduction, but it is a different kind of reduction than any he describes. Its focus is not open-ended utilitarianism, with its tendency to a manipulative conception of individual reform, but the effective expression through criminal law of a determinate set of basic moral principles of decency. This view would include Walker's conception of deterrence, which encompasses the effect of threats in getting people to act in certain ways,<sup>64</sup> but it also would embrace a practical conception of moral responsibility and individual rights.<sup>65</sup>

### III. REFORMING THE INDIVIDUAL

Recent rights theorists have criticized the role of "individual reform" in utilitarian approaches to criminal justice.<sup>66</sup> Individual reform is an ambiguous idea. In its traditional sense it may be interpreted as the goal of bringing a criminal to a remorseful propensity to make amends and change his life. In its modern sense it may be

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<sup>60</sup> *Id.* at 38.

<sup>61</sup> Torture is an example.

<sup>62</sup> An example is severe penalties for infliction of a minor harm.

<sup>63</sup> Richards, *supra* note 20, at 1418.

<sup>64</sup> N. WALKER, *supra* note 25, at 68.

<sup>65</sup> It is unclear that prisons are the inevitable or best means for realizing this latter goal of criminal justice. See text and notes at notes 79-86 *infra*.

<sup>66</sup> N. MORRIS, *supra* note 21, at 1-57; A. VON HIRSCH, *supra* note 21, at 11-18.

defined as therapeutic treatment directed against a criminal's mal-adjustive tendencies. Rights advocates argue that individual reform not only does not work, but that it violates the human rights of prisoners in a way that reformers' utilitarian ideology prevents them from respecting.

Walker responds that these denunciations of the reform goal are overstated. He argues that the ineffectiveness of such treatment efforts in the past should not prejudice us against continued experimentation and that moral arguments of inhumanity overgeneralize from limited instances of indecent treatment. Moreover, he asserts that the elimination of rehabilitation as a penal goal would undesirably change the quality of life in prisons by thwarting the ambitions of prison officials and the hopes of prisoners.<sup>67</sup>

Walker's defense of therapeutic reform, however, shows little understanding of the criticisms leveled at it, reflecting, I believe, his more fundamental failure to give proper weight to the rights-based argument that the criminal justice system should function as an expression of respect for individual rights and responsibility rather than as a mode of functionalist integration. The premise of the rights conception is that to be just, the criminal law should punish only those individuals who are responsible and who culpably violate the rights of others; presumably, criminal justice should be designed to sting the conscience of the wrongdoer to a sense of personal guilt. Nonvoluntary therapy is inconsistent with this conception of just punishment, because such therapy assumes that the prisoner is not a responsible agent. The therapy ideal degrades the prisoner in a way that punishment does not, for it assumes that he lacks the capacities of choice and deliberation sufficient to decide for himself whether therapy is called for—as if criminality always bespeaks rational incapacity. If this were so, punishment itself would be unjust; because it is not, a prisoner's personal autonomy must be respected.<sup>68</sup>

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<sup>67</sup> N. WALKER, *supra* note 25, at 46-64.

<sup>68</sup> It is important to recall Hart's arguments against Lady Wootton's proposals for eliminating the requirement of responsibility as a condition for punishment. Hart argued that such a change would undermine the basic moral distinctions that limit state powers in a fashion consistent with respect for personal responsibility. H.L.A. HART, *supra* note 7, at 158-209. Recent arguments against therapeutic reform reasonably have extended this concern to the prison context and have questioned the morality of assumptions that prisoners are rationally incapacitated, noting that prisoners require even greater protections against abusive state power. See also text and notes at notes 78-86 *infra*.

Walker's invocation of the model of parental authority over children is striking,<sup>69</sup> for it analogizes children's lack of developed rational independence to the case of convicted criminals, even though the premise of criminal treatment is precisely a judgment of the criminal's adult responsibility and culpability. Perhaps there is some connection between the two contexts in the sense that some criminals undoubtedly have not been accorded the same social and economic opportunities as other persons. To rectify this injustice, work opportunities, retraining, and even voluntary therapy might be accorded to such persons. To be just, however, all such programs must honor the rational dignity of criminals as persons.

#### IV. PROTECTION

Walker's discussion of protection follows his excellent chapter on deterrence, which argues that deterrence is better achieved through certainty of punishment than through severity of sentence.<sup>70</sup> Although deterrence thus may be advanced through shorter sentences, Walker argues that lengthy detention may still be justified by the need to protect society from the probability that a given criminal will engage in dangerous conduct upon release.<sup>71</sup> He concedes that evidence of future dangerousness is notoriously bad, and he is not insensitive to the problem of false positives—the substantial number of individuals predicted to be more likely than others to repeat, who in fact will not repeat.<sup>72</sup> Yet he resists the claim that the likelihood of such mistakes is a moral wrong.<sup>73</sup>

Once again, Walker is skeptical of the rights-based attack on protection as a ground for punishment. That attack is grounded on the notion of proportionality: sanctions must be graded among themselves in a way that reflects the underlying moral gravities of offenses and the culpabilities of offenders. Two criminals who have the same culpability and who have committed the same offense should receive roughly similar sentences.<sup>74</sup> Protection-based punishment violates proportionality by imposing longer sentences on

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<sup>69</sup> N. WALKER, *supra* note 25, at 58.

<sup>70</sup> *Id.* at 65-87.

<sup>71</sup> *Id.* at 93.

<sup>72</sup> *Id.* at 91-101. See also N. MORRIS, *supra* note 21, at 62-73.

<sup>73</sup> N. WALKER, *supra* note 25, at 98-99.

<sup>74</sup> One relevant ground for distinctions in sentencing might be differing needs for general deterrence, demonstrated by a rising crime rate, for example.

the repeat offender than on the first-time offender, even though there is no difference in gravity of offense or culpability between them. For what is the repeat offender being punished? If for his past act, the punishment exceeds the just measure appropriate for that act. If for his most recent act, he is punished for something he already has been punished for.

There is a moral answer, not considered by Walker, to this rights-based argument. The fact of multiple recidivism itself indicates greater culpability, and imposition of more severe punishment for multiple repetition therefore may fall within an appropriately expanded moral measure of culpability.<sup>75</sup> Even if this argument is sound, however—and some moral theorists doubt that it is<sup>76</sup>—it will not give Walker the kind of flexibility that he appears to want, for it justifies not an indefinite detention commensurate with predictions of dangerousness, but only an increased sentence more likely to deter repeat offenders and to communicate society's underlying judgment of greater culpability.

Although Walker does not deal adequately with the moral objections to his defense of protection, his practical proposals nevertheless are phrased sensitively in ways that might satisfy some rights advocates. For example, he recommends that any prolongation of detention resting solely on grounds of protection calls for some form of supervision less onerous than prisons.<sup>77</sup>

## V. PRISONERS' RIGHTS

Walker's chapter on "Righting" is philosophically the weakest part of his book. He writes as a Benthamite skeptic about rights in a way that shows no serious attempt to deal with—let alone acknowledge—the rebirth of antiutilitarian theories of rights. After Rawls, it simply will not do to dismiss all rights-based arguments as "rhetorical," especially when, as Walker concedes,<sup>78</sup> such arguments have been instrumental in effecting some desirable and humane social changes. Walker's attempt to deal with prisoners' rights through the idea of forfeiture—that is, the rights to which a criminal by virtue of his criminality has no just claim<sup>79</sup>—ignores the question of the scope of that forfeiture.

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<sup>75</sup> See A. VON HIRSCH, *supra* note 21, at 84-88.

<sup>76</sup> See, e.g., G. FLETCHER, *supra* note 18, at 460-66.

<sup>77</sup> N. WALKER, *supra* note 25, at 112.

<sup>78</sup> *Id.* at 165.

<sup>79</sup> *Id.* at 172-73.

The current design of prisons is inconsistent with human rights. There is no reason for incarceration to require the total deprivation of privacy rights, free speech, meaningful work, and personal security; there is no justification for subjecting prisoners to total official control with no due process safeguards against the inevitable temptations to abuse that such total control invites. Any just concern for moral reform of the individual is served poorly by subjecting him to an education in despotism and the arts of manipulation. As moral individuals, criminals retain all rights not justly forfeited, including the right to a dignified punishment. To the extent that the shocking conditions of prison life cannot be justified by appropriate principles of just punishment, they exceed any justifiable definition of rights forfeiture.

It is natural to suppose that the prison was the morally appropriate solution to the barbarities of European punishments criticized by Enlightenment thinkers, and it is also natural to believe that these thinkers were in substantial agreement about its primacy as the humane form of sanction. But this was not in fact so. Prisons played little role in Beccaria's work<sup>80</sup> and were, of course, foreign to Kant's theory of just punishment.<sup>81</sup> There is a remarkable, but not commonly observed, gap between the human rights metaphors of Enlightenment thought and the role played by prisons in that thought. These institutions, as Foucault observed, were designed not for the dignified punishment of free persons, but rather for complete isolation, surveillance, and manipulative control.<sup>82</sup> If prisons arose under the impetus of religious conceptions of inducing penitence by radical isolation,<sup>83</sup> they received their secular justification not from a rights perspective but from a moral perspective that regarded rights as nonsense—namely, Bentham's utilitarianism.<sup>84</sup>

Prisons play the predominant institutional role in utilitarianism, but not in rights theory. They became for Benthamites the natural expression of the managerial and manipulative impulses of utilitarian panopticism.<sup>85</sup> What could be more natural? If one, like

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<sup>80</sup> See C. BECCARIA, *ON CRIMES AND PUNISHMENTS* (H. Paolucci trans. 1963).

<sup>81</sup> I. KANT, *supra* note 3, at 99-107. Foucault observed that Enlightenment reformers were concerned in general with finding natural forms of criminal sanctions and did not focus on imprisonment as such. M. FOUCAULT, *supra* note 11, at 104-20.

<sup>82</sup> M. FOUCAULT, *supra* note 11, at 135-308.

<sup>83</sup> *Id.* at 122-23; D. ROTHMAN, *DISCOVERY*, *supra* note 11, at 82-85.

<sup>84</sup> See M. FOUCAULT, *supra* note 11, at 195-228.

<sup>85</sup> *Id.* Foucault summarized the development of prisons as "a history of the utilitarian

Bentham, does not believe people have basic rights and identifies criminals as a class of persons unable to conform their conduct to utilitarian requirements, the goal of criminal justice is to redesign those individuals. Thus they must be placed in an isolation regarded as painful and manipulated so that they may be rendered socially functional. Since the American Progressive Era, the metaphor of control and individual reform has become increasingly medical: criminals are sick, and their treatment and cure must vary accordingly.<sup>86</sup> This in turn explains the reliance on discretion in sentencing, probation, and parole.

If human rights theorists have begun recently to question many of these assumptions, perhaps in time they will begin to question the more basic presuppositions of American criminal justice that underlie not only the design of prisons but also the decision to make prisons the standard criminal sanction. If the moral vocabulary of rights becomes the vehicle for such a reassessment, this should not be surprising, for prisons are neither the preferred nor the inevitable consequence of a human rights perspective on criminal justice.

#### CONCLUSION

*Punishment, Danger and Stigma* is the work of a humane skeptic, and Walker's intelligent distinctions are always rewarding. I have omitted mention of his excellent discussions of deterrence, of mitigating and aggravating factors in sentencing policy, and of the role of stigma. Walker's interdisciplinary combination of philosophical argument with empirical research is unusual and very well done, and the book is necessary reading for every serious student of criminal justice.

I object, however, to the weaknesses in its moral arguments: its unreflective utilitarianism, its frequently facile willingness to accept the functionalist approach, and its repeated characterization of rights-based claims as "rhetorical." Moral claims, I have argued, are no less reasonable, and are often more so, than Walker's own.

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rationalization of detail in moral accountability and political control." *Id.* at 139.

<sup>86</sup> See D. ROTHMAN, *CONSCIENCE*, *supra* note 11, at 59-60, 68, 288-89. Rothman notes the pervasive ambiguity in Progressive reasoning of incapacitative and rehabilitative rationales. *Id.* at 74-75, 124-25, 144, 253, 282, 385-86, 419-20.