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# WHAT IS AND IS NOT PATHOLOGICAL IN CRIMINAL LAW

*Kyron Huigens\**

## I. INTRODUCTION

In a recent article in this law review, William J. Stuntz argues that criminal law in the United States suffers from a political pathology.<sup>1</sup> The incentives of legislators are such that the notorious overcriminalization of American society is deep as well as broad. That is, not only are remote corners of life subject to criminal penalties — such things as tearing tags off mattresses and overworking animals — but now crimes are defined with the express design of easing the way to conviction. Is proof of a tangible harm an obstacle to using wire and mail fraud statutes to prosecute political misconduct? Well, then, eliminate tangible harm as an element of proof! The cumulative effect of this multi-dimensional overcriminalization is not just the enhancement of prosecutorial power, but its expansion at the expense of the judiciary. With a broad palette of highly specific offenses to work with, the prosecutor effectively adjudicates. If proof of a serious offense is unavailable, the prosecutor can convict nevertheless through proof of several less serious but more conveniently tailored offenses — usually by means of a plea agreement bargained for in the shadow of near-certain conviction at trial. And this rich palette of offenses also enables the prosecutor to exercise legislative power — with the blessings of legislators — as he mixes and matches narrowly drawn offenses into a variegated basis of liability. The upshot is a huge concentration of power and a serious erosion of the rule of law.

I think Stuntz has misdiagnosed the problem. My argument is not that the trend Stuntz describes is a good one, but that it is either not pathological, or pathological for a reason Stuntz ignores.<sup>2</sup>

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1. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

2. I assume that Stuntz means to use the word “pathological” in its ordinary sense as “due to or involving disease,” WEBSTER’S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 990 (3d college ed. 1994), or as pertaining to pathology, that is to “[a] departure or deviation from a normal condition.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

Power shifts in tripartite constitutional systems: The accretion of powers to the President during and after World War Two was the occasion of great alarm for many conservatives, just as the accretion of power to the nation's prosecutors is the occasion of alarm for Stuntz. The difficulty is that neither law nor the Constitution provides a perfect refuge from politics, and in a constitutional democracy this is as it should be. Imbalances of power in a constitutional system may be dangerous, unwise, or unjust, but at the same time benign — in that they are internal, inevitable, cyclical shifts of power. Just as one can place a benign construction on the dominance of the modern presidency, it is possible to place a benign construction on prosecutorial dominance in contemporary criminal law. Overcriminalization may be the distorted, misguided, but fundamentally legitimate expression of an expectation that the aims of the criminal law will parallel the aims of ordinary morality. If so, then overcriminalization is not pathological.

If overcriminalization is pathological, then Stuntz overlooks the most likely pathogen: the consequentialist theory of punishment. Overcriminalization must be seen in historical context. It has accelerated at about the same time that we have seen an explosion of other harsh measures meant to deal decisively with crime: three strikes laws, mandatory minimum sentences, rigid determinate sentencing systems, sexual offender commitment statutes, and expanded death sentencing.<sup>3</sup> The concurrence and combined effect of these innovations is not an accident. Simplistic legal theory has given us simplistic laws. In spite of the retributive rhetoric that surrounds them, these laws are all premised on a crude act consequentialism: they aim to promote social welfare by the ad hoc incapacitation of anyone who seems likely to diminish it. Scholars of the criminal law used to worry that a consequentialist approach to punishment would reduce the criminal law to a system of quarantine, in which concern for individual desert and proportionality in punishment would be abjured in favor of the welfare-enhancing segregation of undesirables from the general population. Now we have such a criminal law, and prominent scholars embrace, embellish, and defend it.<sup>4</sup>

To attribute these large trends in the criminal law to a theory of punishment probably sounds implausible. It suggests that thoughtful legislators around the country have misread their Hart and neglected

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3. See generally Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829 (2000) (describing and analyzing these innovations).

4. See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence-Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001) (decrying the possible effect of the *Apprendi* decision on the Federal Sentencing Guidelines); see also *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact, other than a prior conviction, that increases punishment beyond a statutory maximum must be proved to a jury).

their Fletcher. This kind of parody is almost-unavoidable when one tries to bring theory to bear on doctrine and policy, but it is, nevertheless, not my argument. Any practical enterprise is backed by a working theory, by some basic assumptions — in the case of punishment, by assumptions about value, motivation, and right conduct. In much of American law and legal scholarship for the last half-century, these assumptions have been mistaken. Scholars, legislators, and judges have been working with a theory of action according to which value and motivation are arbitrarily “subjective,” so that our only guide to right conduct is the analysis of preferences revealed in the market or the voting booth. This theory, best described as pseudo-Humean,<sup>5</sup> has given us the decidedly mixed blessings of legal economics and public choice theory, as well as the act consequentialism that lies behind the quarantine approach to criminal justice. This theory — this set of pervasive assumptions — is the pathogen at work in the overcriminalization that worries Stuntz.

## II. PATHOLOGICAL OR NOT

Stuntz sees, and enables us to see, how overly specific criminal statutes present just as much danger to the rule of law as vague, overbroad statutes. This is an important insight, particularly when presented in the historical and political context that Stuntz gives it. But we might have expected this to be the case: both vagueness and specificity threaten the rule of law when taken to extremes because the principle of legality encompasses many potentially conflicting, less-than-absolute requirements on the criminal law. Some of these conflicts are internal to the rule of law ideal, such as the requirement of generality in criminal prohibitions: it is entailed by the bans on *ex post facto* and judicial lawmaking (given that *ex ante* legislative prohibitions can only be stated in general terms) but it necessarily increases vagueness and detracts from notice. Some conflicts, on the other hand, are external: they arise because certain ends of punishment run counter to legality itself. For example, any sophisticated consequentialist theory of punishment recognizes the utility in mollifying public anger and resentment over crime.<sup>6</sup> But this mollifying function inevitably

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5. See HENRY RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS 14 (1997) (“The core of the pseudo-Humean position is the claim that while reason is concerned with ascertaining the truth of statements or beliefs, desires are not such as to be true or false.”); Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 999-1000 & n.241 (2000) [hereinafter Huigens, *Dead End*] (contrasting this view, which is characteristic of legal economics, with more sophisticated neo-Humean theories of action); see also Kyron Huigens, *Law, Economics, and the Skeleton of Value Fallacy*, 89 CAL. L. REV. 537 (2001) (book review) [hereinafter Huigens, *Law, Economics*] (criticizing legal economists’ conception of value and motivation).

6. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996) (“Punishment is *not* just a way to make offenders suffer; it is a special social

collides with rule of law constraints: prompt lynchings satisfy the mob, but not the rule of law. The prosecutor emerges as a necessary player in the system — one whose job it is to find the right balance between legality and the ends of the criminal law that run counter to legality, as well as between legality's internally conflicting dictates. Stuntz makes a persuasive case that prosecutors have used their political influence to find the wrong balance.

Stuntz's argument that this imbalance is pathological, however, is unpersuasive. Internal conflicts in the rule of law ideal are not pathological. However difficult it might be to find the proper balance between the constituents of legality, such conflicts are a matter of the legal system's ordinary functioning. If there is a pathogen at work in overcriminalization, then one would expect to find it in the countervailing ends of punishment that create external conflicts with the rule of law ideal. Stuntz's argument suggests such a diagnosis: that overcriminalization represents an oversupply of goods such as the mollification of public anger and resentment; and that the skewed incentives that produce this oversupply result from an overvaluation of such goods by political actors, if not by the public at large.<sup>7</sup> But if this is the pathology Stuntz has in mind, then he has not considered carefully enough the nature of the legitimate ends of punishment that run counter to the rule of law, and the role they play in the politics he describes.

Let me suggest a similar but benign diagnosis. Overcriminalization may be the product of an expectation on the part of many citizens that the criminal law will provide not only social control, but also proper condemnation of wrongdoing. This expectation is problematic from a rule of law perspective because the requisite condemnation is not just legal but moral condemnation. Because ordinary morality is compre-

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convention that signifies moral condemnation.”); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997) (“[T]he criminal law’s moral credibility is essential to effective crime control, and is enhanced if the distribution of criminal liability is perceived as ‘doing justice,’ that is, if it assigns liability and punishment in ways that the community perceives as consistent with the community’s principles of appropriate liability and punishment.”); see also 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 82 (London, MacMillan 1883) (“The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to the other.”).

7. Stuntz argues that there is more to the story of overcriminalization than merely the widespread belief that we should “get tough on crime.” Overcriminalization is a pathological overreaction to this belief by legislators. Stuntz, *supra* note 1, at 529-33. This overreaction comes in two forms. One is the aim of increasing conviction rates as much as possible. The pathology of this aim is the subject of the next Part of this Essay. I deal here with the second pathological aim identified by Stuntz, which is to take “symbolic” steps against crime. I take this to refer to the mollifying condemnation of wrongdoing. For example, Stuntz notes that carjacking statutes are redundant and rarely invoked, but they reflect the public’s disapproval of carjacking and symbolize the legislature’s concern about it. *Id.* at 531 & n.108.

hensive, the public expects the criminal law to be comprehensive. Because moral condemnation is subtly responsive to variations in conduct and context, the public expects the criminal law to be subtly responsive in the same way — even though the informality that allows moral condemnation to be subtly responsive is necessarily absent from a legal system. The broad and deep criminal law that Stuntz describes may be the product of an expectation on the part of the public that the criminal law will be broad and deep in these ways. But if this is what lies behind overcriminalization and the accretion of power to prosecutors, then the trends toward overcriminalization are essentially benign. The public's expectation that the criminal law will provide a moral condemnation of wrongdoing is no more pathological than the conflicting constituents of the rule of law ideal, because it is a legitimate expectation.

This benign diagnosis can be supported by the same kind of historical analysis that Stuntz uses to support his thesis.<sup>8</sup> Stuntz is pessimistic about the power of criminal law scholars to counter the trend toward overcriminalization, and one of the reasons for his pessimism is the failure of most states to adopt the central innovation of the Model Penal Code: the culpability, or fault,<sup>9</sup> provisions of section 2.02.<sup>10</sup> But there is more to this story than Stuntz suggests.

The culpability provisions of the Code did not merely simplify and consolidate traditional mens rea categories. They also eschewed the kind of frank normative assessments featured in traditional criminal fault concepts such as “implied malice” and “depraved heart.” This choice by the Code drafters was the product of the dominant strains in legal scholarship at mid-point in the twentieth century — consequentialism, legal positivism, and political liberalism — which combined to cast the criminal law as a means of social control operating independently of ordinary morality.<sup>11</sup> These currents did not lead the Code

8. One criticism of Stuntz's article that I do not pursue here is that his basic mode of analysis is public choice theorizing: he analyzes the costs and incentives of institutional actors under various legal regimes. I find the stories plausible and the analysis persuasive, but Stuntz's hypotheses (like the hypothesis I advance in the text) often cry out for testing. The omission of actual testing is characteristic of public choice theory, see DONALD P. GREEN & IAN SHAPIRO, *THE PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 47-71 (1994), but that makes it no less problematic.

9. The word “culpability” is ambiguous between fault in wrongdoing and eligibility (in the sense of fair candidacy) of a defendant for punishment. Eligibility is the concern in doctrines of excuse, such as insanity. Fault is an aspect of wrongdoing that is best (but not necessarily) described in terms of intentional states. See Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1230-54 (2000) (developing this distinction). The subject of § 2.02's hierarchy of intentional states is fault, not eligibility.

10. Stuntz, *supra* note 1, at 583-84 & n.276.

11. See, e.g., H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28, 46 (1968) [hereinafter HART, PUNISHMENT AND RESPONSIBILITY] (“If with this in mind we turn back to criminal law and its excusing conditions, we can regard their function as a mechanism for similarly maximizing

drafters to reject a fault requirement altogether in favor of general strict liability — as H.L.A. Hart, for example, would have done<sup>12</sup> — but these philosophical and political commitments did lead the Code drafters to cabin the inquiry into fault as much as possible. The primary device the drafters used to limit the fault inquiry was a set of well-defined intentional states — purpose, knowledge, and recklessness — exhibited by the defendant on the occasion of his wrongdoing.<sup>13</sup> This intentional-states or subjective approach to fault permitted the Code to represent the normative question of fault as a descriptive inquiry.<sup>14</sup> The Code recognized a category of negligence as well, and with it a more frank normative inquiry into the reasonableness of the defendant's conduct.<sup>15</sup> But punishing negligent conduct is specifically disfavored in the Code.<sup>16</sup> The default level of fault under the Code is recklessness<sup>17</sup> — an intentional state consisting of the conscious disregard of a known risk.<sup>18</sup>

The intentional-states construction of fault accorded well with the philosophical commitments of the Code's drafters, but it fared poorly in the court of common sense. As Stuntz notes, most states have not adopted recklessness as the default level of fault.<sup>19</sup> The reason for this repudiation of the Code's central provision is its failure to deal with unreasonable mistakes. Under the Code approach, any genuine mistake on the part of the defendant disproves the existence of the requisite intentional state, negates fault, and requires acquittal even if the mistake is unreasonable.<sup>20</sup> This is a hard implication to swallow when it acquits someone such as the drunken, immature, morally obtuse rapist who genuinely believes that a woman's "No" means "Yes," and

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within the framework of coercive criminal law the efficacy of the individual's informed and considered choice in determining the future and also his power to predict that future.").

12. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 11, at 158, 176-77.

13. MODEL PENAL CODE § 2.02(2) (1985).

14. See Alan C. Michaels, "Rationales" of Criminal Law Then and Now: For a Judgmental Descriptivism, 100 COLUM. L. REV. 54, 62-81 (2000) (describing the Model Penal Code drafters' preference for descriptive standards, especially in homicide law).

15. MODEL PENAL CODE § 2.02(2)(d).

16. MODEL PENAL CODE § 2.02 cmt. 4 ("[Negligence] should properly not generally be deemed sufficient in the definition of specific crimes . . .").

17. MODEL PENAL CODE § 2.02(3).

18. MODEL PENAL CODE § 2.02(2)(c).

19. See Stuntz, *supra* note 1, at 583 n.276 (citing Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 243 & n.40 (1997)).

20. See MODEL PENAL CODE AND COMMENTARIES § 2.04 cmt. 1 (1985) ("There is no justification, however, for requiring ignorance or mistake be reasonable if the crime or the element of the crime involved requires acting purposely or knowingly for its commission.").

who is as a result only negligent, not reckless, as to the element of nonconsent in rape.<sup>21</sup> Similarly, the Code's intentional-states approach to fault implies that genuine belief about the necessity for self-defense will justify the use of force, including deadly force. There is no requirement that the belief be reasonable. If, then, a paranoid, racist, trigger-happy social misfit genuinely believes that he is about to be robbed by some black youths on a subway, he may shoot them, regardless of the unreasonableness of his belief. This too proved to be unpalatable to legislatures and courts.<sup>22</sup> For both kinds of mistake, most jurisdictions prescribe a reasonableness inquiry — the functional equivalent of negligence — as the requisite level of fault.<sup>23</sup>

Cases of unreasonable mistake are rare, so it would be hard to attribute the problem of overcriminalization to the Code's inept treatment of such cases. But the Code's intentional-states approach to fault and its pretense to non-normative descriptions of fault are likely culprits in overcriminalization. As I have argued above, one motive behind drafting highly specific criminal statutes is the desire to make the criminal law sensitive to the specific contexts in which wrongdoing takes place, just as our ordinary moral assessments tend to be highly context-sensitive. The doctrines that the Model Penal Code rejected — nonintentional or objective fault doctrines such as “implied malice” and “depraved heart” in homicide — served precisely this role in the criminal law. Nonintentional fault doctrines call for a broad assessment of the manner and circumstances in which wrongdoing is done. They contextualize the jury's inquiry into the defendant's wrongdoing

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21. See *Regina v. Morgan*, [1976] A.C. 182, 203-04 (Lord Cross); *id.* at 214-15 (Lord Hailsham); *id.* at 237-39 (Lord Fraser) (affirming rape convictions of British military personnel while finding error in the trial court's refusal to instruct that a genuine mistake about nonconsent should lead the jury to acquit) (citing Criminal Appeal Act, 1968, Ch. 19 § 2(1) (Eng.) (authorizing the affirmation of convictions in spite of error when not inconsistent with justice)).

22. See *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986) (holding that the New York legislature departed from the Model Penal Code's provision on the exculpatory effect of a genuine belief in justifying conditions by inserting the word “reasonable”): The facts in *Goetz* were less egregious than those in the text, but the fear that such a case could arise in the future and occasion acquittals based on unreasonable and idiosyncratic fears was plainly on the court's mind.

23. See Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 849 (1986) (“[A] majority of courts here have adopted the rule that only a reasonable mistake is a valid defense [to rape.]”); see also, e.g., CAL. PENAL CODE § 197 (2002) (homicide is justifiable “when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury”); N.Y. PENAL LAW § 35.15 (2002) (authorizing a person to use physical force “when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person”). In a variety of provisions, the Code itself balks at the implications of the intentional-states construction of fault. See, e.g., MODEL PENAL CODE § 2.08(2) (barring the use of voluntary intoxication to negate the intentional state of recklessness).



and facilitate a fine-grained moral assessment.<sup>24</sup> To the extent the Model Penal Code succeeded in its reformative aims — and in this respect its influence extends beyond explicit adoptions of its central principle of culpability (§ 2.02) — criminal codes around the country were deprived of this resource.<sup>25</sup> In the absence of the jury-based tailoring permitted by nonintentional fault doctrines, legislators have provided for prosecutor-based tailoring in the form of nuanced, overlapping offense definitions. In short, the abolition of nonintentional fault doctrines under the influence of the Model Penal Code may have had the effect of displacing discretion in the system from juries to prosecutors, as legislators sought context-sensitivity through specific criminal statutes instead of general criminal statutes premised on nonintentional fault doctrines.

The notion that neither prosecutors nor juries should have such discretion is a tempting one, because both approaches seem to detract from the rule of law. But if they do, this is not a matter of pathology. The existence of discretion, somewhere in the system, to make a context-sensitive evaluation of the offender's conduct and character is intrinsic to criminal law because context-specific, retrospective assessments of the offender and his wrongdoing are intrinsic to just punishment.<sup>26</sup> This, at any rate, seems to be our standing judgment. The trend at mid-point in the twentieth century toward treating criminal law as an instrument of social control, divorced from the aims of ordinary morality, was widely repudiated in the 1970s and 1980s.<sup>27</sup> For example, the adoption of determinate sentencing systems by Congress and a number of state legislatures in the 1980s was preceded by a great deal of academic commentary about "just deserts,"<sup>28</sup> and by a noisy repudiation of the indeterminate sentencing systems that were an essential part of the Model Penal Code's consequentialist punishment

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24. See Huigens, *Dead End*, *supra* note 5, at 966-71, 1028-31 (analyzing nonintentional fault in this way).

25. Even those jurisdictions that have not adopted the Model Penal Code have narrowed the range of fault categories and have preferred intentional states as the basis for fault. See Holley, *supra* note 19, at 238 & n.23, 241 & n.32, 245-46 & n.50. In this regard, the Model Penal Code is as much effect as cause. Its intentional states approach to fault was the product of a broad Anglo-American consensus that criminal liability should be confined, as much as possible, to intentional wrongdoing. See, e.g., GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 43 (2d ed. 1961); Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 635-44 (1963).

26. Huigens, *Dead End*, *supra* note 5, at 971-80; Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1458-67 (1995).

27. See FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981) (analyzing the early stages of this trend).

28. See, e.g., NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 45-50 (1974); RICHARD SINGER, *JUST DESERTS* (1979); ERNST VAN DEN HAAG, *PUNISHING CRIMINALS* (1975); ANDREW VON HIRSCH, *DOING JUSTICE* 49-55 (1976).

theory.<sup>29</sup> The rhetoric of the determinate sentencing movement was retributive, and this rhetoric is strong evidence of standing judgments about the role of moral assessments in punishment and the requisite discretion to make them. (This is true of the rhetoric even if, as I argue below, the substance of the reforms was a crude act consequentialism that incapacitates undesirables regardless of desert.) It is evidence that the scholar-reformers of the Model Penal Code failed to dissuade the public from its expectation that the criminal law will provide moral condemnation of wrongdoing. This persistence is itself evidence of that expectation's legitimacy. If overcriminalization is the product of that expectation, then overcriminalization is not pathological — even if it is unwise or unjust.

### III. THE PATHOGEN, IF THERE IS ONE

Stuntz's analysis of the interlocking incentives of criminal justice policy makers is impressive, but the incentives that lead to overcriminalization reduce ultimately to one piece of logic: if conviction is easier, then more people will be convicted and imprisoned. Stuntz never asks why this should be anyone's objective. We can choose to convict and imprison people for a number of reasons. One possibility is that they deserve punishment. But if this is the rationale for punishment, then the logic of more and easier convictions makes no sense. The careful assessment of wrongdoing and desert would proceed in individual cases, in complete disregard of gross conviction rates. A more likely explanation for overcriminalization is that we are attempting to prevent crime in the future by incapacitating the maximum number of people with criminal propensities for as long as possible. If this is the objective of overcriminalization, then it is part of the quarantine movement that has given us three strikes laws, mandatory minimum sentences, rigid determinate sentencing systems, sexual offender commitment statutes, and expanded death sentencing.

Consider, for example, a recent defense of California's three strikes law by one of its drafters, California Secretary of State Bill Jones. He writes: "By carefully targeting the small percentage of criminals most likely to commit the majority of California's crimes, Three Strikes has had a maximum impact on the crime rate by keeping the worst of repeat offenders incarcerated."<sup>30</sup> Later in the same article, one hears overtones of the deep and broad overcriminalization that

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29. See KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 24-35 (1998) (describing the Code's consequentialist sentencing philosophy and its widespread rejection in the 1970s as a prelude to federal sentencing reform).

30. Bill Jones, *Why the Three Strikes Law is Working in California*, 11 *STAN. L. & POL'Y. REV.* 23, 24 (1999).

Stuntz decries: “The simple goal of Three Strikes is public safety. It is far better, for example, to remove a child molester from the streets for the commission of a so-called lower level felony than to wait for the offender to abuse another victim.”<sup>31</sup> The theory of punishment implicit in these arguments is a crude act consequentialism: the aim is to promote social welfare by incapacitating those most likely to reduce it. If overcriminalization is pathological, then this primitive theory of punishment is the pathogen.

This quarantine movement is often described as a triumph of retributivism in punishment.<sup>32</sup> But nothing could be further from the truth.<sup>33</sup> Retribution as an end of punishment is emphasized in deontological and aretaic theories of punishment.<sup>34</sup> Retribution has no effective role in a consequentialist theory of punishment, and, as the foregoing paragraph indicates, the logic of quarantine is thoroughly consequentialist. On the level of theory, the shift from the rehabilitative, indeterminate sentencing philosophy exemplified in the Model Penal Code to the incapacitative, determinate sentencing philosophy exemplified in the Federal Sentencing Guidelines is a shift from a sophisticated, humane consequentialism to a crude, morally obtuse consequentialism. In its extreme forms, the consequentialist theory of punishment denied the relevance of fault and desert to criminal justice policy, seeking to reduce crime and promote social welfare by treating criminogenic psychological and social pathologies.<sup>35</sup> The reformers who gave us the Federal Sentencing Guidelines and its cohort of sen-

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31. *Id.* at 25.

32. See, e.g., Paul G. Chevigny, *From Betrayal to Violence: Dante's Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787, 789 (2001); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1839 (1999); Joseph L. Hoffmann, *Apprendi v. New Jersey: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 266-67 (2001); Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1303-04 (2000).

33. See STITH & CABRANES, *supra* note 29, at 51-55; Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 371 (1989) (“The Commission’s conclusion can be summarized thus: since people disagree over the aims of sentencing, it is best to have no rationale at all.”).

34. The term “retributive theory of punishment” is misleading because retribution is a function of punishment, not a theory of punishment. Given that the moral justification of punishment is the principal, though not the only, issue in the theory of punishment, it makes sense to categorize theories of punishment according to the three main categories of moral theory: consequentialist, deontological, and aretaic. “Aretaic” refers to virtue ethics, which originated with Aristotle and is the subject of a robust modern literature, much of which is extremely useful in thinking through the problems of the criminal law. See, e.g., Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 434-49 (2002) [hereinafter Huigens, *Solving Apprendi*] (analyzing the constitutional validity of determinate sentencing, mandatory minimum sentencing, and three-strikes sentencing in aretaic terms).

35. See ALLEN, *supra* note 27, at 5-7; R.A. Duff & David Garland, *Introduction: Thinking About Punishment, in A READER ON PUNISHMENT* 1, 8-10 (R.A. Duff & David Garland eds., 1994); see also, e.g., BARBARA WOOTEN, *CRIME AND CRIMINAL LAW* 52-53, 75-79 (1963) (describing the purpose of criminal law as crime prevention and denying the relevance of mens rea to that task).

tencing practices used retributive rhetoric to repudiate rehabilitation as an end of punishment, but they did not in fact adopt or advance a retributive theory of punishment. For example, the goal of setting sentences according to desert was explicitly disavowed by the Guidelines' principal drafter, Stephen Breyer, as unworkably "subjective."<sup>36</sup> He adopted instead a revealed preference approach to sentencing, under which the presumptive sentences of the Guidelines were based, ostensibly, on the actual practices of sentencing judges. In fact, these sentencing preferences were systematically overstated.<sup>37</sup> The result has been unduly harsh sentences imposed under a system that is both too narrow and too rigid to tailor sentences to desert. As in the case of three strikes laws, the aim is not a principled proportionality premised on desert, but the promotion of social welfare by means of the quarantine of social undesirables.

Ultimately, however, the quarantine movement's implicit theory of punishment is pathological, not because it is crude, but because it is consequentialist. Consequentialism is a deeply flawed moral theory, and the pervasive, if largely unconscious and inarticulate, consequentialism of twentieth-century American legal theory and practice has been the source of enormous confusion and damage.<sup>38</sup> An important clue to the pathological nature of this theory is Breyer's use of the word "subjective" as an explanation for his rejection of desert as a basis for the Guidelines' sentencing ranges. Breyer's consequentialism in the theory of punishment seems to be motivated, as it apparently is for many consequentialists, by the belief that value judgments are noncognitive; that they are the product of feeling as opposed to reason (and in that sense "subjective," because the individual has exclusive access to his feelings).<sup>39</sup> If value is divorced from reason, then one must suppose that all human ends are just subliminal givens, and that

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36. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15-16 (1988) (citing the "inherent subjectivity" of judgments about just deserts as the reason the Guidelines do not pursue a principled retributivism).

37. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993); von Hirsch, *supra* note 33, at 373.

38. To give an example from far afield that conveys the scope of the problem I have in mind, one can argue that a simplistic ethics of maximization produced both the economics behind the deregulation of financial markets in the 1980s and 1990s and also the evisceration of professional ethics in the accounting and legal professions, both of which led, in turn, to the accounting scandals, bear market, and recession of 2002. See George Soros, *Busted: Why the Markets Can't Fix Themselves*, NEW REPUBLIC, Sept. 2, 2002, at 18, 21.

39. See Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, CRIM. JUST., Spring 1999, at 28, 30 (1999) ("But [a 'just deserts'] approach foundered on the shoal of philosophical differences, for those differences threatened unacceptable subjectivity."). But see Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 270 (2002) ("The relevant values, by limiting interpretive possibilities and guiding interpretation, themselves constrain subjectivity . . .").

rational analysis of right conduct is limited to the means by which these given ends can be maximized.<sup>40</sup> This is the same moral theory and theory of action behind the Model Penal Code's approach to fault.

On these assumptions about rationality and right conduct, it makes sense to minimize the role of value judgments by reframing the normative demands of the law in descriptive terms, because those normative demands are arbitrary to the extent that they reflect the subjective, ultimately irrational value judgments of jurors and judges. This move is ubiquitous in twentieth-century legal thought. From the legal positivist school to the law and economics movement, the ingenuity of twentieth-century legal scholars in their attempts to eradicate "subjective value judgments" from the law was remarkable. Ultimately, however, it was a fool's errand. Law is irreducibly a normative system, normative choices entail value judgments,<sup>41</sup> and value judgments are not beyond the reach of reason.<sup>42</sup> To cabin normativity and value in

40. See THOMAS HOBBS, *LEVIATHAN* 39-40 (Richard Tuck ed., 1991) (1651) ("But whatsoever is the object of any mans Appetite or Desire; that is it, which he for his part calleth *Good*: And the object of his Hate, and Aversion, *Evill*. . ."). Gary Becker acknowledges the roots of economics in this hedonic conception of value. See GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 8 (1976) (describing the basis of economic theory in "the pleasure-pain calculus"); see also Martin Hollis & Robert Sugden, *Rationality in Action*, 102 *MIND* 1, 2-3 (1993) (describing Hobbes's conception of value as among the origins of rational choice theory).

41. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 19 (1959) ("The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in light of constitutional provisions, even though the action involves value choices, as invariably action does.").

42. There is a broad, neo-Humean consensus in Anglo-American philosophy that motivations have a significant affective or emotional component, and that Kantian cognitivism — the notion that belief alone can motivate action — is untenable. Garrett Cullity & Berys Gaut, *Introduction*, in *ETHICS AND PRACTICAL REASON* 1-27 (Garrett Cullity & Berys Gaut eds., 1997) (describing a broad consensus over internalism regarding reasons for action and a desiderative account of internalism); cf. NANCY SHERMAN, *MAKING A NECESSITY OF VIRTUE: ARISTOTLE AND KANT ON VIRTUE* 125-26 (1997) (describing Kant's view of the relationship between motivation and the emotions). The "pseudo-Humean" view that defined the questionable goals of much twentieth-century legal thought is the notion that valuation and motivation are noncognitive in a stronger sense, premised on a hard distinction between reason and emotion. See *supra* note 5. But while it is true that emotions can distort rational thinking, it is also demonstrably true that rational thought is impossible without the capacity for emotion. ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 52-79 (1994). Emotions have truth value; that is, one can be mistaken in one's emotions. GERALD GAUS, *VALUE AND JUSTIFICATION: THE FOUNDATIONS OF LIBERAL THEORY* 136 (1990). For example, emotions can be changed through a process involving their articulation and rational criticism. See *id.* at 31-34 (noting that psychotherapy assumes that emotions are cognitive); Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 *MICH. L. REV.* 1520, 1546 (1992) (book review) (same). Just as emotions are subject to rational evaluation, so are the valuations and motivations that are premised in emotion. GAUS, *supra*, at 106-26; JUSTIN OAKLEY, *MORALITY AND THE EMOTIONS* 34-37 (1992); ANDREW ORTONY ET AL., *THE COGNITIVE STRUCTURE OF EMOTIONS* 34-47 (1988); Andrew Ortony, *Value and Emotion*, in *MEMORIES, THOUGHTS, AND EMOTIONS: ESSAYS IN HONOR OF GEORGE MANDLER* 337 (William Knessen et al. eds., 1991); cf. RONALD DESOUSA, *THE RATIONALITY OF EMOTION* 218-20 (1987) (describing mistakes in desire as arising from mistakes about the aspect or character of the emo-

the manner demanded by consequentialist legal theory is unnecessary, impossible, and unwise.

The particular pathology of the consequentialist theory of punishment is its demonstrated tendency to devolution. Consequentialist punishment theorists have defended their views against charges that welfare maximization authorizes scapegoating<sup>43</sup> and quarantine,<sup>44</sup> and that a consistent consequentialist system of social control could hardly be called punishment at all because it has no use for such traditional features of punishment as wrongdoing, fault, and desert.<sup>45</sup> The principal response to such objections was developed by, among others, John Rawls<sup>46</sup> and H.L.A. Hart.<sup>47</sup> The argument is a variation on rule consequentialism: it asserts that consequentialism does not authorize scapegoating or quarantine because the moral justification of punishment does not proceed on a case by case basis. Punishment systems as a whole are morally justified on consequentialist grounds, but the justification of punishment in individual cases is only a legal justification within the terms of the punishment system. For the sake of public acceptance and intuitive appeal — and in order to forestall scapegoating and quarantine — the legal system might be outfitted with the tradi-

tion). Desires have propositional content, whereas mere feelings do not. MICHAEL SMITH, *THE MORAL PROBLEM* 104-111 (1994) (pointing out that, whereas we say that “I feel a desire to” we never say “I feel a pain to”). We also are fallible regarding our desires, as we are not regarding our feelings. *Id.* Even a valuation that ordinarily is deemed a matter of pure taste, such as a liking for a particular food, is not beyond the reach of reason. See John Willoughby, *A Chemical Mystery That Excites the Taste Buds*, N.Y. TIMES, Jan. 14, 1998, at F3 (reporting on Asian cultures’ recognition of *umami* as a distinct taste in addition to bitter, sour, sweet, and salty).

43. See, e.g., J.D. Mabbott, *Punishment*, reprinted in *THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS* 39, 41 (H.B. Acton ed., 1969) (1939) (“Suppose it were discovered that a particular criminal had lived a much better life after his release and that many would-be criminals believing him to have been guilty were influenced by his fate, but yet that the ‘criminal’ was punished for something he had never done, would these excellent results prove the punishment just?”).

44. See HART, *Postscript: Responsibility and Retribution*, in *PUNISHMENT AND RESPONSIBILITY*, *supra* note 11, at 210, 232-33 [hereinafter HART, *Postscript*] (describing “the extreme point” of consequentialist punishment theory as not requiring a crime or conviction).

45. Mabbott’s response to the scapegoating argument, like Hart’s, turned on the distinction, discussed in the text, between a practice on one hand and instances of the practice on the other. It is perhaps a measure of the dominance of consequentialism in their day that both Mabbott and Hart thought that the partial accommodation of retributive concerns in the consequentialist justification of punishment made his theory a “retributive” one. See HART, *Postscript*, *supra* note 44, at 233; Mabbott, *supra* note 43, at 39; see also Antony Flew, *The Justification of Punishment*, reprinted in *THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS* 83, 92 (H.B. Acton ed., 1969) (1954) (“[I]n so far as Mabbott’s view can be called retributive it is not a justification (satisfactory or otherwise); and in so far as any sort of justification is offered it is that of an ideal (not hedonistic) utilitarian.”).

46. See John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955).

47. See HART, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY*, *supra* note 11, at 1, 5-11.

tional categories of wrongdoing, fault, and desert. Indeed, such features arguably are required by the consequentialist theory of punishment because they are welfare-maximizing: if the public does not see the traditional categories at work, the argument goes, the criminal justice system will lose credibility and, as a result, efficacy as a system of punishment.<sup>48</sup>

The difficulty with this argument is that it is no defense of punishment at all. By this reasoning, if the public were to lose its preference for punishing only upon proof of wrongdoing, fault, and desert, then those things would no longer be required features of just punishment. Should the public develop a preference for a system of quarantine instead of a system of punishment, the consequentialist theory of punishment would sanction the adoption of quarantine. Obviously, this is no longer a mere debating point. We are well on our way to replacing punishment with quarantine. Wittingly or not, legal scholars of a consequentialist bent have done their part in bringing about this devolution.

Admittedly, causation and responsibility are hard to assign in the case of such an enormous social change. But the consequentialist theory of punishment — and, again, by this I mean the working theory, the basic assumptions of lawyers, judges, and legislators, as well as scholars — undoubtedly has played a large role and bears much of the responsibility. One sees this not only in Breyer's disavowal of desert as too "subjective," but also in the ineffectual responses to such choices by defenders of traditional criminal law values. In their otherwise cogent and devastating critique of the Federal Sentencing Guidelines, Stith and Cabranes argue that determinate sentencing robs the end of a criminal trial of its *gravitas*. The simple application of a sentencing grid lacks the tension, the mystery, and the profound theater of discretionary sentencing.<sup>49</sup> They argue for the necessity of "highly subjective judgments"<sup>50</sup> and the use of intuition<sup>51</sup> in sentencing. But this is hardly persuasive. The consequentialist can reply that intuitions and subjective judgments are incompatible with legality because they are arbitrary, and he can dismiss the theater of sentencing as inessential and inefficient aesthetics. Stith and Cabranes do not concede the premise that sentencing judgments are "subjective" in the sense that Breyer supposes they are,<sup>52</sup> but they say

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48. This part of the argument has been further developed by Paul Robinson and John Darley. See Robinson & Darley, *supra* note 6, *passim*.

49. See STITH & CABRANES, *supra* note 29, at 81-82.

50. *Id.* at 150.

51. *Id.* at 169.

52. *Id.* at 82 ("This does not mean that judgment, as we understand it, is a matter of subjective 'feeling.'").

too little about alternative conceptions of value, motivation, judgment, and just punishment to be able to escape the gravitational pull of consequentialist legal theory.<sup>53</sup> Whatever might be the precise causal role of consequentialism in the devolution of punishment to quarantine, it has, at a minimum, left great scholars of good will without the necessary conceptual resources to defend genuine punishment.

Stuntz's greatest hope for the cure of overcriminalization — the constitutionalization of substantive criminal law — is precluded by the same set of mistaken philosophical commitments that caused the problem he critiques.<sup>54</sup> The constitutionalization of substantive criminal law requires the Supreme Court to make contested value judgments, which the current Court is extremely reluctant to do. The Court's view, and the prevailing view among constitutional scholars, is that the political branches should make such judgments.<sup>55</sup> One of the principal reasons behind this deference to other branches is the belief that value judgments are noncognitive, and that the only rational way to analyze them is in terms of completed choices in a marketplace of ideas.<sup>56</sup> The result is a constitutional jurisprudence of revealed preferences. For example, the Court's seemingly robust standard for Eighth Amendment analysis — whether the practice in question is consistent with "evolving standards of decency"<sup>57</sup> — is in reality little more than counting heads to see if the state legislatures have forged a consensus on the constitutional question at hand.<sup>58</sup> Actually to deliberate on questions of value and to define the ends of a great nation is a role that the present Court simply refuses to perform, in part because some of its members doubt the very possibility of such deliberations. The

53. See Huigens, *Solving Apprendi*, *supra* note 34, at 434-42 (offering an alternative diagnosis of the Guidelines' shortcomings).

54. See Stuntz, *supra* note 1, at 587-96.

55. See, e.g., Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1301-02 (1998).

56. Justice Scalia has explicitly drawn the connection between judicial deference and a noncognitive conception of valuation on a number of occasions, most recently in his dissent from the Court's imposing a per se Eighth Amendment ban on executing the mentally retarded. He wrote: "[t]he unexpressed reason for this unexpressed 'contemplation' of the Constitution is presumably that really good lawyers have moral sentiments superior to those of the common herd, whether in 1791 or today. . . . '[I]n the end,' it is the *feelings and intuition* of a majority of the Justices that count . . ." *Atkins v. Virginia*, 122 S. Ct. 2242, 2265 (2002) (Scalia, J., dissenting); see also *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (opinion of Scalia, J.); cf. Kathleen M. Sullivan, *The Supreme Court 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 80 (1992) (attributing Scalia's preference for rules over standards to "an effort to avoid judgments of value" and to a hard fact/value distinction that is characteristic of legal positivism).

57. *Trop v. Dulles*, 356 U.S. 86, 100-101 (1957).

58. See, e.g., *Atkins*, 122 S. Ct. at 2248-49 (citing increasingly common legislative bans on execution of the mentally retarded as the principal reason for its decision to recognize such a ban under the Eighth Amendment). *But see Atkins*, 122 S. Ct. at 2247 (saying that the Court's judgment is "brought to bear on" the objective evidence of legislative action).



same pathogen that has devolved punishment into quarantine will probably preclude the constitutional revival of genuine punishment, at least in the near future.

#### IV. CONCLUSION

If constitutionalization of substantive criminal law is a solution to the problem of overcriminalization, then a necessary step — not to say a complete solution — is to jettison the jurisprudence of revealed preferences and the philosophical commitments to noncognitivism and consequentialism that lie behind it.

Stuntz's view of this task is hard to figure out. On one hand, his general method owes much to public choice analysis, which suggests a commitment to consequentialism. He also seems to subscribe to the jurisprudence of revealed preferences. In a critical footnote, he writes: "If criminal law is inescapably political, both in the sense that it rests on contestable value judgments and in the sense that it embodies trade-offs between different values, it seems natural to assign responsibility for it to the most politically accountable actors."<sup>59</sup> On the other hand, Stuntz recognizes the possibility of rational value judgments and genuine deliberations on public ends. Notice that he refers to "contestable" and not merely "contested" value judgments. And he goes on to say:

My response to that argument is not to deny its premise. Rather, I seek to show that legislators' political incentives are to criminalize too much — with "too much" defined by the preferences of the very constituents whose wishes legislators are supposed to represent. Once one understands these incentives, one may conclude that courts are more likely than legislatures to capture social value judgments accurately.<sup>60</sup>

But to make this argument, Stuntz has to deny the premise that value judgments should be left to legislatures because they are contestable. Stuntz's argument is that whatever level of criminalization voters prefer, legislators rationally and systematically produce more than that amount. But if courts are to deal with this oversupply through the constitutionalization of criminal law, they will have to be persuaded to do so in particular cases, for particular reasons, with particular results — and in doing so these courts will not be "captur[ing] social value judgments accurately." Instead, they will be making value judgments of their own.

Not only is there nothing wrong with courts making value judgments, it is unavoidable. Legal decisionmaking in any forum is irreducibly normative, and normative decisionmaking entails value judg-

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59. Stuntz, *supra* note 1, at 527 n.96.

60. *Id.*

ments. The Court's making overt value judgments seems problematic only because false conceptions of value and normativity have been used to suggest that there is some alternative. To get rid of those assumptions would make it easier for the Court to constitutionalize substantive criminal law. This would tend to work against overcriminalization and the other features of the quarantine movement not only for the reasons that Stuntz gives, but also because it would block the principal pathogen in the criminal law: the consequentialist theory of punishment.