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A VIRTUOUS STATE WOULD NOT ASSIGN CORRECTIONAL HOUSING BASED ON ABILITY TO PAY

*Bradley W. Moore** †

INTRODUCTION

Pay-to-stay jails expose the moral tension between the dominant theories of punishment: retributivism and deterrence. A turn to a third major moral theory—virtue ethics—resolves this tension. According to virtue ethics, the moral worth of an action follows from both the character of the action and the disposition of the actor. Virtuous acts promote human flourishing—the central goal of life—when they are the right actions performed for the right reasons. The virtue ethics theory of punishment suggests that pay-to-stay jails conflict with the promotion of human flourishing. A virtuous state’s criminal justice system would not include fee-based incarceration because it undermines the role of punishment in fostering practical judgment, an essential prerequisite to encouraging human flourishing. Neither the retributivist desire to punish offenders equally in identical (and shoddy) prison conditions nor the deterrence effect of requiring inmates to cover the costs of their confinement is motivated by virtuous reasons. Furthermore, the resolution of the pay-to-stay jails dilemma using virtue ethics highlights why retributivism and deterrence should be rejected as theories of punishment in favor of a virtue ethics-based approach.

I. RETRIBUTION AND DETERRENCE: CONFLICTING ANSWERS TO THE PAY-TO-STAY QUESTION

Retributivism, which imposes punishment in proportion to the criminal offender’s moral desert, suggests that pay-to-stay jails are unjustified. This deontological moral theory, based substantially on the writings of Immanuel Kant, holds that punishment is a categorical imperative: the state has the right and the duty to punish all morally blameworthy acts. This duty exists irrespective of the positive or negative consequences that follow from the act of punishment. Proportionate punishment brings human relations back into the proper alignment that the morally blameworthy crime disrupted. From a retributivist point of view—assuming that the original level of punishment is

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just—prisoners paying fees for more comfortable jail-time experiences receive less than their deserved punishment for a reason unrelated to their blameworthiness: their ability to pay. Thus, retributivism would not permit pay-to-stay programs.

Applying the other main theory of punishment—deterrence—to pay-to-stay jails yields a contrary result. Deterrence actually favors pay-to-stay programs. Like other utilitarian justifications of punishment such as rehabilitation and incapacitation, deterrence is a consequentialist moral theory: punishment is justified if its positive consequences outweigh its harms. The state should punish criminals only to the extent that such punishment sufficiently deters them and other prospective criminals from committing future criminal acts. From a deterrence perspective, the decisions of California city jails to implement pay-to-stay programs reflect a novel way to address acute overcrowding and underfunding, both of which are social harms in their own right. Pay-to-stay programs increase the overall welfare of jails and municipalities by lowering net correctional costs while simultaneously decreasing deterrence only marginally. Offender participants in pay-to-stay programs—perhaps due to a comfortable position in society correlated with their ability to pay the fees—still wish to avoid returning to jail, indicating that specific deterrence remains effective for the individual offender. For example, in “For \$82 a Day, Book a Cell in a 5-Star Jail,” the *New York Times* described the attitude of one inmate who served her jail term in a pay-to-stay facility: “Ms. Brockett, who normally works as a bartender in Los Angeles, said the experience was one she never cared to repeat. ‘It does look decent,’ she said, ‘but you still feel exactly where you are.’” In fact, as the conditions in pay-to-stay facilities are better than in regular jails, these programs cause less harm to the offender for the same (or nearly the same) amount of deterrence. Only a subset of criminals (those who can afford to pay) receive the easier jail experience, preserving the general deterrent effect of jail on society as a whole. Meanwhile, jails—like their prisoners—also benefit from reduced overcrowding. In short, deterrence levels do not change significantly for pay-to-stay programs, and the programs alleviate overcrowding and underfunding. Therefore, deterrence justifies pay-to-stay programs.

II. A VIRTUOUS ALTERNATIVE

As deterrence and retributivism provide conflicting answers to questions of the proper form and level of punishment for pay-to-stay participants and other inmates, criminal justice requires a third moral theory for the justification of punishment. Virtue ethics, also referred to as Aretaic theory, offers a viable alternative to deterrence and retributivism that better accounts for both the practical and aspirational purposes of punishment. The essence of virtue ethics is that the moral value of an action depends neither on its conformity to categorical moral rules, as in deontological theory, nor on the overall happiness that the action causes, as in consequentialist theory. Rather, the morality of an action depends on both the action’s character and

on the moral agent's disposition while performing the action. The central purpose of virtue ethics is to answer the question, "How should I live?" instead of the question, "What is the right action?" Virtue ethics' answer is that a person should live in a way that cultivates the virtues necessary for human flourishing. A moral agent exercises virtue through practical reasoning; knowing the proper action depends on wisdom, deliberation, and moral judgment. In other words, a virtuous agent acts not just rightly, but for the right reasons.

In *On Aristotelian Criminal Law: A Reply to Duff*, Professor Kyrone Huigens, the strongest advocate of a virtue ethics theory of criminal law, describes the justification of punishment as follows:

Aristotelian punishment theory attempts to describe the criminal law in terms of virtue. Virtue, for Aristotle, was not adherence to moral duties against one's inclinations, but a quality of exemplary practical judgment by which the agent does right because the right is what he wants to do—not in the sense that he wishes to comply with a rule, but in the sense that his judgment is so well attuned to the good in ordinary affairs that the right course of action and its objectives are desirable to him. I have argued that the justification of punishment turns on an assessment of whether the defendant exhibited a lack of Aristotelian virtue in the conduct that violated the criminal law, because the inculcation of this kind of virtue is a justifying end of the criminal law.

If criminal law's function in society is to promote virtue, then punishment is justified only if it facilitates the development of practical reason: the tendency and motivation to do the right act because one values the proper reasons for acting rightly. When a criminal makes an unvirtuous choice, punishment plays an educative role. Punishment does not act, however, as a deterrent—a person should choose the right action out of a desire to do so, not out of fear of sanction. A criminal offense constitutes a failure of practical reason: the perpetrator acted through the wrong means or for the wrong ends. However, virtuous punishment habituates the offender to form a desire to act rightly for the right reasons.

Therefore, practical reason should guide the state in deciding what punishment to impose. Imposing either excessive or overly merciful punishment would not be virtuous if it inhibits rather than promotes the development of practical reason in the offender. The state should also impose punishment only for the right reasons—the cultivation of virtue and the promotion of human flourishing. The correctness of the punishment depends on the practical wisdom present in the justice system as a whole. Individual judges exercise practical wisdom when they determine fault and punishment. Likewise, the policies of the state should be evaluated based on the extent to which they reflect practical wisdom and instill virtue.

III. THE VIRTUE ETHICS ANSWER TO THE PAY-TO-STAY QUESTION

Pay-to-stay jail policies inhibit, rather than foster, the instillation of virtue and the promotion of practical reasoning. Consider first the prisoner

relegated to standard jail facilities. Those prisoners who cannot afford pay-to-stay jail upgrades will likely feel resentment at their disparate treatment. Jail already alienates many criminals and destroys a desire to act rightly for the right reasons. Resentment of pay-to-stay jails can only exacerbate the risk that prisoners will not experience punishment in a way that promotes practical judgment. Second, prisoners who serve time in pay-to-stay facilities will be less likely to perceive punishment in a virtue-developing way. Although they may feel less resentment, the sense of entitlement that they may feel could blunt the educative effect of punishment. Finally, pay-to-stay jail policies threaten the fostering of the state's own practical judgment. With these programs, the government has chosen to solve a broader crisis of overcrowding and underfunding by taking advantage of the different wealth levels of its prisoners, irrespective of the effect on these prisoners' development of practical judgment. While citizens might believe that a program to provide more funding for jails and reduce crowding is good for promoting virtue, a state needs to create the right kind of program, for the right reasons. A state undermines the virtue-promoting function of the criminal law when it creates a program that does not consider its citizens to be equal before the law.

Exploring the public reaction to the punishment of Paris Hilton, a recent California jail guest, can further explain how virtue ethics best resolves the problem with pay-to-stay jails. While resentment at the idea that Ms. Hilton might pay for a more pleasant jail stay might sound like a retributivist concern, the amount of punishment is not the issue; forty-five days in jail for driving with a suspended license is, if anything, on the harsher end of possible penalties. Rather, the nature and the function of the punishment are what matter to most people. If Ms. Hilton receives a harsh punishment but does not change her attitude towards the law, then people will still not be satisfied. The key role of Ms. Hilton's punishment is to teach her to align her character and her disposition with the virtues for a flourishing life, so that she can make the choices that a virtuous moral agent would make. Virtue ethics best explains the resentment people felt from speculation that Ms. Hilton might opt for the more tolerable pay-to-stay jail facilities.

However, critics might raise two major objections to the use of virtue ethics to resolve the pay-to-stay jails dilemma. First, virtue ethics begs the question: there needs to be some agreement on what the virtues are before society can say differential jail facilities are not virtuous. Second, society already conditions the delivery of services on the consumer's ability to pay in many contexts—why should jail be different?

The virtue ethicist has a reply to these criticisms. First, virtue ethics is impressive not because of how little agreement exists about what a flourishing life looks like but how much agreement exists. For example, in *Non-relative virtues: An Aristotelian Approach*, the philosopher Martha Nussbaum observes that while local understandings of the virtues may vary, there is wide cross-cultural consensus about what the virtues are. Furthermore, even if some disagreement exists as to the constitution of a virtuous life, virtue ethics is less likely to lead to absurd results than rule-based theories

like retributivism and deterrence, which have more trouble managing equitable exceptions and moral complexity. Even if retributivism and deterrence can codify the rules that should govern in a given situation, practical wisdom is necessary to apply those rules. Ultimately, it is the application of practical wisdom, not the content of a moral code, that determines the outcome of a moral dilemma. Virtue ethics avoids the senseless application of moral rules by allowing for a full appreciation of the equities in an ethical conflict. Second, even if society as a whole is improperly structured on the basis of ability to pay, it would not follow that virtue ethics is an invalid moral theory; rather, society itself may need some restructuring in order to further promote human flourishing. A society that better provides its citizens the opportunity to live a flourishing life might start by eliminating pay-to-stay jails, but it would not stop there.

CONCLUSION

Retributivism and deterrence should be rejected as the dominant theories of punishment because the scope of a virtue ethics critique of the criminal justice system would not end with pay-to-stay jails. Virtue ethics explains society's discomfort with municipalities' pay-to-stay responses to overcrowding and underfunding. The virtuous state, through the application of practical reason, would have chosen another solution, one that would promote practical reason in prisoners and citizens more generally. To the extent that the current correctional system fails to develop practical reason in prisoners in other ways, many other reforms are necessary.

Shifting to a virtue ethics approach would best capture the true purpose of punishment. Commonly cited problems with the prison system as a whole—inordinate costs, inability to prepare prisoners for reentry into society, excessive mandatory minimum sentences—would likely find better resolution if the state were to take a virtue ethics approach to crime and punishment. The dominant theories of punishment, deterrence and retributivism, rely on moral rules that cannot account for the nuance and complexity of competing moral claims. Therefore, as pay-to-stay jails show, the state cannot successfully balance the competing concerns of deterrence and retributivism. Virtue ethics avoids this trap by focusing on character and disposition, not on specific acts. As such, the state should reject retributivist and deterrent justifications for punishment, and all criminal justice reforms should instead be evaluated by the standard of whether or not the virtuous state would choose such reforms.