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Article

**\*561** BY THE LIGHT OF VIRTUE: [\[FN1\]](#) PRISON RAPE AND THE CORRUPTION OF  
CHARACTER

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**\*563** "The degree to which a society is civilized can be judged by entering its prisons."

Fyodor Dostoevsky, *The House of the Dead* (1860). [\[FN1\]](#)

"We must not exaggerate the distance between 'us,' the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration."

Chief Judge Richard Posner, *Johnson v. Phelan* (1995). [FN2]

### I. Introduction

During a press conference in 2001 regarding former Enron Chairman Kenneth Lay, California Attorney General Bill Lockyer joked that he would "love to personally escort Lay to an eight-by-ten cell that he could share with a tattooed dude who says, 'Hi, my name is Spike, honey.'" [FN3] In other words, the chief law enforcement officer of the most populous state in the country not only acknowledges, but celebrates, rape as a feature of criminal punishment. Meanwhile, a recent advertising campaign for a popular soft drink featured the company's pitch man, the comedian Godfrey, distributing cans of soda in a prison. When he drops a can, he starts to bend over to pick it up, but quickly stops himself, saying, "I'm not picking that up." [FN4] The commercial ends with Godfrey seated in a cell next to a large, tattooed inmate whose arm is draped around him. [FN5] When Godfrey delivers the company's tag line--"When you drink 7UP, everyone is your friend"--the inmate tightens his hold, to Godfrey's obvious discomfort. [FN6] Although Lockyer's remarks are disturbing because they were uttered by a public official, the soda commercial may be even more unsettling, for it is based on the market-tested assumption that prison rape is an appropriate subject of humor and that the joke will not be lost on viewers. [FN7]

Why are prison rape jokes considered socially acceptable? Do we believe, with Bill Lockyer, that rape is a fitting punishment for a variety of crimes? Or does the humor mask our uneasiness about the fate of prison \*564 inmates? Perhaps--what seems most likely--few people have thought deeply about the treatment of prisoners because, as Judge Posner suggests, they are not "us." [FN8]

This Article examines the problem of prison rape in the United States from a philosophical perspective. Of particular concern is the disparity between our official conception of prison as a form of punishment--punitive primarily because of the curtailment of liberty--and the deplorable conditions characteristic of contemporary prisons. In the context of prison rape, the Supreme Court has held that inmate-on-inmate violence may constitute an Eighth Amendment violation only under very limited circumstances, in effect denying relief in all but the most egregious cases. [FN9] Yet subjecting individuals to an environment teeming with violent sexual predators and virtually no means of self-defense would strike most people as paradigmatically "cruel and unusual."

The problem of prison rape, however, represents more than a failure of prevailing constitutional doctrine; it is first and foremost a failure of our moral obligation to treat people humanely. This claim is far from obvious, so accustomed have we become to defining our moral obligations primarily in terms of the positive legal rights of others. But even a more expansive conception of individual rights, one that incorporates moral as well as legal considerations, does not adequately capture the wrongness of prison rape. In this context, talk of rights--the coin of the liberal realm--is both practically and conceptually inadequate. [FN10] A full account of the problem of prison rape must also include an assessment of character--of the ways in which what we do (or fail to do) defines who we are.

\*565 Before turning to these issues, the first task is to examine the nature and scope of the problem of prison rape in the United States. Have popular media portrayals of prison life, such as *The Shawshank Redemption* and HBO's *Oz*, exaggerated the problem? In Part II, a review of the empirical literature establishes that while reliable data concerning prison rape is hard to come by, even conservative estimates suggest a problem of considerable magnitude. Moreover, this literature provides the basis for some generalizations about the distinctive character of rape in the prison environment. For example, inmate-on-inmate rape is a phenomenon primarily limited to males. [FN11]

While the empirical evidence justifies the particular focus on male-on-male abuse in the prison environment, the focus on rape perpetrated by other inmates also stands in need of justification. I shall argue that this facet of the larger problem of the treatment of prison inmates raises distinctive legal and philosophical issues that uniquely test the limitations of the traditional liberal framework. To the extent that the analysis yields constructive insights, they are likely to apply with equal or greater force to other forms of abuse, especially abuse inflicted on inmates by guards and other officials.

Part III considers prison rape in the context of the traditional justifications for punishment. Not surprisingly, this analysis reveals that prison rape is not readily defensible in either retributive or utilitarian terms. From the retributive perspective, the controlling value in determinations of punishment is the infliction of suffering in proportion to an offender's moral desert. [\[FN12\]](#) While this may initially suggest that rape would be a fitting punishment at least for rapists, retributivists are bound to reject this crude proportionality as inconsistent with the principle of respect for persons that retributivism presupposes. [\[FN13\]](#)

Deterrence, a utilitarian rationale, might be thought compatible with rape as a punishment for rape--or any other crime--if it were shown to be effective in reducing the likelihood of future attacks on the innocent. But this positive consequence would have to be weighed against the staggering disutility of subjecting individuals to this form of treatment. Moreover, the inherent brutality of rape might quickly expose the limits of our willingness to countenance such utilitarian calculations in any event. After all, we are not inclined to adopt draconian forms of punishment despite the intuitively plausible possibility that they might be effective. So, for example, we do not sever the hands of shoplifters, presumably because we are unwilling to purchase crime prevention at so high a human cost.

**\*566** The problem of prison rape, however, concerns not the formal sentences meted out by courts, for no court officially sentences an offender to a term of rape. Rather, inmate-on-inmate rape claims implicate the duty of guards and officials to protect inmates from one another. Part IV reviews the Supreme Court's Eighth Amendment jurisprudence as it bears on the duty of corrections officials to provide for the health and safety of their charges. With respect to inmate-on-inmate rape, the Court has adopted the "deliberate indifference" standard, which requires an inmate to prove that officials disregarded a known and substantial risk of serious harm to the inmate. [\[FN14\]](#) In most cases, inmates are unable to meet this demanding burden.

In view of the limitations of prevailing constitutional doctrine, Part V is an attempt to develop an approach to the problem of prison rape that is independent of the Eighth Amendment. In particular, I argue that the traditional liberal reliance on individual rights does not by itself adequately address the problem--the wrongness--of prison rape. First, the practice of incarceration itself reflects the determination that offenders forfeit at least some of their rights--liberty, for example--as a result of their wrongdoing. So it at least remains open to question whether the bundle of rights they retain is sufficiently robust to rule out harsh, even violent, forms of treatment. Moreover, as a practical matter, prison inmates are perhaps the least sympathetic rights claimants in our society; they are no one's constituency and are typically drawn from the least influential social groups. Under these circumstances, the exclusive focus on individual rights is unlikely by itself to yield a strong commitment to the humane treatment of prisoners.

Finally, the treatment of prisoners, as Dostoevsky observed, determines in part who we are; it is a measure of our humanity. In Jesus's formulation, nations are to be judged by their treatment of the "least of these" [\[FN15\]](#)--the most despised members among us. On this view, our response to the problem of prison rape implicates the character of our society, reflecting either (or both) the virtues we purport to live by or the vices that actually animate our practices. Are we humane and compassionate? Or callous and cruel? What guidance, if any, might a concern for virtue supply?

At first blush, questions about virtue may seem quaint in our liberal democratic society. In a political and social environment that prizes pluralism and diversity, talk of virtue seems somehow misplaced--more appropriate for private religious instruction or personal self-reflection. The recent reaction to the Abu Ghraib [\[FN16\]](#) prison abuse scandal suggests otherwise, \*567 however. For in addition to the outcry over the apparent rights violations depicted in the photographs, we were told that the conduct did (or did not) accurately reflect our values; that the offending soldiers were (or were not) us. [\[FN17\]](#) In this context, at least, we seemed to care deeply about our national character.

This preoccupation with character is the distinguishing attribute of virtue ethics. In contrast to the dominant approaches to normative ethics in Western philosophy, which focus on either duties or consequences, [\[FN18\]](#) virtue ethics concerns the dispositions of character that human beings ought to cultivate and possess. Thus, the rights theorist evaluates the institution of punishment and its discrete applications primarily in terms of whether the practices respect or violate individual rights. The consequentialist's goal is that the imposition of punishment maximize good consequences and minimize bad ones. For the virtue ethicist, the aim is to impose punishment in the appropriate way; the justness of punishment depends on the motives for punishing and the attitude with which it is imposed.

Although virtue ethics is distinguished by the centrality of virtue and character in determinations of right conduct, neither deontological nor consequentialist theories reject such considerations altogether. Indeed, Kant, perhaps the quintessential deontologist, devoted the second part of *The Metaphysics of Morals* to *The Doctrine of Virtue*, which addresses the ethical, as distinct from the juridical, duties of persons. [\[FN19\]](#) Moreover, even \*568 consequentialist accounts of ethics may assign an instrumental value to the virtues to the extent that the virtues are believed to be productive of good consequences. [\[FN20\]](#)

By the same token, virtue and character do not tell the whole story of the wrongness of prison rape, for the determination of the morally appropriate treatment of prisoners depends in part on the moral status of prisoners. [\[FN21\]](#) That is, the "right" treatment of prisoners is essentially connected to their status as human beings, and we should expect a very different account if prisoners had the moral status of rodents or weeds. Virtue ethics thus can add an important dimension to the discussion of prison rape without displacing more familiar rights-based considerations. By broadening our perspective in this way, it may be possible to see that we should treat prisoners humanely not only out of respect for their rights, but also out of respect for ourselves.

## II. The Problem of Prison Rape

In the 1994 film *The Shawshank Redemption*, the Tim Robbins character (Andy), a young, fragile-looking bank executive convicted of murdering his unfaithful wife and her lover, is victimized by a group of violent sexual predators who force other male inmates to engage in oral and anal sex with them. [\[FN22\]](#) Although the film has a happy ending, Andy is periodically sexually assaulted for about two years, until he befriends a guard who puts an end to the attacks. [\[FN23\]](#) Later, when a newly arrived inmate confesses to the murder of Andy's wife and her lover, we learn that Andy is innocent of the crime for which he was convicted.

*The Shawshank Redemption* exemplifies what we might think of as the Hollywood profile of prison rape: a naïve and unsuspecting non-violent first-time offender brutalized and exploited by a group of vicious lifers. From the moment he arrives on the yard, Andy's victimization seems inevitable. Despite the strict rules that prevail in the prison setting, inmates seem readily able to gain access to one another, and Andy is attacked, among \*569 other places, in the prison laundry and in the projection booth of the prison auditorium. [\[FN24\]](#) So far as we can tell, he never reports the attacks to prison officials.

Although compelling as fiction, we may be skeptical about whether the story is in any way typical of actual prison life.

Indeed, though many first-time offenders report that rape is what they most fear about prison, this might itself be an artifact of the media and popular culture's portrayals of prison life. [FN25] So the questions remain: How common is prison rape? What are its typical characteristics?

The study of prison rape from an empirical perspective presents uniquely daunting methodological challenges. In particular, researchers must rely primarily on self-reports of sexual violence or third-party reports, neither of which is likely to be wholly reliable. [FN26] Many inmates are reluctant to report rape out of shame, intimidation, or fear of being labeled a "snitch." [FN27] Additionally, while it is often difficult to distinguish rape from consensual sexual activity in ordinary settings, [FN28] the problem is exacerbated in the prison environment, where strong incentives, such as obtaining protection and avoiding other forms of violence, for example, lead some \*570 inmates to be coerced into "consensual" sexual relationships. [FN29] Finally, in the absence of mandatory reporting requirements, most jurisdictions do not compile data on the incidence of prison rape reported by inmates in correctional institutions. [FN30] Under these circumstances, generalizations about the frequency of prison rape have only limited value, though even the most skeptical analysts do not deny the existence of the problem. [FN31]

Despite this uncertainty, recent congressional findings in connection with the Prison Rape Elimination Act of 2003 ("PREA") [FN32] provide some insight into the nature and scope of the problem of prison rape in the United States. Relying on the testimony of social scientists and penologists, Congress "conservatively" estimated that thirteen percent of inmates in the United States have been sexually assaulted in prison. [FN33] Based on this figure, Congress found that "nearly 200,000 inmates now incarcerated have been or will be the victims of rape. The total number . . . assaulted in the past 20 years likely exceeds [one million]." [FN34] Congress also found that young first-time offenders and inmates with mental illness are at the greatest risk for victimization. [FN35] Finally, Congress noted the "severe physical and psychological effects" associated with prison rape, including the spread of HIV/AIDS and other sexually transmitted diseases, as well as the increased unemployment, homelessness, and recidivism among prison rape victims when they are released. [FN36]

\*571 These findings highlight some of the distinctive attributes and harms of prison rape. The bulk of empirical research also indicates that inmate-on-inmate rape is largely a problem among male prison populations. [FN37] Beyond this empirical evidence, rape, as distinct from other forms of abuse, and inmate-on-inmate abuse, as opposed to abuse by prison officials, raises distinctive legal and philosophical issues that require special inquiry. What follows is an attempt to spell out the considerations that warrant the particular focus on inmate-on-inmate rape among male prison populations.

#### A. Male Populations

Although contemporary research establishes that inmate-on-inmate rape is primarily a problem among male prison populations, [FN38] the earliest studies of sex in prison focused on consensual relationships among women and girls in reform schools and other institutional settings. [FN39] These findings suggest several possible explanations for the relatively low frequency of documented inmate-on-inmate rape among female prison populations.

First, according to these early studies, institutionalized females are generally less violent than male inmates, often organizing themselves into "families" whose members satisfy one another's "psychological, social, and physiological needs." [FN40] In addition, some researchers have speculated that the relatively low rates of sexual coercion among female inmates is due to the smaller size of women's facilities, the less violent criminal histories of female inmates, or possibly "women's general disinclination to initiate sexual coercion." [FN41]

While the earliest studies lacked the rigor and precision of contemporary methodologies, the results from more recent studies do not \*572 differ significantly from the earlier findings. Homosexual conduct among incarcerated women is not un-

common, but there is generally little evidence of coercion or force. [FN42] At least part of the reason for the lack of evidence of sexual coercion among female inmates may be the relative dearth of contemporary studies. As one researcher notes, "until 1996 no research existed on the topic of sexual coercion in female prisons." [FN43] Although one recent study found higher-than-expected rates of victimization perpetrated by female inmates in an unnamed Midwestern prison, [FN44] the primary form of significant sexual abuse for women inmates remains victimization by male guards. [FN45]

## B. Rape

Perhaps more controversial than the focus on male victims is the particular focus on rape as distinct from other forms of violence or abuse. The empirical evidence indicates that rape results in greater physical and psychological harm for victims than other forms of violence or abuse; [FN46] that it exacerbates interracial tensions within prisons and in the community at large; [FN47] and that it increases the level of violence, both inside and outside of prison. [FN48] Moreover, the fact that AIDS is rampant in prison--the second \*573 leading cause of death after natural causes [FN49]--might be reason enough to focus on the sexual practices that spread HIV.

Whatever the empirical evidence in the prison context, the question of whether rape in any context is worse than other forms of physical attack cannot be answered with confidence. Although most U.S. jurisdictions reserve harsher penalties for rape than for other acts of battery--treating rape as only somewhat less serious than murder [FN50]--the rationale for its special status in the criminal law has occasionally been called into question. [FN51] For example, in a widely cited essay challenging the assumption that rape is worse than other forms of interpersonal attack, philosopher Michael Davis considers and rejects several possible justifications for rape's special status in the criminal law. [FN52] Davis concludes that rape should be treated the same as "simple battery," the unlawful touching of another person. [FN53] Under his modified scheme, a "typical rapist probably would not receive . . . more than six-months imprisonment." [FN54] As counterintuitive as this might seem, Davis's thought-provoking discussion merits closer attention.

Davis argues that part of what accounts for the rape-is-worse phenomenon is the natural tendency to associate rape with extreme brutality and grave physical injury--the "worst rape." [FN55] In fact, however, Davis cites evidence to suggest that rape does not usually involve great bodily harm and that few victims suffer long-term psychic injury. [FN56] More common is what Davis calls "simple rape," in which the victim is not physically injured. [FN57] \*574 Because simple rape, according to Davis, is akin to simple battery, simple kidnapping, and other offenses against the person, the penalties for all such offenses should be similar.

To support this conclusion, Davis identifies what he takes to be the viable candidates for treating rape as more serious and then attempts to show that none stands up to scrutiny. Although Davis successfully undermines the case for some possible justifications--including Marxist, feminist, and "traditional" [FN58] accounts of rape law--the bulk of his analysis is unpersuasive. The following discussion focuses on aspects of Davis's "fear-based" and "loss-based" analyses.

Davis contends that most people, if given a choice, would prefer to be (simply) raped rather than badly beaten. Indeed, Davis observes that men and women "do not seem to be different when forced to choose between suffering rape and suffering other serious crimes." [FN59] Both will choose rape. Based on these results, [FN60] Davis concludes that simple rape is a less serious harm to an individual than other crimes and deserving of a correspondingly less severe penalty.

Apart from the controversial claim that most people would choose rape in these circumstances--which seems far from obvious--Davis's conclusion has a more serious flaw. For even if we accept Davis's empirical premise, we should be cautious about drawing any strong conclusions from these results. As Jeffrie Murphy has observed, we might not want to rest too much weight \*575 on the relative prospective fear of these experiences. [FN61] To illustrate, Murphy imagines being put to

the choice of having his fingernail pulled out with pliers or having his character believably defamed and his reputation destroyed. He thinks he would choose the latter, the extreme reputational harm, "purely because of a physiological, reflexive response to the idea of intense physical pain." [FN62] This does not establish that the actual harm of the nail-pulling is worse; only that one is likely to anticipate the prospect with greater fear and trepidation. This suggests that rape may indeed be more harmful than a severe beating regardless of one's prospective assessment in a forced-choice situation. If so, it seems reasonable for the criminal law to punish more severely the offense that carries the greater harm.

Davis also rejects the "objectification" argument, according to which the special wrongness of rape consists in the fact that such an attack reflects the use of the victim's body--the victim's "self"--by another "as if it were a mere object one owned." [FN63] Davis counters that all crimes of interpersonal violence treat the victim as an object, so this feature cannot justify the special status of rape. In all such cases, "[t]he victim's body becomes a mere inconvenience the attacker treats in any way he thinks may serve the ends he is pursuing." [FN64] Moreover, taken to its logical conclusion, the objectification argument is incoherent on this view, at least with respect to rapists motivated by a desire to degrade their victims. After all, a mere object cannot be degraded. "If the rapist's victim becomes an object in his eyes as soon as the crime begins, what then is the point of continuing the crime?" [FN65]

Several problems plague Davis's response to the objectification argument. First, rape is not simply the use of another's body for one's own purposes; it is a particular kind of use. Contrary to Davis's claim, the victim's body is not merely an "inconvenience" en route to some other end the attacker is pursuing; it is integral to the attack. In this way, rape is unlike at least some brutal beatings, which may be incidental to an attacker's other objective. Thus, for example, a beating may be motivated by the desire to extract information, to gain access to property, or to intimidate a victim. If these goals could be achieved without a beating, the attacker would presumably refrain. By contrast, the victim's body is essential to the rape, not just by definition, but because sexually dominating the victim is the end at which the rapist aims. [FN66] Thus, even for a rapist using the victim's body as a \*576 means to another end--as a component of genocide, [FN67] ethnic cleansing, [FN68] or political revenge, [FN69] for example--the use of the victim's body constitutes the attacker's ultimate aim; it is not merely contingently related to the attack. [FN70]

Davis's argument that the objectification analysis is self-refuting also fails. The rapist motivated by a desire to degrade his victim does not literally mistake the victim for an object; rather, he treats her as an object. After all, it is not by accident that he rapes a person and not an animal or a piece of fruit. He rapes precisely to assert power over a human being and to literally degrade her, that is, to reduce her value. [FN71] Although this might be true of some brutal beatings, it does not seem to be an essential element of such attacks.

Finally, Davis's rejection of the distinction between rape and ordinary battery reflects a misapprehension of the experience of rape. My own intuition is that the harm of rape is especially grave because it represents a mockery--a perversion--of something that is singularly intimate, precious, and human. As the Supreme Court has observed in a different context, decisions about sex and sexuality "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." [FN72] The rapist thwarts his victim's autonomous choice, \*577 treating her, and perhaps himself, like a rutting animal. Although, as Davis notes, various acts of battery similarly defy the wishes of victims, none entails, as rape does, the corruption of an act invested with the complex meaning and significance of human sexuality. [FN73] Davis's mistake is to consider the various justifications for rape's special status in isolation from one another, when it is the totality of these considerations that yield the judgment that rape is worse.

The dynamics of rape in the prison environment further complicate the analysis of whether rape is worse than other forms of physical abuse. Although certain aspects of rape are common in all settings--the use of threats of violence and intim-

idation to compel compliance, the admixture of violence and sexuality, and an array of complex social meanings [FN74]-certain attributes distinguish rape in the prison setting. In particular, prison rape is a means of domination that elevates the status of rapists at the expense of victims within the confines of a relatively small and insular social group. [FN75] Moreover, having been subordinated once, prison rape victims are marked as targets and subject to repeated victimization. [FN76] In extreme cases, \*578 victims may become the "property" of another inmate to be used, traded, or sold as a valuable commodity. [FN77]

In addition to the psychological trauma characteristic of rape victims generally, victims of male-on-male rape also report feeling a loss of their manhood. [FN78] Thus, in addition to the feelings of guilt, shame, and self-doubt that so many rape victims experience, [FN79] male rape victims often feel emasculated as well, believing that a "real man" would have fought more strenuously to avoid being raped. [FN80] Indeed, despite recent modifications in the law of rape that reflect a more progressive attitude toward female rape victims, such as the abolition or relaxation of force and resistance requirements and shield laws that exclude evidence of an accuser's sexual history and moral character, [FN81] male rape victims are more likely than not to have their negative self-perceptions reinforced by others. In particular, guards and other inmates often view male rape victims as contemptibly weak, probably latent homosexuals who may have invited, or at least welcomed, the sexual encounter. [FN82]

### C. Inmate-on-Inmate

The final distinction concerns the particular focus on inmate-on-inmate rape as opposed to the direct abuse of inmates by guards and other officials. From a legal and political perspective, cases of direct official abuse are almost certainly more troubling. As a general matter, official malfeasance has the capacity to harm a greater number of people. [FN83] In addition, abuses \*579 cloaked in the trappings of legality undermine the very idea of justice under law. [FN84] As a result, we are more likely to regard such abuses as matters of public concern, for we are more obviously implicated in the affirmative abuses committed by our officials. [FN85]

Inmate-on-inmate abuse, by contrast, presents a special challenge. As an initial matter, the ascription of responsibility to officials in such cases represents a form of omission liability. That is, rather than assigning responsibility on the basis of an official's actions, we seek to assign it on the basis of official inaction. Liability for omissions--for failures to act-- is notoriously complicated. [FN86] In most legal contexts, individuals have no duty to provide even minimal assistance to someone in need. [FN87] Moreover, in both the civil and criminal law settings, liability is ordinarily justified in terms of a culpable mental state, which is typically based on inferences drawn from an actor's conduct, together with the causation of harm. [FN88] But in the absence of affirmative conduct, there may be nothing from which to infer a mental state [FN89] and no metaphysical basis for the ascription of causation. [FN90] Indeed, there is something quite unnatural about the formulation: "Officer Smith caused the rape of Inmate Jones (by Inmate Doe)." In such a case, the obvious candidate for causation (and culpability) is Inmate Doe.

In the prison context, officials do have an affirmative duty to provide for the health and safety of inmates, [FN91] thereby eliminating one of the most daunting obstacles to omission liability. But even in the face of such a duty, problems of causation and culpability persist. Thus, while the law can assign \*580 liability by definition, [FN92] it cannot alter the metaphysical fact that an omission cannot cause harm. [FN93] Moreover, even in circumstances where one has an affirmative duty to act, the absence of an action provides, at best, a problematic basis for an inference regarding the concomitant mental state. That is, one's failure to act cannot support a reliable inference about one's subjective mental state, which may be anything from obliviousness to outright malice. [FN94]

These features of omission liability suggest the distinctive challenges of assessing moral blameworthiness in the context of inmate-on-inmate rape. Although guards and officials have an affirmative duty to protect the health and safety of inmates, the failure to fulfill this duty lacks the obvious indicia of liability. First, an official who fails to protect an inmate has not thereby caused harm. Moreover, in the absence of direct abuse, or any action at all, we can draw no reliable inferences about the official's subjective mental state. Finally, where the harm to an inmate is caused by another inmate, rather than directly by a guard, we are less likely to experience the sense of vicarious responsibility associated with the misconduct of those authorized to act in our name.

#### D. Focusing on Rape Among Male Inmates

As the foregoing suggests, the problem of inmate-on-inmate rape among male prison populations is particularly troubling. First, because inmate-on-inmate violence is a significant problem largely confined to incarcerated males, it is in this environment that the need for reform is most pressing. In addition, because the harm of rape generally comprises both physical injury and extreme psychological trauma, rape represents, for many, the ultimate violation of self short of death. Moreover, the consequences of prison rape range from physical debilitation and personal dysfunction to anti-social behavior and public disorder. Finally, the complexities of omission liability render the problem of inmate-on-inmate \*581 abuse especially difficult to recognize as an urgent social problem and less susceptible to traditional means of legal redress. Thus, without discounting the significance of other forms of prisoner abuse, the problem of inmate-on-inmate rape among male prisoners is especially intractable. Accordingly, I shall focus on those aspects of the problem that present the greatest challenges.

### III. Justifications for Punishment

Rape, of course, is not a formal part of any criminal sentence in the United States. [FN95] As a result, any analysis of rape as a justified punishment is perhaps beside the point. But the prominent role of prison rape in the popular imagination suggests that, despite our official rejection of punitive rape, we may actually welcome the perceived benefits of this unavowed feature of prison life. Thus, California Attorney General Bill Lockyer can publicly intimate that rape would be a fitting punishment for corporate fraud and face no significant political repercussions. [FN96]

In a 1994 survey, fifty percent of respondents said they believed that society accepts prison rape as "part of the price criminals pay for wrongdoing." [FN97] Similarly, at least some prison staff reportedly view "rape as a legitimate deterrent to crime and a just desert for its commission." [FN98] Other observers have suggested that rape is used as a "management tool," [FN99] a means of maintaining "peace" by "allowing aggressive predators to have \*582 their way." [FN100] In extreme cases, prison staff have orchestrated inmate-on-inmate rapes to punish rules violations [FN101] or to enhance the punishment of despised sex offenders. [FN102]

A review of the traditional justifications for punishment establishes that none can accommodate rape as a form of punishment without compromising other important values that structure the institutions of the criminal law. But our apparent ambivalence about prison rape suggests that we may be willing to turn a blind eye to rape in pursuit of certain punitive goals that we are unwilling to defend openly. After considering the traditional justifications, I will briefly consider "vengeance" and "blind-eye deterrence" as alternative explanations for public attitudes about prison rape.

#### A. The Traditional Justifications

The traditional justifications for punishment in American criminal law fall into two broad categories: utilitarian [FN103] and retributive. [FN104] The principal utilitarian justifications--incapacitation, [FN105] deterrence, [FN106] and \*583 rehabilitation, [FN107]--are defended in terms of the positive consequences they are believed to bring about. In the case of deterrence, for example, its viability as a justification for punishment is measured in terms of its efficacy in achieving the goal

of crime prevention by means of the threat of punishment. Retributivism, by contrast, is centrally concerned with the imposition of suffering in proportion to an offender's moral desert. [\[FN108\]](#) On this view, punishment of the deserving is intrinsically good; its justification does not depend on any further positive consequences that punishment might be expected to produce. Although a retributivist will welcome the positive consequences that punishment may incidentally yield--crime prevention, for example, or character reformation-- such consequences are not part of the justification for punishment. [\[FN109\]](#) Thus, a "retributivist punishes because, and only because, the offender deserves it." [\[FN110\]](#)

In addition to the traditional justifications in their pure forms, various combinations of these yield further possible justifications for punishment. Prominent among these alternatives are several versions of the expressive theory of punishment, which draw on both utilitarian and retributive elements. [\[FN111\]](#) The expressive rationale, in general terms, views punishment as a means for communicating a message to the offender and to society at large--that certain behavior is unacceptable and will not be tolerated. In this way, the expressive justification is utilitarian in character, focusing on the forward-looking goal of expressing and affirming society's moral values. [\[FN112\]](#) It is also retributive "in that it makes the relationship between past crime and present punishment central to the meaning and justification of punishment." [\[FN113\]](#)

**\*584** From the utilitarian perspective, punishment is justified in terms of its effectiveness in preventing crime, while at the same time generating the least possible amount of human suffering. [\[FN114\]](#) The utilitarian principle of deterrence [\[FN115\]](#) thus defines proportionality in terms of the relevant utilitarian goals, prescribing exactly that amount of punishment necessary to achieve those goals; any suffering above that amount is excessive and unjustifiable. On this view, rape might be an appropriate punishment for any crime, provided it is enough, but no more than necessary, to reduce the likelihood of future offenses. By the same token, a strongly worded letter of reprimand might also suffice as a punishment for the rapist, so long as it proved effective in achieving the goal of deterrence.

Although rape--or an angry letter--could in principle be justified as an appropriate punishment for rape in utilitarian terms, we have good reasons for believing that a utilitarian calculation will not yield this result for either form of sanction. In the case of the letter, it seems highly improbable that the threat of receiving even a very nasty letter would be sufficient to deter a would-be rapist. We can easily imagine that, from the point of view of a would-be rapist, the prospect of the "utility" of committing rape dramatically exceeds the threatened disutility of receiving an angry letter.

Rape as punishment is likely to be disutilitarian as well. The positive consequence of crime prevention would have to be weighed against the profound disutility of imposing this form of treatment. Any such calculation must include not only the unhappy consequences associated with the offender's experience of the sanction, but also the negative consequences for those assigned to authorize, inflict, and oversee it. Among other considerations, Kant's (consequentialist) concern was that the imposition of such punishments would brutalize and corrupt our own humanity as well as that of the offenders, fostering sadism and cruelty among those who administer criminal punishment and society in general. [\[FN116\]](#) Moreover, the very idea of state-sanctioned rape is so anathema that we would almost certainly reject it as unacceptably barbaric.

**\*585** The retributive justification for punishment traces its modern origins to Immanuel Kant. In Kant's classic formulation: "The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it . . . ." [\[FN117\]](#) In specifying the nature and amount of punishment that is deserved, Kant invoked the principle of *lex talionis*--the "principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favorably than the other." [\[FN118\]](#) Thus, "the act of punishment [should] be the same as the act that constituted the offense." [\[FN119\]](#) Although *lex talionis* is not definitive of retributivism, it provides at least some guidance in determining the proportionate punishment in particular cases. Thus, Kant is adamant that if an offender has commit-

ted murder, "he must die." [FN120] For, "[t]here is no sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between the crime and the retribution unless the criminal is judicially condemned and put to death." [FN121]

In the context of rape and other forms of torture, however, even Kant rejects the easy symmetry that might otherwise warrant raping the rapist or torturing the torturer. According to Kant, the punishment of offenders "must be kept free of any maltreatment that would make an abomination of the humanity residing in the person suffering it." [FN122] To be sure, Kant does not provide any further defense of the claim that executing a murderer respects the murderer's humanity in a way that raping the rapist does not. But we surely grasp the intuitive force of the distinction. We can readily conceive of a "dignified death" as well as more and less humane forms of execution. By contrast, it makes no sense to speak of "dignified rape" or "humane torture." These latter acts, by their very nature, degrade the humanity of the sufferer. Accordingly, even an "arch-talon" [FN123] such as Kant does not countenance rape as a form of punishment, even for rapists.

\*586 Finally, the expressive justification is also inconsistent with rape as a form of punishment. First, because the expressive justification combines retributive and utilitarian considerations, the same objections generated by the pure theories hold as well against "expressive rape." In addition, the expressive justification presupposes a moral agent who is capable of apprehending and accepting correct moral values. [FN124] In this way, the aim is (at least partly) to persuade an offender "not merely to obey the law, but to accept its justified demands and judgments." [FN125] Thus, even if the fear of brutal treatment were effective in bringing about obedience, the result would reflect manipulation rather than respect for the offender's humanity. Moreover, the chances of achieving even manipulated obedience are probably quite low. To the extent that rape-as-punishment is left to the random forces of prison dynamics, the message to the offender is likely to be systematically miscommunicated. That is, while the most vulnerable inmates tend to be the least brutal and dangerous themselves, they will receive the harshest "expression" of society's values. Meanwhile, the message likely to be received by the most violent and predatory offenders is that they can continue to prey on the weak. Finally, even if the state were to impose rape purposefully and systematically, it seems even less likely that offenders would embrace the values of such a community--one that willfully subjects its members to such brutal and degrading treatment.

## B. Alternative Explanations

Although rape is a poor candidate for justified punishment, at least two possible alternatives may account for its lingering appeal. One possible explanation is simple revenge. [FN126] That is, beyond (and perhaps behind) the \*587 retributive ideal--that offenders should suffer in proportion to their moral desert--lies the impulse for revenge. [FN127] On this view, the moral foundation of the criminal law is the collection of vengeful emotions that are triggered by injury or harm, manifesting themselves in a desire to "get even." [FN128] In the context of prison rape, the desire for revenge can account for the attitudes of those guards and inmates (and others) who view sexual offenders as worthy targets for rape. In this way, raping the rapist is a form of *lex talionis*--with no Kantian side-constraints--that satisfies the visceral desire to get even.

Another possible explanation for public attitudes toward prison rape is a kind of blind-eye deterrence. That is, despite our unwillingness to openly endorse the use of such tactics, perhaps we welcome what we perceive to be the deterrent effects of the threat of prison rape. On this account, "the tougher, colder, and more cruel and inhuman a place is, the less chance a person will return." [FN129] Thus, while officially committed to the humane treatment of prisoners, we still reap the crime control benefits of exceptionally harsh treatment. In this way, we are not forced to confront the tension between our principles and practices.

Regardless of whether vengeance or blind-eye deterrence provides an accurate psychological description of public atti-

tudes toward prison rape, neither constitutes a justification of prison rape. Vengeance, whether meted out by guards or other inmates, is by definition lawless. [\[FN130\]](#) Similarly, blind-eye \*588 deterrence requires the willful violation of official rules and norms, and collective self-deception about the dissonance between our principles and practices. Whatever our psychological inclinations, such a disingenuous subterfuge cannot be reconciled with our commitment to the rule of law.

#### IV. Eighth Amendment Jurisprudence

Apart from the law's official rejection of rape or the risk of rape as a form of punishment in the United States, several aspects of contemporary Eighth Amendment [\[FN131\]](#) jurisprudence seem conducive to challenges by inmates seeking relief from attacks perpetrated by other inmates. As an initial matter, the prohibition on "cruel and unusual" punishment represents an "abstract moral principle" [\[FN132\]](#) that is to be interpreted according to "the evolving standards of decency that mark the progress of a maturing society." [\[FN133\]](#) In light of this standard, the Supreme Court has taken a firm rhetorical stand against rape as a form of punishment: "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" [\[FN134\]](#) Thus, "prison conditions may be restrictive and even harsh, but gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective, any more than it squares with the evolving standards of decency." [\[FN135\]](#)

The Court has also held that prison officials have an affirmative duty of care toward inmates housed in their facilities. Thus, in requiring the provision of reasonable medical care for inmates, the Court noted the common law rule that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." [\[FN136\]](#) Pursuing a similar line of reasoning, the Court has made clear that officials have a duty to protect inmates from one another: "Having incarcerated 'persons [with] demonstrated proclivit[ies] for anti-social, criminal, and often violent conduct,' having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the \*589 government and its officials are not free to let the state of nature take its course." [\[FN137\]](#)

Despite this promising rhetoric, inmates seeking relief from abuse at the hands of other inmates face a number of significant obstacles, the first and most basic of which is conceptual. The constitutional basis for challenges to the conditions of confinement is the Eighth Amendment prohibition on cruel and unusual punishment. As the Court has noted, however, "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'" [\[FN138\]](#) Accordingly, "an official's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment." [\[FN139\]](#) Indeed, for at least one sitting Justice, the idea of an Eighth Amendment challenge concerning abuse by another inmate is incoherent: "Because the unfortunate attack [i.e., the rape] that befell petitioner was not part of his sentence, it did not constitute 'punishment' under the Eighth Amendment." [\[FN140\]](#) For Justice Clarence Thomas, the dispositive fact is that "judges or juries--but not jailers--impose punishment." [\[FN141\]](#)

Although the Court has not fully embraced Justice Thomas's conception of the Eighth Amendment, it has consistently circumscribed the scope of constitutional protection for inmate-on-inmate violence. Thus, "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.'" [\[FN142\]](#) In particular, the Court adopted the "deliberate indifference" standard developed in cases involving the failure to provide medical care or treatment. [\[FN143\]](#)

Under the deliberate indifference standard, an official is liable for the harm an inmate suffers at the hands of another inmate only if he consciously disregards a known and substantial risk of serious harm to the inmate and fails to take reasonable steps to abate the risk. [\[FN144\]](#) For liability under this subjective recklessness standard, it is not enough to show that a risk was obvious, [\[FN145\]](#) that officials should have known, or that a reasonable official \*590 would have known. [\[FN146\]](#) An inmate must instead prove that officials did in fact know of the danger and failed to take reasonable steps to protect him.

[\[FN147\]](#)

In practice, the deliberate indifference standard precludes relief in all but the most egregious cases. Among other problems, the absence in most jurisdictions of official prison rape statistics makes it more difficult for inmates to establish that officials were aware of and disregarded a known and substantial risk. [\[FN148\]](#) Additionally, while the surest way for an inmate to alert officials to the existence of a risk is to report threats by other inmates, [\[FN149\]](#) the prison environment is notoriously hard on "rats," and inmates risk violent retaliation for snitching on other inmates. [\[FN150\]](#) Finally, inmates who risk reporting rape or threats of rape can, at best, hope to be placed in protective custody. [\[FN151\]](#) Despite the relative security that protective custody affords, it is an unattractive option for many inmates. As one \*591 commentator observed, protective custody is "a prison within a prison." [\[FN152\]](#) In a typical institution, it "consists of several hours of lockdown, loss of privileges, and removal from prison activities (i.e., church, educational programs, movies, work, classes)." [\[FN153\]](#)

A further obstacle to legal relief for prison rape victims is the Prison Litigation Reform Act ("PLRA"). [\[FN154\]](#) Passed in 1996 with the stated goal of curbing frivolous inmate suits, [\[FN155\]](#) the PLRA significantly curtails the ability of inmates to sue prison officials over the conditions of confinement. Although the PLRA does not diminish the rights of prisoners, it places substantial obstacles in the way of vindicating those rights. In particular, the PLRA limits inmates' access to the courts by restricting the availability of attorneys' fees, and thus attorneys, for successful suits; [\[FN156\]](#) requiring that inmates first exhaust available prison grievance procedures, [\[FN157\]](#) which are notoriously slow and ineffectual; [\[FN158\]](#) requiring filing fees even from indigent defendants who have previously filed unsuccessful claims; [\[FN159\]](#) and limiting the scope and duration of injunctive remedies for legitimate rights violations. [\[FN160\]](#)

Between the Supreme Court's Eighth Amendment jurisprudence and the statutory reforms of the PLRA, the current legal environment provides prison rape victims and would-be victims with little hope of relief from the courts. But while prevailing doctrine could be modified in various ways to better accommodate the legitimate grievances of inmates, the problem of prison rape represents more than a failure of existing legal standards. More fundamentally, the problem of prison rape, and our indifference to it, represents a moral failure that implicates us all.

#### \*592 V. Rights, Virtue, and Character

The commitment to individual rights, reflected in the Eighth Amendment proscription against cruel and unusual punishment, is a defining attribute of a liberal democratic society. [\[FN161\]](#) Other important rights in the context of criminal justice include the right to a jury trial, [\[FN162\]](#) the right against self-incrimination, [\[FN163\]](#) and the right to be free from unreasonable search and seizure. [\[FN164\]](#) In these various ways, rights protect individuals against the awesome power of government by ruling out (or requiring) certain forms of conduct and treatment. [\[FN165\]](#) Experience suggests that rights are essential to the pursuit of justice. [\[FN166\]](#)

But justice alone may be an insufficient basis for a morally decent society. [\[FN167\]](#) In the context of prison rape, for example, the commitment to \*593 rights falls far short of protecting individuals from brutal treatment at the hands of other inmates. The problem is not--or at least not only--that many victims will be unable to establish a rights violation under existing legal standards. The problem, rather, is that with or without an established rights violation, the rights model cannot take the full measure of the wrongness of prison rape. [\[FN168\]](#) Having been conditioned to focus on actionable rights violations, we often respond with indifference to instances of mere suffering. When we are not directly responsible for harm, we are less inclined to feel implicated in its infliction. The tendency to distance ourselves in this way is exacerbated by the unpopularity of the victims of prison rape and the relative obscurity of the problem. [\[FN169\]](#) Under these circumstances, we are ill-equipped to notice or care about these instances of profound suffering.

More generally, contemporary liberalism is too often inattentive to the considerations of virtue and character that might ground a more compassionate response to the victims of prison rape. After a brief review of the rights model, a discussion of virtue ethics raises the possibility of incorporating such considerations into our ethical framework. In the context of prison rape, the virtue-ethical perspective insists that something more is at stake than the rights of unpopular inmates--also at stake is our character. Extrapolating from the conception of character at the heart of virtue ethics, we will then be in a position to examine the limitations of our approach to the problem of prison rape in terms of national character.

#### A. The Rights Model

Among the most influential sources of contemporary liberalism is the work of Immanuel Kant. Kantianism is generally regarded as a form of deontology, the view that morality consists in distinctive duties in terms of \*594 which right and wrong conduct is defined. [FN170] Thus, the rightness or wrongness of an act is not determined primarily by the goodness or badness of the consequences it yields. Certain moral imperatives--prohibitions on lying, cheating, and stealing, for example--illustrate this feature. As a general matter, one is enjoined from doing these things regardless of whether doing them in particular cases would yield better consequences.

According to Kant, human reason is the source of these moral imperatives. [FN171] On this view, we can have reasons for endorsing only those principles of action that could be adopted (rationally) by everyone concerned. [FN172] From this starting point, it is possible to justify the various duties of persons--the perfect duties--which correlate with the rights of others. [FN173] Thus, a rational person could not will the adoption of a universal principle of stealing, because it would render his own property insecure. The duty to refrain from stealing correlates with the rights of others to be free from the unauthorized taking of their property.

Kant maintained that people also have imperfect duties--of charity or benevolence, for example--which do not correspond to the rights of others. [FN174] Imperfect duties are those that cannot be observed toward all other persons; no one, for example, can help every person in need. Thus, though individuals have a duty of charity, no one has a right to another's charity. In this way, Kant's "duties of virtue" require the performance of certain actions and not others, but they do not specify any particular character or disposition with which such actions must be undertaken. [FN175] It is these considerations of character and motive that are the preoccupation of virtue ethics.

#### \*595 B. Virtue Ethics

The primary inspiration for contemporary virtue ethics is Aristotle, whose central insight in his account of ethics was that human flourishing consists in the exercise of certain virtues. [FN176] For Aristotle, "the good for man is an activity of soul in accordance with virtue." [FN177] In its many modern variants, virtue ethics is often distinguished from alternative ethical approaches on the grounds that it is agent-centered. [FN178] That is, instead of asking "What is the right action?" as a rights theorist would do, [FN179] the virtue ethicist asks "What sort of person should I be?" The short answer, of course, is that one should be a virtuous person, that is, a person with the disposition or character to act in some ways and not in others. But one's actions only reflect one's character; they do not constitute it. [FN180] Thus, we cannot conclude on the basis of a single action, or even a series of actions, that a person is, for example, courageous, honest, or compassionate. "A virtue, unlike a mere habit, is a disposition to act for reasons, and so a disposition which is exercised through the agent's practical reasoning; it is built up by making choices and exercised in making further choices." [FN181] Indeed, "the disposition in question . . . is multi-track. It is concerned with many other actions as well, with emotions and emotional reactions, choices, values, desires, perceptions, \*596 attitudes, interests, expectations and sensibilities." [FN182] Cultivating the virtues thus involves bringing "one's emotions in[to] harmony with one's rational recognition of certain reasons for action" and responding with sensitivity

to life's moral complexity. [\[FN183\]](#)

From the perspective of virtue ethics, a key shortcoming of both deontological and utilitarian ethics is the failure to take adequate account of this moral complexity. [\[FN184\]](#) On this view, the traditional attempt to reduce morality to a set of duties and rules that can be followed by any rational person is inherently futile. [\[FN185\]](#) Because rules of general applicability cannot possibly accommodate all contingencies, a rule-based ethics necessarily falls short in the numerous cases where the rules run out. [\[FN186\]](#) By contrast, the virtue ethicist maintains that moral decision-making requires practical wisdom, "the capacity to recognize, in any particular situation, those features of it that are morally salient." [\[FN187\]](#) In particular, because the "virtues are concerned with actions and feelings, . . . the moral education needed to develop them involves the education of the emotions." [\[FN188\]](#) In this way, "[o]ccasion by occasion, one knows what to do . . . not by applying universal principles but by being a certain kind of person: one who sees situations in a certain distinctive way." [\[FN189\]](#)

A related flaw in rule-based ethics on this view is the failure to account for the "texture of our moral experience." [\[FN190\]](#) Recall that the focus of deontology is determining the right course of action. Thus, in a case of moral conflict where only one of two valid moral principles can be followed, the deontological question is: "What is the right thing to do, x or y?" If we assume that the outcomes associated with x and y are both morally repugnant, but outcome x is slightly less bad, then the deontologist can \*597 readily declare the doing of x "morally right." [\[FN191\]](#) But in such a case, a morally right decision does not entail that x is a morally right action, for the doing of x will itself produce a morally repugnant outcome. This resolution of the dilemma, though morally correct, fails as a formal matter to accommodate remorse or regret--the "moral remainder" that such a terrible choice should yield. [\[FN192\]](#) By way of illustration, Rosalind Hursthouse likens this phenomenon to the professional shortcomings of certain doctors. [\[FN193\]](#) In a variety of cases, a patient might complain not about a doctor's decision, but about the callous or insensitive way he delivers or acts upon it. "[H]aving made (what they take to be) the morally right decision, they . . . can review their conduct with complete satisfaction. But if someone dies, or suffers, or undergoes frightful humiliation as a result of their decision, even supposing it is unquestionably correct, surely regret is called for." [\[FN194\]](#) An ethical structure that makes no room for such regret at least partly misses the moral point.

### C. Personal Virtue and National Character

Despite the significance of the distinctions between deontology and virtue ethics, it is not important for present purposes whether the rights model can--or can be made to--accommodate considerations of motive and character. It is enough to see that virtue ethics, by placing motive and character at the center of its ethical model, highlights such considerations in a way that liberalism, relying on the rights model, traditionally has not. It is these considerations of motive and character that provide the resources for examining our complicity in the problem of prison rape.

The traditional domain of virtue ethics is individual morality. That is, virtue ethics primarily concerns itself with questions about personal virtue--the sort of person one should be, the dispositions of character one should cultivate, the kind of life one should lead. In this way, the individual agent, \*598 and not social rules, is the unit of analysis. [\[FN195\]](#) Thus, Aristotle's Ethics was oriented toward how one could become a good person. [\[FN196\]](#) Similarly, the focus of contemporary virtue ethics is on the moral agent, "a certain sort of person with a certain complex mindset." [\[FN197\]](#) As a result, the implications of personal virtue for contemporary law and politics are less well-developed. [\[FN198\]](#)

Despite its traditional focus on personal morality, the central insight of the virtue ethical tradition has implications as well for the assessment of national character. In particular, the significance of motive and character in personal morality has an analog in the life of a nation or people. That is, what matters is not only what actions nations perform and what policies they pursue, but the attitudes and dispositions with which they characteristically undertake such actions and policies. National

character thus offers an additional vantage point from which to assess our response to the problem of prison rape in the United States.

To establish this, it is first necessary to make sense of character as a national attribute. The basic idea is an intuitive one, reflected in the aftermath of the Abu Ghraib prison abuse scandal. In addition, the concept of national character has been in play for several centuries, though only loosely and variously articulated. After a brief analysis of the concept, it will then be possible to assess our own national character and the ways in which it is implicated in the problem of prison rape.

\*599 With a few notable exceptions, [\[FN199\]](#) Americans generally reacted with outrage at the sight of American soldiers mistreating Iraqi prisoners at the Abu Ghraib prison in Iraq. Shortly after the pictures became public, President George W. Bush appeared in an interview on Arab television. Asked about the abuses at Abu Ghraib, he declared: "This is not America." [\[FN200\]](#) He also insisted that "the actions of these few people do not reflect the hearts of the American people." [\[FN201\]](#) Meanwhile, Susan Sontag declared: "[T]he photographs are us." [\[FN202\]](#) According to Sontag, "[w]hat is illustrated by these photographs is as much the culture of shamelessness as the reigning admiration of unapologetic brutality." [\[FN203\]](#) Former Vice President Al Gore also weighed in, claiming that the soldiers' conduct at Abu Ghraib was "completely out of keeping with the character and basic nature of the American people and at odds with the principles on which America stands." [\[FN204\]](#) Finally, Andrew Sullivan editorialized that the actions of a few soldiers at Abu Ghraib were an inadequate basis for calculating "the moral state of an entire nation." [\[FN205\]](#) Instead, according to Sullivan, "Abu Ghraib . . . remind[s] Americans that their virtue is inherent not in their somehow being better than other people around the world, but in the ability of the democratic system to flush out and correct inevitable human error." [\[FN206\]](#)

Regardless of the merits of any one of these claims--whether the photographs are or are not us--each reflects a recognition that we can speak sensibly, if not uncontroversially, of a national character. Indeed, despite Sullivan's admonition against taking the measure of an entire nation based on the actions of a few, he offered an alternative conception of American \*600 national character based on the commitment to democratic principles and processes. In this way, Sullivan's account of national character echoes that of John Stuart Mill.

Mill conceived of national character primarily in terms of shared "political antecedents; the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past." [\[FN207\]](#) On this view, national community "is at once shaped by circumstances and freely willed, a product of the evolution of 'national character' and an expression of a 'daily plebiscite.'" [\[FN208\]](#) In the United States, national character consists (roughly) in the founding and sustaining documents of our representative form of government; the historical triumphs, transgressions, and defeats that constitute our shared past; and the ongoing--if imperfect--commitment to the processes of democratic accountability.

#### D. Punishment and National Character

The stories we tell about who we are as a people tend to emphasize these features--liberty, equality, self-government, and self-improvement. In the context of criminal punishment, the Eighth Amendment's proscription against cruel and unusual punishment signals our formal commitment to the humane and compassionate treatment of all criminal offenders. Moreover, the Supreme Court has held that criminal punishment must comport "with the basic concept of human dignity at the core" [\[FN209\]](#) of the "cruel and unusual punishments" clause, as well as the "evolving standards of decency that mark the progress of a maturing society." [\[FN210\]](#) Cruel punishments are "inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity." [\[FN211\]](#) Even with respect to capital punishment, the Court has rejected \*601 sentencing schemes that "exclude[ ] from consideration . . . the possibility of compas-

sionate or mitigating factors stemming from the diverse frailties of humankind." [\[FN212\]](#)

Despite this morally uplifting storyline, our attitudes and practices regarding prison rape suggest that our commitment to the humane and compassionate treatment of criminal offenders may be insincere, or at least inadequate. Thus, "the astonishing prevalence and tolerance of sexual violence and subjugation . . . among male prisoners" [\[FN213\]](#) perhaps reveals that "our commitment to the moral values of order, lawfulness, and security [is] mere hypocrisy." [\[FN214\]](#) At a minimum, we seem to have lost sight of the critical distinction "between really accepting a proposition and simply mouthing the words." [\[FN215\]](#) That is, with respect to the institutions of criminal punishment, "the suffering of others has not become a part of [our] emotional repertory in such a way that it will influence [our] conduct, provide [us] with motives and expectations, and so forth." [\[FN216\]](#) Although we seem to have achieved a consensus about the correct moral values regarding punishment, we do not appear to care very much whether these values are actually honored in practice.

This disjunction between our cherished principles and actual practices at times seems endemic to criminal punishment in the United States. "We profess to abhor rape, to adore personal dignity, to uphold the rights of the downtrodden--yet we sentence tens of thousands of men every year to the most bestial kind of abuse, without a second thought beyond the occasional chuckle." [\[FN217\]](#) Although the reasons for this dissonance cannot be established with certainty, the most compelling explanations reflect a few common themes.

One of the earliest attempts to come to terms with this aspect of human behavior is found in the New Testament, where Jesus repeatedly directs his followers to refrain from judging others too harshly. Thus, when confronted with an adulteress, he admonishes the mob that has assembled to punish **\*602** her: "He that is without sin among you, let him first cast a stone at her." [\[FN218\]](#) In this way, Jesus suggests that the inclination to judge and punish others harshly inevitably reflects hypocrisy on the part of those who are themselves imperfect. [\[FN219\]](#) Likewise, in the parable of the unforgiving servant, [\[FN220\]](#) Jesus illustrates the hypocrisy that can distort our perception of the appropriate treatment of others. Having been spared by his master the harsh consequences of his own default, a household servant nevertheless withholds mercy from his debtor, refusing the compassion that his own creditor showed him.

In these and other parables, Jesus offers lessons in moral humility that are equally instructive for the secular law. [\[FN221\]](#) In particular, he recognizes the potential for self-deception when one human being presumes to judge another. Such judgments cannot be avoided in the criminal law, but they can be tempered by the recognition of our own fallibility. In this way, the teachings of Jesus are, among other things, an exhortation to resist the us-versus-them mentality that too often characterizes the institution of criminal punishment.

In a very different context, Friedrich Nietzsche offered an analysis of the institution of criminal punishment that similarly underscores the human potential for self-deception, self-righteousness, and cruelty. Thus, Nietzsche admonished us to "[m]istrust all in whom the impulse to punish is powerful." [\[FN222\]](#) According to Nietzsche, what lies behind our retributive judgments is resentment--a volatile mix of resentment, fear, cowardice, cruelty, envy, hypocrisy, and self-deception (among other things). [\[FN223\]](#) Punishment, on this view, is simply an excuse for venting these emotions and delighting in the suffering of others--a "warrant and title to cruelty." [\[FN224\]](#) Nietzsche, of course, was not advocating compassion or mercy, which he regarded as slave emotions. [\[FN225\]](#) Instead, the value of his insight is the recognition that as a psychological matter, human beings have the capacity for both cruelty and rationalization. In the context of punishment, this should cause us to question whether our zeal for justice actually reflects emotions that we officially reject in the criminal law, such as spite, malice, **\*603** envy, and revenge. Indeed, to the extent that the passion for justice and the penchant for cruelty spring from a common emotional source, we should proceed with the utmost caution.

A similar insight is reflected in the work of Martha Nussbaum, who cautions against the excesses of the "we/them mentality, in which judges set themselves above offenders, looking at their actions from a lofty height and preparing to find satisfaction in their pain." [FN226] In extreme cases, one "who notes and reacts to every injustice, and who becomes preoccupied with assigning just punishments, becomes, in the end, oddly similar to the raging ungentle people against whom he reacts." [FN227] In this way, the zeal to punish wrongdoers as harshly as possible may render the punisher (or reveal him to be) himself vicious. [FN228] The danger, as Judge Posner reminds us, is that we will come to view offenders as "members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect." [FN229] Were we to adopt this view, "then no issue concerning the degrading or brutalizing treatment of prisoners would arise." [FN230]

The tendencies captured in these analyses are human and by no means unique to particular peoples or forms of government. In the United States, the commitment to the rule of law and individual rights stands as a powerful check on the cruel and inhumane treatment of criminal offenders. But to the extent that the rights model neglects questions of character and motive, \*604 we can expect the rules to fall short in various ways. Thus, in the context of prison rape, we can point to a rule, such as the Eighth Amendment, against the inhumane treatment of prisoners. In the face of an injunction of this sort, such conduct is categorically off-limits. The problem then becomes specifying precisely what the abstract prohibition on cruelty forbids. [FN231] This is complicated, in turn, by the indirect nature of the abuse, which allows guards, officials, and the public to deny responsibility for the victims' suffering. [FN232] Moreover, once the Supreme Court declares that the Eighth Amendment requires some threshold level of treatment (X), we have very few resources for insisting that X is morally unacceptable and that a more humane level of treatment is morally appropriate for prisoners than what their rights have been interpreted to require. In such a case, the constitutional pronouncement conditions us to adopt the bare minimum as our standard of decency.

The considerations of motive and character that animate virtue ethics, by contrast, call our attention to the suffering of prison rape victims and the indifference--and worse--with which we have typically responded. In particular, such considerations remind us that morality is not exhausted by the determination of whether a right has been respected or violated. For in exercising or respecting a moral right, we may nevertheless "do something cruel, or callous, or selfish, light-minded, self-righteous, stupid, inconsiderate, disloyal, dishonest--that is, act viciously." [FN233]

In the context of prison rape, the threat to character associated with such attitudes can take a variety of forms. First, as already suggested, prison rape almost certainly corrupts the character of the inmates themselves, rape victims and perpetrators alike. Regardless of whether it violates their rights, it is indecent to consign human beings to an environment where they are likely to be degraded by others or (further) degrade themselves. By treating wrongdoers this way, we effectively eliminate any chance of restoring them to correct moral values or instilling in them a respect for the physical and psychological integrity of other persons. [FN234] Instead, if they are paying attention, they will learn that human life lacks intrinsic value, that the strong \*605 can have their way by preying on the weak, and that the concern of the human community extends only to those who never transgress its laws.

In addition, as Kant suggested, the tolerance (and worse) of prison rape can be expected to corrupt the character of those responsible for the administration, implementation, and oversight of penal institutions. For if rape and torture are "themselves . . . punishable crimes against humanity," [FN235] the creation and maintenance of prison conditions that foster them must compromise "the moral integrity of the officials who have to administer the penal system." [FN236] Moreover, "insofar as our existing penal institutions and practices are . . . radically unjust, oppressive, or morally corrupt . . . they put all of us in a morally problematic position." [FN237] In a self-governing society, where criminal punishment is imposed in our name, such pervasive corruption is bound to taint us all. [FN238]

Finally, and perhaps most worrisome, the problem of prison rape--especially our attitudes about it--reflects the corruption that has already taken root in our national character. Despite the principles and practices by which we define ourselves--especially our commitment to due process and humane, proportionate punishment--the cruelty and indifference characteristic of criminal punishment in the United States bespeak a more vicious disposition.

## VI. Conclusion

My central claim has been that the considerations of motive and character that are at the heart of virtue ethics add an important dimension to our understanding of the problem of prison rape in the United States without displacing more familiar rights-based considerations. Indeed, the Eighth Amendment represents an important affirmation that the gratuitous infliction of suffering constitutes an intolerable violation of a fundamental right. But the public's indifference to the fate of prison inmates does not violate anyone's rights; it is more insidious than that. For in our failure to care about the suffering of these victims--and in our penchant to make jokes about it--we exhibit a degree of callousness that signals the corruption of our character.

It is unclear whether incorporating the virtue-ethical considerations will have any direct legal consequences, but by asking a different set of questions--about who we are and what is acceptable to us--we may discover **\*606** a broader range of solutions. In particular, by seeing the problem of prison rape at least partly as a failure of national will, we may come to see in the efforts to alleviate the suffering of these victims the vindication of our own values. The Prison Rape Elimination Act of 2003 may reflect just such a shift in attitude. [\[FN239\]](#) Its stated purpose is to establish a zero-tolerance standard for prison rape, [\[FN240\]](#) but its practical effects are mostly symbolic--creating a federal commission, [\[FN241\]](#) mandating reporting by state corrections officials, [\[FN242\]](#) and establishing a national clearinghouse for data and information on the incidence of prison rape. [\[FN243\]](#) Although critics have questioned the efficacy of these measures, [\[FN244\]](#) Congress's willingness to address the problem represents a significant, if modest, step toward reform.

Indeed, attending to the suffering of prison rape victims does not mean that we must immediately divert resources from schools and health care to prisons, or that the problem of prison rape should become our top legislative priority. In an environment of scarce resources, it is natural to prefer the needs of law-abiding citizens. Still, if our formal commitment to humane prison conditions is to mean anything, we cannot continue to ignore the problem of prison rape. As a first step, we should experience deep regret over the necessity for the difficult policy judgments that contribute to the shameful state of our prisons and see them for the morally flawed actions they are. Instead, we seem to take a sort of satisfaction in our self-righteousness, congratulating ourselves and our officials for denying inmates a minimally decent living environment. [\[FN245\]](#)

**\*607** These public attitudes about inmates--the strong us-versus-them mentality and the inevitable prison rape jokes--translate into public policy in a variety of ways. For example, public indifference to prison rape victims is almost certainly reflected in the reluctance of officials to prosecute offenders. Prosecutors tend to be elected officials with little incentive to champion the cause of such unpopular victims. [\[FN246\]](#) Thus, "[a]lthough local prosecutors are nominally responsible for prosecuting criminal acts that occur in prisons, they are unlikely to consider prisoners part of their real constituency." [\[FN247\]](#) As a result, prosecutions of prison rape are exceedingly rare, and perpetrators can realistically expect to commit the offense "without fear of spending additional time in prison." [\[FN248\]](#) The wholesale failure to prosecute inmates who victimize other inmates cannot be reconciled with any defensible conception of justice. Mocking the plight of such victims is positively indecent.

The purpose of invoking virtue and character in the context of prison rape is not to keep people from telling or laughing at prison rape jokes. The point, rather, is to remember the attributes by which we define ourselves, including the commitment

to the humane treatment of all persons. It is this ideal, embedded in our documents, institutions, and traditions, that constitutes our national character at its best. And it is our character that we compromise when we fail to be even minimally decent.

[FN1]. The phrase "by the light of virtue" alludes to Milton:

Vertue could see to do what vertue would/By her own radiant light, though Sun and Moon/Were in the flat sea sunk ... /  
He that has light within his own cleer brest/May sit i' th' centre and enjoy bright day,/But he that hides a dark soul, and  
foul thoughts/Benighted walks under the mid-day Sun;/Himself is his own dungeon.

John Milton, Comus: A Mask Presented at Ludlow Castle 1634, available at [http://www.dartmouth.edu/~milton/reading\\_room/comus/index.shtml](http://www.dartmouth.edu/~milton/reading_room/comus/index.shtml) (last visited Oct. 25, 2005).

[FNaa1]. Associate Professor, Arizona State University College of Law; J.D., University of Pennsylvania (2000); Ph.D., Arizona State University (2003). I owe special thanks to Jeffrie Murphy and Richard Dagger for numerous discussions about these and related (and unrelated) issues over the years. I am also indebted to Nicholas Wolterstorff and the participants in the Erasmus Institute Summer Seminar (2004), especially Benjamin Lipscomb, who helped me to see the virtues of virtue ethics. I am grateful as well to the participants in the Arizona Moral and Political Theory Conference (2005), especially Jim Nickel and Mark Timmons. Finally, thanks to Adam Spease and the editors of the Iowa Law Review for their thoughtful and careful work.

[FN1]. Fyodor Dostoevsky, *The House of the Dead* 56 (David McDuff trans., Penguin Books 1985) (1860).

[FN2]. [Johnson v. Phelan, 69 F.3d 144, 152 \(7th Cir. 1995\)](#) (Posner, C.J., dissenting).

[FN3]. Investigating Enron, *Wall St. J.*, Nov. 30, 2001, at A14.

[FN4]. Rhonda Bodfield Bloom, *Invisible Assault*, *Ariz. Daily Star*, Jan. 25, 2004, at E1 (emphasis added).

[FN5]. Doug Young, *Blasted for Jail Rape Jokes*, *Reuters*, May 30, 2002, available at <http://www.curenational.org/new/index.html> (follow hyperlink "issues"; then follow "Prison Rape" hyperlink).

[FN6]. *Id.*

[FN7]. The 7UP commercial ran for two months before the parent company of 7UP, Cadbury-Schweppes, canceled the ad in response to protests from prisoners' rights organizations. *Id.* A spokeswoman for the company noted that the commercial was well-received by test audiences, which raised no objections to the content of the ad. *Id.*; see also Bodfield Bloom, *supra* note 4, at E1 (describing the content of the 7UP commercial).

[FN8]. [Johnson v. Phelan, 69 F.3d 144, 152 \(7th Cir. 1995\)](#) (Posner, C.J., dissenting).

[FN9]. See *infra* Part IV. See generally, e.g., [Farmer v. Brennan, 511 U.S. 825 \(1994\)](#). In addition to the Eighth Amendment, prisoners are legally protected from human rights abuses by provisions of federal statutory law and international law. Human Rights Watch, *No Escape: Male Rape in U.S. Prisons*, pt. III (2001), available at <http://www.hrw.org/reports/2001/prison/report.html> [hereinafter *No Escape*] (noting statutory provisions that allow the Department of Justice to prosecute officials for prisoner abuse and applicable provisions of international law). However, the primary means of redress for victims of prison abuse is private civil litigation pursuant to the Eighth Amendment and [42 U.S.C. § 1983 \(2000\)](#), which provides a cause of action for the enforcement of constitutional rights. See *id.* In addition, pre-trial detainees, who are not formally subject to "punishment" and thus not covered by the Eighth Amendment, enjoy equivalent pro-

tection under the Due Process Clause of the Fifth Amendment. See generally [Bell v. Wolfish, 441 U.S. 520 \(1979\)](#).

[FN10]. Cf. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 110 (1991) (noting "that something is missing from the underlying assumptions of public discourse, as well as from its basic vocabulary, in many situations where people have difficulty translating an important concern into political or legal language"). Michael Sandel makes a similar point in the context of the genetic engineering controversy: "In liberal societies they reach first for the language of autonomy, fairness, and individual rights. But this part of our moral vocabulary is ill equipped to address the hardest questions posed by genetic engineering." Michael J. Sandel, *The Case Against Perfection*, *Atlantic Monthly*, Apr. 2004, at 51.

[FN11]. See Preface to *No Escape*, *supra* note 9; see also *infra* Part II.A (explaining the prevalence of male-against-male rape).

[FN12]. Jeffrie G. Murphy, *Introduction to Punishment and Rehabilitation 2* (Jeffrie G. Murphy ed., 1995) (defining retributivism: a "criminal, having done wrong in the past, deserves to suffer punishment in direct proportion to the wrong the criminal has done").

[FN13]. Jeremy Waldron, [Lex Talionis, 34 Ariz. L. Rev. 25, 48 \(1992\)](#).

[FN14]. See [Farmer, 511 U.S. at 837](#); see also *infra* Part IV (defining the "deliberate indifference" standard).

[FN15]. Matthew 25:40.

[FN16]. Abu Ghraib is a prison in Iraq that came under the control of coalition forces after the invasion and occupation of Iraq in 2003. In 2004, reports surfaced alleging that prisoners had been abused and tortured by American forces at Abu Ghraib. The story and photos of the abuse came to public attention with the appearance of an article in *The New Yorker* by Seymour Hersch. See generally Seymour M. Hersch, *Torture at Abu Ghraib*, *The New Yorker*, May 10, 2004.

[FN17]. See, e.g., Interview by Alhurra TV with President George W. Bush (May 5, 2004), available at [www.gpoaccess.gov/wcomp/v40no19.html](http://www.gpoaccess.gov/wcomp/v40no19.html) ("This is not America."); Susan Sontag, *Regarding the Torture of Others*, *N.Y. Times Mag.*, May 23, 2004, at 25 ("[T]he photographs are us."). See generally *infra* Part V.C.

[FN18]. The conventional account of the dominant ethical approaches distinguishes deontological from consequentialist ethics. Deontological ethics is characterized by a commitment to categorical rules that forbid or require certain forms of conduct. Rights-based theories, including contemporary American liberalism, tend to be deontological, conceiving of rights as side constraints, or "trumps," that limit or enable individual action. See Ronald Dworkin, *Taking Rights Seriously* 194 (1977). Consequentialism, the belief that actions should be evaluated in terms of their consequences, recognizes and protects rights only to the extent that they are determined to be instrumental in maximizing good consequences. The most significant form of consequentialism is utilitarianism, according to which human welfare (or well-being) is the good to be maximized. See generally Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J.H. Burns & HLA Hart eds., Methuen 1982) (1789) [hereinafter *Bentham, Introduction*] (advocating "the greatest good for the greatest number"). Despite the imprecision, for convenience I shall use "deontological" and "rights-based" (on the one hand) and "consequentialist" and "utilitarian" (on the other) more or less interchangeably.

[FN19]. See Immanuel Kant, *The Doctrine of Virtue* 84 (Mary J. Gregor trans., 1964) (1797). The first part of *The Metaphysics*, *The Doctrine of Law*, addresses juridical duties--those that can be coercively enforced by forces external to the person, including law and other forms of social pressure. See generally Immanuel Kant, *The Metaphysics of Morals* (Mary J. Gregor

trans., 1996) (1797).

[FN20]. See, e.g., John Stuart Mill, Utilitarianism, in *On Liberty and Other Essays* 131, 154 (John Gray ed., 1991) (1859) [hereinafter Mill, *On Liberty*] (noting that the cultivation of veracity, for example, "is one of the most useful ... things to which our conduct can be instrumental," because trust is "the principal support of ... social well-being"). For contemporary consequentialist accounts attempting to include a role for virtue theory, see generally Julia Driver, *Uneasy Virtue* (2001) and Brad Hooker, *Ideal Code, Real World* (2000).

[FN21]. See Christine Swanton, *Virtue Ethics* 5 (2003) ("Virtues are, after all, dispositions of responsiveness to items in the world, and these items have morally significant features (such as status, value, or a good) which shape the requirements for appropriateness of response.").

[FN22]. *The Shawshank Redemption* (Castle Rock Entertainment 1994).

[FN23]. The guard arranges for Andy's protection--by brutally beating and permanently disabling one of the attackers--only after Andy uses his knowledge of banking and finance to provide legal advice that allows the guard to shield his assets from the IRS. *Id.*

[FN24]. *Id.* Charles Fried notes the irony of the lawlessness in prison: "[T]he one institution in which we have the almost unlimited right to control the lives of our fellow citizens and which is intended to represent the ultimate commitment to order and personal security, is too often deeply disorderly and ultimately insecure." Charles Fried, [Reflections on Crime and Punishment](#), 30 *Suffolk U. L. Rev.* 681, 687 (1997).

[FN25]. See Richard S. Jones & Thomas J. Schmid, *Inmates' Conceptions of Prison Sexual Assault*, 69 *Prison J.* 53, 55 (1989). See generally Christine A. Saum et al., *Sex in Prison: Exploring the Myths and Realities*, 75 *Prison J.* 414 (1995); Bodfield Bloom, *supra* note 4. This concern is also reflected in the film *25th Hour* (Touchstone Pictures 2002), in which the main character asks his friends to beat him up before he goes to prison so he will appear tough rather than vulnerable to predatory inmates. The strategy of this fictional character reflects the reality of the prison experience. According to one study, "one's performance [in prison] is everything.... The inmates who gave poor performances and were perceived as feminine by other inmates were most often the victims of sexual assault." Christopher Hensley et al., *Characteristics of Prison Sexual Assault Targets in Male Oklahoma Correctional Facilities*, 18 *J. Prison Violence* 595, 598 (2003) [hereinafter Hensley et al., *Characteristics*].

[FN26]. See, e.g., Saum et al., *supra* note 25, at 418 (identifying problems); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 *J. Sex Res.* 217, 226 (2002) [hereinafter Struckman-Johnson & Struckman-Johnson, *Sexual Coercion Reported by Women*] (noting the limitations of an anonymous self-report survey instrument, including deceptive reporting and self-selection).

[FN27]. See Helen M. Eigenberg, *Rape in Male Prisons: Examining the Relationship Between Correctional Officers' Attitudes Toward Male Rape and Their Willingness to Respond to Acts of Rape*, in *Prison Violence in America* 145, 147 (Michael C. Braswell et al. eds., 2d ed. 1994); James E. Robertson, [A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison](#), 81 *N.C. L. Rev.* 433, 443 (2003) [hereinafter Robertson, *Clean Heart*].

[FN28]. See, e.g., Joshua Dressler, *Understanding Criminal Law* 580-82 (2001) (discussing the role of force and resistance requirements as aspects of determining whether sex was consensual).

[FN29]. See, e.g., No Escape, supra note 9, at pt. V ("[I]n the context of imprisonment, much more so than in the outside world, the concepts of consent and coercion are extremely slippery."); Saum et al., supra note 25, at 418 ("The problem is that some sexual activity may appear consensual although an inmate may actually be coerced into participating only because he feels that there are no other alternatives.").

[FN30]. No Escape, supra note 9, at pt. VIII (reporting that almost half of the fifty states do not collect data on rapes occurring in their jails and prisons).

[FN31]. See, e.g., Daniel Lockwood, Sexual Exploitation in Prison, in Encyclopedia of American Prisons 440 (Marilyn D. McShane & Frank P. Williams eds., 1996) ("[S]ocial science researchers have found the rate of prison rape to be much lower than claimed by popular writers on the topics, who have guessed at the rate without using proper victimization surveys."); Saum et al., supra note 25, at 414 (noting the disparity between popular perceptions about the frequency of prison rape and the actual number of documented incidents).

[FN32]. 42 U.S.C. §§ 15601-09 (2000).

[FN33]. Id. § 15601. PREA defines rape as "carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person's will." Id. § 15609. This definition is generally consistent with the terminology from empirical studies of prison rape. See, e.g., Cindy Struckman-Johnson et al., Sexual Coercion Reported by Men and Women in Prison, 33 J. Sex Res. 67, 69 (1996) [hereinafter Struckman-Johnson et al., Sexual Coercion Reported by Men] (casting the survey in terms of nonconsensual "sexual contact," defined as "touching of genitals, oral, anal, or vaginal sex"). I shall use "rape" in a similarly broad way to include various forms of sexual abuse effected by force, intimidation, or coercion.

[FN34]. 42 U.S.C. § 15601.

[FN35]. Id.

[FN36]. Id.

[FN37]. See Preface to No Escape, supra note 9; infra text accompanying notes 38-45.

[FN38]. See, e.g., Preface to No Escape, supra note 9 (noting that a gender-neutral announcement of the Human Rights Watch rape study distributed to male and female populations alike yielded more than 200 responses from males, but none from females); Struckman-Johnson et al., Sexual Coercion Reported by Men, supra note 33, at 67 (finding rates of victimization for male inmates of twenty-two percent and seven percent for female inmates in a Midwestern state prison system).

[FN39]. See Christopher Hensley et al., Introduction: The History of Prison Sex Research, 80 Prison J. 360, 360 (2000) [hereinafter Hensley et al., Introduction].

[FN40]. Id. at 361.

[FN41]. Struckman-Johnson & Struckman-Johnson, Sexual Coercion Reported by Women, supra note 26, at 218. One inmate-observer, who published a qualitative analysis of her own experiences in prison, noted that "rape occurred at a much lower rate than other forms of sexual behavior." Leanne Fiftal Alarid, Sexual Assault and Coercion Among Incarcerated Prisoners: Excerpts from Prison Letters, 80 Prison J. 391, 399 (2000). The study in Midwestern prisons supports the conclusion that the rate of prison rape among female (and presumably male) populations depends in part on the nature of the facility. See Struckman-Johnson & Struckman-Johnson, Sexual Coercion Reported by Women, supra note 26, at 224 (reporting substan-

tially higher rates of sexual coercion in the one "rough prison" of three studied, "where nearly half the inmates had committed serious crimes against persons").

[FN42]. Hensley et al., Introduction, *supra* note 39, at 361.

[FN43]. Christopher Hensley et al., Inmate-to-Inmate Sexual Coercion in a Prison for Women, 37 *J. Offender Rehabilitation* 77, 81 (2003) [hereinafter Hensley et al., Inmate-to-Inmate].

[FN44]. See Struckman-Johnson & Struckman-Johnson, Sexual Coercion Reported by Women, *supra* note 26, at 225 ("One of our most important findings was that nearly one half of the incidents of sexual coercion were carried out by female inmates.").

[FN45]. See, e.g., Agnes L. Baro, Spheres of Consent: An Analysis of the Sexual Abuse and Sexual Exploitation of Women Incarcerated in the State of Hawaii, 8 *Women & Crim. Just.* 61, 62 (1997) (citing numerous sex abuse "scandals" involving corrections officials and female inmates); Hensley et al., Inmate-to-Inmate, *supra* note 43, at 85 (noting that relatively low rates of sexual coercion among female inmates is likely due to an exclusive focus on coercion perpetrated by inmates). The problem of officials directly abusing inmates is almost certainly more, not less, troubling than inmate-on-inmate abuse. See, e.g., Thomas W. Pogge, How Should Human Rights Be Conceived?, in *The Philosophy of Human Rights* 187, 194 (Patrick Hayden ed., 2001) (exploring the intuition that wrongdoing by government is worse than similar "private" wrongs: "Official moral wrongs masquerade under the name of law and justice and they are generally committed quite openly for all to see...."). However, as discussed below, the problem of inmate-on-inmate abuse raises distinctive legal, moral, and philosophical concerns that make it the "harder" case to address. See *infra* Part II.C.

[FN46]. Prison Rape Elimination Act of 2003, [42 U.S.C. § 15601 \(2000\)](#) ("Victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment upon their release from prison.").

[FN47]. *Id.* (noting that the high incidence of prison rape "increases the level of interracial tensions and strife within prisons and, upon release of perpetrators and victims, in the community at large").

[FN48]. *Id.* (noting "increases [in] levels of violence, directed at inmates and at staff, within prisons" as well as increased risk of "violent crime by individuals... brutalized by prison rape").

[FN49]. No Escape, *supra* note 9, at pt. VI ("AIDS is currently the second leading cause of death among prison inmates.") (citing U.S. Dep't of Justice, Bureau of Statistics, HIV in Prison & Jails, 1995 (1998), <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivpj95.pdf>).

[FN50]. Michael Davis, Setting Penalties: What Does Rape Deserve?, 3 *L. & Phil.* 61, 66 (1984).

[FN51]. See, e.g., Jeffrie G. Murphy, Some Ruminations on Women, Violence, and the Criminal Law, in *In Harm's Way* 209, 211 (Jules Coleman & Allan Buchanan eds., 1994) [hereinafter Murphy, Some Ruminations] (exploring the feminist impact on criminal law theory); Martin D. Schwartz & Todd R. Clear, Toward a New Law on Rape, 26 *Crime & Delinq.* 129, 135 (1980) (proposing a "normalization" of rape law by subsuming it under the general heading of assault).

[FN52]. Davis, *supra* note 50, at 81-88.

[FN53]. *Id.* at 61.

[FN54]. *Id.* at 106. Davis regards this relatively lenient punishment for rape as a worthwhile trade-off for more certain convictions. See *id.* ("Punishing rape less severely might make punishment more certain.").

[FN55]. *Id.* at 97.

[FN56]. *Id.* at 71-72 (citing sources). But see Julie A. Allison & Lawrence S. Wrightsman, Rape: The Misunderstood Crime 152-61 (1993) (examining the short- and long-term effects that many rape victims experience); Lynne Henderson, Rape and Responsibility, 11 L. & Phil. 127, 175 (1992) ("[A]ll rape is a form of soul murder...."); Emily C. Shanahan, [Stranger and Nonstranger Rape: One Crime, One Penalty](#), 36 Am. Crim. L. Rev. 1371, 1376-82 (1999) (outlining a broad account of the non-physical harm of rape, including psychic trauma, loss of trust, and fear).

[FN57]. This aspect of Davis's argument is also controversial. See [Coker v. Georgia](#), 433 U.S. 584, 612 (1977) (Burger, C.J., dissenting) ("To speak blandly, as the plurality does, of rape victims who are 'unharm'd'... takes too little account of the profound suffering the crime imposes upon the victims and their loved ones."); Henderson, *supra* note 56, at 174-75 (rejecting Davis's assumption that "rape is not painful, that forcible intercourse is not violent"); Shanahan, *supra* note 56, at 1376 (noting that all rape victims experience "the violence and injury of penetration itself").

[FN58]. According to the "traditional analysis," rape is a serious crime because it results in the loss of a woman's chastity. Davis, *supra* note 50, at 80. Davis notes that while such a concern may help explain how we came to have the rape laws that we have, it is almost certainly obsolete. *Id.* Thus, "[m]ost of us think many things dearer than chastity (for example life, limb, or health)." *Id.*

[FN59]. *Id.* at 84.

[FN60]. Davis is candid that his claims are not based on reliable survey methods. Rather, he conducted informal polls among colleagues and friends, and invites others to test his results by conducting similar surveys. *Id.* A recent incident in Arizona casts doubt on Davis's results. During a hostage crisis at an Arizona prison in the spring of 2004, inmates held two guards, a male and a female, for fifteen days. I doubt whether I was alone in having an especial fear that, even if the hostages were eventually released, it was the female guard who faced the graver threat (short of death). Although I was relieved when the guards were released alive, my heart sank when it was confirmed that the female guard had been repeatedly raped. Although the male guard's face was badly beaten, it was the female guard's ordeal that seemed especially devastating. A series of newspaper stories marking the anniversary of the stand-off, the longest in U.S. history, featured a profile of the female guard and her efforts to cope with the aftermath of the incident. Only a brief paragraph was devoted to the male guard's recovery, focusing on his physical condition and professional plans. I suspect many of us regarded this asymmetry as perfectly appropriate. See Judi Villa, "I've Got to Find a New Lois;" Ex-Hostage Struggles to Rebuild Her Life, *Ariz. Republic*, Jan. 16, 2005, at A23.

[FN61]. Murphy, *Some Ruminations*, *supra* note 51, at 217.

[FN62]. *Id.*

[FN63]. Davis, *supra* note 50, at 79.

[FN64]. *Id.*

[FN65]. *Id.*

[FN66]. See, e.g., Allison & Wrightsman, *supra* note 56, at 54 (characterizing rape as "the sexual expression of aggression, rather than the aggressive expression of sexuality" (quoting D. Gelman, *The Mind of the Rapist*, *Newsweek*, July 23, 1990, at 47)). Allison and Wrightsman explore the various typologies of rape, which broadly include stranger and acquaintance rape. *Id.* at 46-98. In addition, within these categories, rapists appear to have a variety of motivations. See *id.* at 54-59, 68; see also *id.* at 74-77 (noting the significance of traditional power differentials between men and women in the context of acquaintance rape).

[FN67]. See generally Christoph Schiessl, *An Element of Genocide: Rape, Total War, and International Law in the Twentieth Century*, 4 *J. Genocide Res.* 197 (2002).

[FN68]. *Id.* at 200; see also Cheryl Benard, *Rape as Terror: The Case of Bosnia*, 6 *Terrorism & Pol. Violence* 29, 37 (1994) (relating a pregnant Bosnian victim's story of being raped by a group of Serbs, who told her "even in the womb, it was not too late to turn her baby into a Serb").

[FN69]. See Schiessl, *supra* note 67, at 202.

[FN70]. This conception of the logical relationship between the use of the victim's body and the aim of the attack is modeled on Antony Duff's conception of the expressive function of punishment. In characterizing criminal punishment as expressive, Duff denies that the imposition of suffering on wrongdoers is merely a means to an end:

[T]o talk thus of punishment as a reformatory endeavour is not to suggest that it is a contingently efficient means towards a further and independently identifiable end: for the kind of reform at which punishment aims can be achieved only through the kind of suffering which punishment aims to impose on, or induce in, the criminal.

R.A. Duff, *Expression, Penance and Reform*, in *Punishment and Rehabilitation*, *supra* note 12, at 170.

[FN71]. Not all rapists have this motivation, but Davis confines his critique of the objectification argument to the rapist who seeks to "degrade or demonstrate power over a victim." Davis, *supra* note 50, at 79.

[FN72]. [Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 \(1992\)](#); see also [Lawrence v. Texas, 539 U.S. 558, 567 \(2003\)](#) ("When [consensual] sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."). The Court has also characterized rape as "the ultimate violation of self" short of murder, expressing "almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established." [Coker v. Georgia, 433 U.S. 584, 596 \(1977\)](#); see also [id. at 612](#) (Burger, C.J., dissenting) ("Rape is not a mere physical attack; it is destructive of the human personality.").

[FN73]. Davis notes that other acts of battery--back-slapping, hugging, and kissing, for example--can also be expressions of affection among intimates. Davis, *supra* note 50, at 90. Thus, "[s]exual battery is not unique among batteries in requiring acts that are not in themselves harmful." *Id.* By the same token, according to Davis, battery can involve one's "private parts"--just as rape does--as, for example, a surgeon who maliciously removes an unwilling patient's sexual organs. *Id.* at 91. Finally, a perpetrator seeking sexual gratification need not touch one's "private parts"; he may, for example, force his sex organ into an armpit, a navel, or an ear. *Id.* Nor is sexual gratification a requirement for the offense of rape. *Id.* But these observations miss the point. What is distinctive about rape is the combination of factors--debasement something distinctively invested with human significance by means of a battery on one's most intimate and private self. It may be a separate question whether our society should discard that distinction, though my own view is that we would lose something that enriches our lives were we to do so. In any case, Davis has not refuted or even addressed these considerations that seem central to any discussion of the wrongness of rape. For arguments that rape's special status reflects underlying pathologies in sexual interactions, see gener-

ally Pamela Foa, What's Wrong with Rape?, in *Ethics in Practice: An Anthology* 212 (Hugh LaFollette ed., 1997).

[FN74]. See generally Allison & Wrightsman, *supra* note 56.

[FN75]. See *No Escape*, *supra* note 9, at pt. V ("[I]n the prison context, where power and hierarchy are key, rape is an expression of power. It unequivocally establishes the aggressor's dominance, affirming his masculinity, strength, and control at the expense of the victim's.").

[FN76]. See *id.* ("Stigmatized as a 'punk' or 'turn out,' the victim of rape will almost inevitably be the target of continuing sexual exploitation, both from the initial perpetrator and... from other inmates as well."); Struckman-Johnson et al., *Sexual Coercion Reported by Men*, *supra* note 33, at 71 (noting the results of a study indicating that "[t]argets, on the average, had experienced nine episodes of pressured or forced sex").

[FN77]. See *No Escape*, *supra* note 9, at pt. V (describing incidences of inmates being enslaved, rented, and sold).

[FN78]. See Allison & Wrightsman, *supra* note 56, at 49; *No Escape*, *supra* note 9, at pt. VI (noting the "unwritten code of inmate beliefs, that a real man 'would die before giving up his anal virginity'" (quoting Letter to Human Rights Watch (Oct. 13, 1996))).

[FN79]. See Allison & Wrightsman, *supra* note 56, at 154 (noting that, after fear, self-blame is "the second most common reaction" to rape) (quoting R. Janoff-Bulman, *Characterological Versus Behavioral Self-Blame Inquiries into Depression & Blame*, 37 *J. Personality & Soc. Psychol.* 1798, 1798-1809 (1979)); *id.* at 151 (noting the tendency of rape victims to question their worth); *id.* at 166 (noting victims' reactions of self-blame and self-doubt).

[FN80]. See *No Escape*, *supra* note 9, at pt. VI (quoting a victimized inmate: "Men are supposed to be strong enough to keep themselves from being raped."); *id.* at V (noting "the common inmate belief that a real man would never submit to rape").

[FN81]. See Allison & Wrightsman, *supra* note 56, at 213-14.

[FN82]. See *No Escape*, *supra* note 9, at pt. VI ("Unless a prisoner is visibly injured from a sexual assault, guards often intimate that the sex was consensual: that the prisoner actually invited it."); James E. Robertson, *The Prison Rape Elimination Act of 2003: A Primer*, 10 *Crim. L. Bull.* 270, 276 (2004) (noting the tendency for prison guards to accept the "myth" that a "real man" cannot be raped because he will fight to the death").

[FN83]. See Pogge, *supra* note 45, at 194. Because the state typically enjoys a monopoly on the legitimate use of force, it has the capacity to assert its authority on a broad scale. See, e.g., Robert Nozick, *Anarchy, State, and Utopia* 108-09 (1974) (characterizing the state in terms of its claim to a "monopoly on the use of force"); Clifford J. Rosky, [Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States](#), 36 *Conn. L. Rev.* 879, 885 (2004) (making a similar claim). In addition, the very legal mechanisms that facilitate so many aspects of our lives can quickly grind them to a halt as well. See HLA Hart, *The Concept of Law* 79 (2d ed. 1994).

[FN84]. See Pogge, *supra* note 45, at 194 ("Such [state-inflicted] wrongs do not merely deprive their victims of the objects of their rights but attack those very rights themselves; they do not merely subvert what is right, but the very idea of right and justice.").

[FN85]. See *id.*

[FN86]. See, e.g., Joshua Dressler, [Some Brief Thoughts \(Mostly Negative\) About "Bad Samaritan" Laws](#), 40 *Santa Clara L. Rev.* 971, 979 n.41 (2000) [hereinafter Dressler, Brief Thoughts] (summarizing aspects of the debate).

[FN87]. See, e.g., Kathleen M. Ridolfi, [Law, Ethics, and the Good Samaritan: Should There Be a Duty to Rescue?](#), 40 *Santa Clara L. Rev.* 957, 958 (2000) (noting "how little is owed by way of a duty to rescue under Anglo-American law"). Whether one has a moral duty in such cases is less obvious, though many of the same problems involving mental state and causation affect the analysis of whether and when individuals have a moral duty to come to the aid of another. See, e.g., HLA Hart & A.M. Honoré, *Causation in the Law* 63 (1st ed. 1959); Michael Moore, *Placing Blame* 251-329 (1997) [hereinafter Moore, *Placing Blame*].

[FN88]. See Moore, *Placing Blame*, supra note 87, at 403; Dressler, *Brief Thoughts*, supra note 86, at 982.

[FN89]. See Dressler, *Brief Thoughts*, supra note 86, at 982-83.

[FN90]. See Moore, *Placing Blame*, supra note 87, at 273 (denying that "omissions cause anything" and noting that "omissions are literally nothing at all") (citing Michael Moore, *Act & Crime: The Philosophy of Action and Its Implications for Criminal Law* (1993)).

[FN91]. See [Estelle v. Gamble](#), 429 U.S. 97, 103 (1976); infra Part IV.

[FN92]. See Hart & Honoré, supra note 87, at 65 (noting the distinction between legal responsibility for and actual causation of harm). For example, as Hart and Honoré observe, the law can hold an employer responsible for the acts of its employees despite the fact that the employer did not cause the harm that resulted. *Id.*

[FN93]. See Moore, *Placing Blame*, supra note 87, at 251 (observing that "absent actions ('omissions') have no effects because they enter into no singular causal relations"). Moore's claim is not uncontroversial. See, e.g., Mill, *On Liberty*, supra note 20, at 15 ("A person may cause evil to others not only by his actions but by his inaction...."); Dressler, *Brief Thoughts*, supra note 86, at 979 n.41 (noting the "lingering metaphysical issue" regarding whether a "non-action is ever the cause of harm").

[FN94]. See Dressler, *Brief Thoughts*, supra note 86, at 982. Dressler notes that relative to our commonplace inferences about intent based on actions, it is "far harder to determine why a person does not act." *Id.* Thus, in a hypothetical situation involving a blind person about to step into oncoming traffic, Dressler suggests the range of possible explanations for a bystander's failure to act, including lack of awareness, slow reaction time, and simple fear. *Id.*

[FN95]. See [Farmer v. Brennan](#), 511 U.S. 825, 833 (1994) (offering numerous cases defining duties of prison officials and addressing prison conditions).

[FN96]. See *Investigating Enron*, supra note 3. In 2002, one year after suggesting that he would welcome the rape of Enron Chairman Ken Lay in prison, Lockyer was re-elected as Attorney General of California, and his name was mentioned as a strong gubernatorial candidate for 2006. See Greg Lucas, *Names for 2006 Gubernatorial Election Includes Actor Arnold's*, *San Diego Union-Trib.*, Nov. 10, 2002, at A14 ("Lockyer was the biggest vote getter on the Democratic ticket, the only one to crest 50 percent and capture 150,000 more votes than Gov. Gray Davis, who bested Republican challenger Bill Simon in Tuesday's election."). By contrast, an eight-term Illinois Republican legislator, Cal Skinner, was defeated in a 2000 primary election after campaigning for an end to prison rape in Illinois. Skinner attributes his defeat at least partly to his efforts on behalf of prisoners. Eli Lehrer, *Hell Behind Bars: The Crime That Dare Not Speak Its Name*, *Nat'l Rev. Online*, Feb.5,2001, ht-

tp:// www.spr.org/en/news/pre2002/02501.html. As Skinner notes, "[c]onvicted criminals aren't the most popular people with conservative voters in a conservative district." *Id.*; see also Fred Dickey, Rape, How Funny Is It?, *L.A. Times Mag.*, Nov. 3, 2002, at 44 (quoting Skinner: "There's no lobbyist crusading against prison rape. For a lawmaker, it's a mission without a political reward.").

[FN97]. Charles M. Sennott, Poll Finds Wide Concern About Prison Rape; Most Favor Condoms for Inmates, *Boston Globe*, May 17, 1994, at 22.

[FN98]. Robertson, *Clean Heart*, *supra* note 27, at 446.

[FN99]. Lehrer, *supra* note 96; see also Helen M. Eigenberg, Correctional Officers' Definitions of Rape in Male Prisons, 28 *J. Crim. Just.* 435, 436 (2000) (noting that "some officers may use rape or the threat of sexual violence to control inmates").

[FN100]. James E. Robertson, Compassionate Conservatism and Prison Rape: The Prison Rape Elimination Act of 2003, 30 *New Eng. J. on Crim. & Civ. Confinement* 1, 9 (2004) [hereinafter Robertson, *Compassionate Conservatism*] (quoting congressional testimony of Mark Earley, President and Chief Financial Officer, Prison Fellowship Ministries).

[FN101]. See Mark Arax & Mark Gladstone, Five Guards Are Indicted in Prison-Rape Scandal, *Contra Costa Times* (Walnut Creek, Cal.), Oct. 9, 1998, at A17 (reporting that a former guard "described how fellow officers had transferred [the victim] into the cell of ['the Booty Bandit'], knowing that the 6-foot-3, 230-pound prison enforcer would likely rape the small, skinny Dillard").

[FN102]. Bob Egelko, Former Prison Guards Sentenced, *S.F. Chron.*, Feb. 7, 2003, at A19 (reporting convictions of two former guards who induced inmates to rape "convicted child molesters and rapists, as well as prisoners who would not cooperate with them").

[FN103]. Utilitarianism is the most prominent form of consequentialism, the view that actions should be evaluated in terms of their consequences. For the utilitarian, the consequence to be maximized is happiness--or utility.

[FN104]. See Moore, *Placing Blame*, *supra* note 87, at 92 (identifying "two sorts of prima facie justifications of punishment--effecting a net social gain (utilitarian), and giving just deserts (retributivist)").

[FN105]. Incapacitation involves disabling an offender from engaging in further criminal conduct. The most obvious forms of incapacitation are imprisonment and execution; in both cases, offenders are physically prevented from offending again. See, e.g., Jeremy Bentham, *Panopticon Versus New South Wales*, in 4 *The Works of Jeremy Bentham* 173, 183 (John Browning ed., Russell & Russell, Inc. 1843) [hereinafter Bentham, *Panopticon*] ("This contrivance [incapacitation] was as firmly laid down in school-logic as could be wished. Mischievously or otherwise, for a body to act in a place, it must be there.").

[FN106]. Deterrence may be either "general" or "specific." General deterrence concerns the "prevention of similar offenses on the part of individuals at large, viz. by the repulsive influence exercised on the minds of bystanders by the apprehension of similar suffering in case of similar delinquency." *Id.* at 174. Specific deterrence is "prevention of similar offenses on the part of the particular individual punished in each instance, viz. by curing him of the will to do like in the future." *Id.*

[FN107]. Rehabilitation concerns the attempt to reform a wrongdoer, either in Bentham's sense--by "curing" the offender of the impulse to engage in wrongdoing--or by otherwise reforming an "offender's character, habits, or behavior patterns so as to

diminish his criminal propensities." Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 11 n.\* (1st ed. 1976).

[FN108]. See Moore, *Placing Blame*, supra note 87, at 105.

[FN109]. See Robert Nozick, *Philosophical Explanations* 374 (1981) [hereinafter Nozick, *Philosophical Explanations*] ("These further consequences are not to be dismissed simply; but we shall see them as an especially desirable and valuable bonus, not as part of a necessary condition for justly imposed punishment.").

[FN110]. Michael S. Moore, *The Moral Worth of Retribution*, [hereinafter Moore, *Moral Worth*] in *Punishment and Rehabilitation*, supra note 12, at 94.

[FN111]. For variations of the expressive theory, see Nozick, *Philosophical Explanations*, supra note 109, at 370; Jean Hampton, *The Retributive Idea*, in *Forgiveness and Mercy* 111, 130 (1988); Duff, supra note 70, at 169, 170; Joel Feinberg, *The Expressive Function of Punishment*, in *Doing & Deserving* 95 (1970).

[FN112]. See Nozick, *Philosophical Explanations*, supra note 109, at 371 (characterizing those who view punishment primarily in terms of the goal of reforming offenders as "teleological retributivists"); Duff, supra note 70, at 170.

[FN113]. Duff, supra note 70, at 170; see also Nozick, *Philosophical Explanations*, supra note 109, at 370 ("Retributive punishment is an act of communicative behavior."); Hampton, supra note 111, at 130 ("So even in a situation where neither the wrongdoer nor society will either listen to or believe the message... the retributivist will insist on the infliction of punishment insofar as it is a way of 'striking a blow for morality'....").

[FN114]. See Bentham, *Introduction*, supra note 18, at 158 ("[A]ll punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.").

[FN115]. Deterrence here refers broadly to crime prevention and rehabilitation. See Bentham, *Panopticon*, supra note 105, at 174 (defining specific deterrence in terms of the "prevention of similar offenses on the part of the particular individual punished in each instance, viz. by curing him of the will to do like in the future").

[FN116]. See Immanuel Kant, *The Metaphysical Elements of Justice* \*363 (John Ladd trans., Bobbs-Merrill Co. 1965) (1780) [hereinafter Kant, *Metaphysical Elements*]; Waldron, supra note 13, at 38.

[FN117]. Kant, *Metaphysical Elements*, supra note 116, at \*331.

[FN118]. *Id.* at \*332.

[FN119]. Waldron, supra note 13, at 32. Although Kant's conception of retributivism includes *lex talionis*, many do not. See, e.g., Moore, *Moral Worth*, supra note 110, at 95 ("It is quite possible to be a retributivist and to be against both the death penalty and *lex talionis*, the idea that crimes should be punished by like acts being done to the criminal."). Likewise, one committed to *lex talionis* need not be a retributivist. See, e.g., Waldron, supra note 13, at 31 ("[R]easoning along the lines of [*lex talionis*] might have a part to play in the determination of an appropriate penalty even for a utilitarian judge or legislator.").

[FN120]. Kant, *Metaphysical Elements*, supra note 116, at \*333.

[FN121]. *Id.*

[\[FN122\]](#). Id.

[\[FN123\]](#). Waldron, *supra* note 13, at 40.

[\[FN124\]](#). Duff, *supra* note 70, at 195.

[\[FN125\]](#). Id. at 173; see also Herbert Morris, A Paternalistic Theory of Punishment, in *Punishment and Rehabilitation*, *supra* note 12, at 154, 158 (arguing that the moral good of punishment is "an autonomous individual freely attached to that which is good").

[\[FN126\]](#). Revenge, strictly speaking, is the act or desire of seeking retaliation against another who has harmed or wronged one. In this sense, revenge is personal between the victim and wrongdoer. See Nozick, *Philosophical Explanations*, *supra* note 109, at 367 (noting that the personal tie may extend to families and groups). For present purposes, I shall use "revenge" more colloquially, referring generally to the desire to impose, or to see imposed, harsh treatment on wrongdoers. In this sense, revenge may be thought of as a kind of unreflective retributivism--a misguided perception about what offenders truly deserve; it may also reflect more generally a "feeling of hatred--call it revenge, resentment, or what you will--which the contemplation of such [wrongful] conduct excites in healthily constituted minds." James Fitzjames Stephen, *Liberty, Equality, Fraternity* 152 (1967). This general meaning of revenge is commonplace in judicial opinions. See, e.g., [Schiro v. Indiana](#), 533 N.E.2d 1201 (Ind. 1989), cert denied, 493 U.S. 910, 914 (1989) (Stevens, J., dissenting from denial of certiorari) (noting a jury's role, in appropriate cases, of expressing an "outraged community's desire for revenge or retribution"); [Furman v. Georgia](#), 408 U.S. 238, 305 (1972) (Brennan, J., concurring) (claiming that society has rejected punishment as a means to "get even" with criminals); [id. at 344](#) (Marshall, J., concurring) (noting the "demand for vengeance on the part of many persons in a community against one who is convicted of a particularly offensive act"); [Johnson v. Phelan](#), 69 F.3d 144, 152 (7th Cir. 1995) (Posner, C.J., dissenting) (lamenting that the treatment of criminal offenders too often depends on "what a vengeful populace and a resource-starved penal system choose to give them").

[\[FN127\]](#). Robert Nozick has identified five basic attributes that distinguish retribution from revenge: (1) retribution is inflicted for a wrong, not merely a harm or injury; (2) retribution sets an internal limit on the amount of punishment that is in proportion to the degree of the wrong, while revenge is limitless in principle; (3) revenge, but not retribution, is personal between the punisher and the punished; (4) revenge, but not retribution, involves "pleasure in the suffering of another;" and (5) retribution is a general principle that calls for application across similar cases, while revenge may (or may not) be imposed at the whim of the revenger. Nozick, *Philosophical Explanations*, *supra* note 109, at 363-68. Despite this conceptual distinction, Nozick acknowledges that the difference may be less stark in practice. Id. at 368. In addition, many of those who defend retributivism as a justification for punishment recognize that the retributive and vengeful emotions may spring from a common source. See, e.g., Moore, *Moral Worth*, *supra* note 110, at 105; Jeffrie G. Murphy, *Getting Even: The Role of The Victim*, in *Punishment & Rehabilitation*, *supra* note 12, at 151 n.32 ("Perhaps such attempts at drawing a sharp distinction between the two have been misdirected.").

[\[FN128\]](#). Jeffrie G. Murphy, *Getting Even: Forgiveness and Its Limits* 3 (2003).

[\[FN129\]](#). Robertson, *Clean Heart*, *supra* note 27, at 446 (quoting an inmate).

[\[FN130\]](#). See Nozick, *Philosophical Explanations*, *supra* note 109, at 366-68 (exploring the necessary definitional distinction between retribution and revenge and observing that inherent limitations on retribution are absent for revenge). Even Jeff Murphy, who offers a qualified defense of the role of revenge in criminal punishment, suggests that such a role is only defensible if revenge can be institutionalized. Murphy, *supra* note 128, at 17-26. Thus, invoking the myth of the Furies, and

their transformation into the Eumenides ("kindly ones"), Murphy observes that "they will represent not vigilante activity (with which revenge should not be confused) but the pursuit of revenge under the constraints of law." *Id.* at 20.

[FN131]. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [U.S. Const. amend. VIII](#).

[FN132]. Antonin Scalia, *A Matter of Interpretation* 145 (1997).

[FN133]. [Trop v. Dulles, 356 U.S. 86, 101 \(1958\)](#).

[FN134]. [Farmer v. Brennan, 511 U.S. 825, 834 \(1994\)](#) (quoting [Rhodes v. Chapman, 452 U.S. 337, 347 \(1981\)](#)).

[FN135]. *Id.* at 833 (internal citations and quotations omitted).

[FN136]. [Estelle v. Gamble, 429 U.S. 97, 104 \(1976\)](#) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." (quoting [Gregg v. Georgia, 428 U.S. 153, 173 \(1976\)](#))).

[FN137]. [Farmer, 511 U.S. at 833](#) (internal citation omitted).

[FN138]. *Id.* at 837 (emphasis added).

[FN139]. *Id.* at 838.

[FN140]. *Id.* at 859 (Thomas, J., concurring).

[FN141]. *Id.* (internal citation omitted).

[FN142]. [Farmer, 511 U.S. at 834](#) (quoting [Wilson v. Seiter, 501 U.S. 294, 297 \(1991\)](#)).

[FN143]. [Estelle v. Gamble, 429 U.S. 97, 104 \(1976\)](#).

[FN144]. [Farmer, 511 U.S. at 830, 837](#).

[FN145]. The Court does note that in cases where the risk to an inmate was objectively obvious, an official will be hard-pressed to deny that he was unaware of the risk:

Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

See *id.* at 842 (internal citation omitted). In view of this, one commentator has argued that courts should not grant summary judgment under Rule 56 to defendants in cases where inmates have alleged facts that, if taken as true, might establish that the risk of harm was obvious:

When a court grants summary judgment for defendant-officials in spite of an obvious risk, it is effectively making a factual finding that the obviousness of the risk, in the given case, does not warrant an inference of actual knowledge. It is simply inappropriate for a court to decide this factual question on summary judgment.

Brian Saccenti, Comment, [Preventing Summary Judgment Against Inmates Who Have Been Sexually Assaulted by Showing that the Risk Was Obvious, 59 Md. L. Rev. 642, 663 \(2000\)](#).

[FN146]. [Farmer, 511 U.S. at 837-38.](#)

[FN147]. *Id.* The Court also notes that a defendant-official's response need not be effective, only "reasonable," to avoid liability. See *id.* at 844 ("[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.").

[FN148]. See, e.g., *No Escape*, *supra* note 9, at pt. VIII (reporting that almost half of the fifty states do not collect data on rapes occurring in their jails and prisons). In any event, such evidence may be of little value to an inmate attempting to prove official awareness of risk. See, e.g., *Robertson, Clean Heart*, *supra* note 27, at 453 ("[T]he courts have eschewed systemic analysis....").

[FN149]. See [McGill v. Duckworth, 944 F.2d 344, 349 \(7th Cir. 1991\)](#) ("A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety.").

[FN150]. See, e.g., [United States v. Bailey, 444 U.S. 394, 426 n.6 \(1980\)](#) (Blackmun, J., dissenting) (noting that the life of an inmate who reports a rape or threat of rape "isn't worth a nickel") (citing R. Goldfarb, *Jails: The Ultimate Ghetto* 325-26 (1975)); *No Escape*, *supra* note 9, at pt. VIII (noting the dangers to inmates of reporting rapes and threats of rape); *Robertson, Clean Heart*, *supra* note 27, at 455 ("Notification in this manner comes at great risk to a targeted inmate: he becomes a snitch.").

[FN151]. Inmates are not guaranteed that their requests for protective custody will be honored. See, e.g., *Robertson, Clean Heart*, *supra* note 27, at 456.

[FN152]. *Id.* at 459-60.

[FN153]. *Hensley et al., Characteristics*, *supra* note 25, at 604; see also *No Escape*, *supra* note 9, at pt. VIII (likening protective custody conditions to those of disciplinary segregation); *Robertson, Clean Heart*, *supra* note 27, at 460 (noting that "protective custody affords inmates little freedom of movement, scant programming, and slim prospects for a prison job"). Underlining the strong disincentives for inmates to request protective custody, courts have cited high rates of protective custody in an institution as evidence of pervasive fear of victimization. See, e.g., [Jensen v. Clarke, 94 F.3d 1191, 1197 \(8th Cir. 1996\)](#) (citing dramatic increases in the number of inmates in protective custody in concluding that inmates face "a substantial risk of physical harm"); [Ramos v. Lamm, 485 F. Supp. 122, 141 \(D. Colo. 1979\)](#) (noting that the size of the protective custody population is "one of the most accurate barometers" of fear in an institution).

[FN154]. [Pub. L. No. 104-134, 110 Stat. 1321 \(1996\)](#) (codified in scattered sections of 18, 28, & 42 U.S.C. (2000)).

[FN155]. See, e.g., 142 Cong. Rec. 6, 8237 (1996) (statement of Sen. Abraham) ("Our proposals will return sanity and State control to our prison systems. To begin with, we would institute several measures to reduce frivolous inmate litigation.").

[FN156]. [42 U.S.C. § 1997e\(d\) \(2000\)](#).

[FN157]. *Id.* § 1997e(a).

[FN158]. See *Robertson, Compassionate Conservatism*, *supra* note 100, at 16.

[FN159]. See [28 U.S.C. § 1915\(b\)\(1\) \(2000\)](#).

[FN160]. See [18 U.S.C. §§ 3626\(a\)-\(g\) \(2000\)](#); see also *No Escape*, supra note 9, at pt. VIII.

[FN161]. See Robert A. Dahl, *On Democracy* 48-50 (1998); Mill, *On Liberty*, supra note 20, at 17 ("No society in which these liberties [of conscience, expression, and association] are not, on the whole, respected, is free, whatever may be its form of government...."). Similarly, John Locke wrote:

The Reason why Men enter into Society, is the preservation of their [lives, liberties, and] Property; and the end why they chuse and authorize a Legislative, is, that there may be Laws made, and Rules set as Guards and Fences to the Properties of all the Members of the Society, to limit the Power, and moderate the Dominion of every Part and Member of the Society.

John Locke, *Two Treatises of Government* § 222, at 430 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

[FN162]. [U.S. Const. amend. VI](#).

[FN163]. [U.S. Const. amend. V](#).

[FN164]. [U.S. Const. amend. IV](#).

[FN165]. That is, legal rights aim to protect individuals from government. Individuals also possess moral rights, which are not assigned by the legal system, do not depend on the existence or operation of a legal regime, and hold generally against other individuals. See, e.g., Judith Jarvis Thomson, *The Realm of Rights* 2-3 (1990) (noting that even in the absence of a law against nose-breaking, an individual has a right that others refrain from doing so).

[FN166]. See, e.g., Dahl, supra note 161, at 50 (noting the significance of rights for the maintenance of liberty and justice); John Rawls, *A Theory of Justice* 4-5 (1971) (same); Mill, *On Liberty*, supra note 20, at 7 passim (warning of the dangers, abundant in history, of the tyranny of the majority).

[FN167]. See, e.g., Judith Jarvis Thomson, *A Defense of Abortion*, 1 *Phil. & Pub. Aff.* 47, 59-61 (1971) (distinguishing justice from decency). Thomson, in defending a woman's right to choose an abortion, notes that particular circumstances may render the exercise of a right "morally indecent." *Id.* at 59. In the context of her now-famous violinist example, Thomson observes that a person who refuses to sacrifice one hour to save the life of a world-class violinist who will otherwise die does not act unjustly, but is nevertheless indecent. *Id.* at 61. To highlight this distinction, Thomson imagines alternative scenarios involving two young brothers. *Id.* at 56-61. In the first case, the boys are jointly presented with a box of chocolates. Under these circumstances (and all other things being equal), each boy has a claim to half of the candy; if the older boy eats all of it, he acts unjustly. *Id.* at 56. By contrast, if the older boy is alone presented with the chocolates and proceeds to eat the entire box in front of his younger brother, he does not act unjustly but (presumably) indecently; in that event, "he is greedy, stingy, callous--but not unjust." *Id.* at 60. See generally Avishai Margalit, *The Decent Society* (1996) (arguing that decency is a more urgent and realistic goal for society than justice).

[FN168]. Of course, the rape itself constitutes a violation of a moral right, regardless of whether the rapist or anyone else is held legally liable. See Thomson, supra note 165, at 1-2. But in the absence of prosecution or another form of redress, the right will not be vindicated.

[FN169]. Although prison rape is a highly visible popular culture phenomenon, see supra Part II, the problem of prison rape has a relatively low profile. Thus, prison rape has not been widely studied, see, e.g., Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men*, supra note 33, at 67; the magnitude of the problem remains indeterminate, see, e.g., Robertson, *Compassionate Conservatism*, supra note 100, at 7-9; and, according to some officials, the problem has been greatly exagger-

ated. See *id.* (quoting Martin Horn, the commissioner of the New York City Probation Department's characterization of the PREA as "the 'Oz Bill'" because it represents a similarly unrealistic portrayal of prison life); see also *No Escape*, *supra* note 9, at pt. I (noting that "serious, sustained, and constructive attention to [prison rape] remains rare"). As Stephen Donaldson, the late President of the organization Stop Prisoner Rape said, "the rape of males is a taboo subject for public discussion.... If ever there was a crime hidden by a curtain of silence, it is male rape." *No Escape*, *supra* note 9, at pt. I.

[FN170]. See generally David McNaughton, *Deontological Ethics*, in *Routledge Encyclopedia of Philosophy* 890 (Edward Craig ed., 1998).

[FN171]. See Onora O'Neill, *Kantian Ethics*, in *Routledge Encyclopedia of Philosophy*, *supra* note 170, at 200, 201 (discussing Kant's conception of practical reasoning).

[FN172]. See Immanuel Kant, *Groundwork of the Metaphysics of Morals* 88 (Herbert J. Paton ed., 1961) (1785) ("Act only on that maxim through which you can at the same time will that it should become a universal law.").

[FN173]. See Kant, *The Metaphysics of Morals*, *supra* note 19.

[FN174]. See, e.g., Kant, *The Doctrine of Virtue*, *supra* note 19, at 115-22.

[FN175]. Recent scholarly work examining Kant's theory of virtue suggests that this claim may be too strong. See generally Barbara Herman, *The Practice of Moral Judgment* (1993) (offering a reinterpretation of Kantian ethics that emphasizes moral judgment and moral personality); Nancy Sherman, *Making a Necessity of Virtue: Aristotle and Kant on Virtue* (1997) (tracing the role of emotions and practical wisdom in Aristotelian and Kantian ethics and finding numerous commonalities); Mark Timmons, *Motive and Rightness in Kant's Ethical System*, in *Kant's Metaphysics of Morals* 255 (Mark Timmons ed., 2002) (investigating the role of motive in Kant's conception of right action and concluding that motive is relevant to the rightness of at least some actions).

[FN176]. See Aristotle, *Nicomachean Ethics* (J.A.K. Thomson trans., 1976) (n.d.); Roger Crisp & Michael Slote, *Introduction to Virtue Ethics* 1, 2 (Roger Crisp & Michael Slote eds., 1997); see also Rosalind Hursthouse, *On Virtue Ethics* 8 (1999) [hereinafter Hursthouse, *On Virtue Ethics*].

[FN177]. Aristotle, *supra* note 176, at 76.

[FN178]. See, e.g., Hursthouse, *On Virtue Ethics*, *supra* note 176, at 48; Crisp & Slote, *supra* note 176, at 3.

[FN179]. I have so far distinguished between ethical approaches that depend on duties and rights on the one hand and consequences on the other. See *supra* note 18 and accompanying text. However, I shall relax this distinction for purposes of comparison with virtue ethics on the grounds that most defensible contemporary accounts of consequentialism, including utilitarianism, recognize rights as an effective means of maximizing good consequences. Indeed, this was John Stuart Mill's approach. See, e.g., Mill, *On Liberty*, *supra* note 20, at 19 *passim* (defending "Liberty of Thought," including speaking and writing, based on the dire consequences for individuals and society of failing to protect these liberties against majority interference). For Mill, and consequentialists generally, rights are likely to be important, but not fundamental.

[FN180]. According to Aristotle:

But virtuous acts are not done in a just or temperate way merely because they have a certain quality, but only if the agent also acts in a certain state, viz. (1) if he knows what he is doing, (2) if he choose it, and chooses it for its own sake, and

(3) if he does it from a fixed and permanent disposition.

See Aristotle, *supra* note 176, at 97.

[FN181]. Julia Annas, *Virtue Ethics*, in *Oxford Companion to Ethical Theory* (David Copp ed., forthcoming 2006).

[FN182]. Rosalind Hursthouse, *Virtue Ethics*, in *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/ethics-virtue/> (last visited Oct. 27, 2005) [hereinafter Hursthouse, *Virtue Ethics*].

[FN183]. *Id.*

[FN184]. See, e.g., Hursthouse, *On Virtue Ethics*, *supra* note 176, at 18, 59 and *passim*.

[FN185]. See, e.g., *id.* at 40; Roger Crisp, *Virtue Ethics*, in *Routledge Encyclopedia of Philosophy*, *supra* note 170, at 622-23 (tracing the development of virtue ethics).

[FN186]. See, e.g., Aristotle, *supra* note 176, at 93 ("[A]ny account of right conduct must be stated in outline and not in precise detail.").

[FN187]. Hursthouse, *Virtue Ethics*, *supra* note 182.

[FN188]. Hursthouse, *On Virtue Ethics*, *supra* note 176, at 19.

[FN189]. John McDowell, *Virtue and Reason*, in *Virtue Ethics*, *supra* note 176, at 161-62; see also Aristotle, *supra* note 176, at 93 (noting that because general rules lack the precision to address specific situations, "agents are compelled at every step to think out for themselves what the circumstances demand").

[FN190]. Hursthouse, *On Virtue Ethics*, *supra* note 176, at 55.

[FN191]. Hursthouse offers the following example:

The man who has induced two women to bear a child of his by promising marriage, can only marry one, but may not be in an irresolvable dilemma; it may be worse to abandon A than B, and let us suppose he makes "the morally right decision" and marries A, perforce breaking his promise to B and condemning her child to illegitimacy.

*Id.* at 46-47. The point, she suggests, is that this man "merits not praise, but blame, for having created the circumstances that made it necessary for him to abandon B; he should be feeling ashamed of himself, not proud, and so on." *Id.*

[FN192]. *Id.* at 47-48.

[FN193]. *Id.* at 48. The observation could also be applied to lawyers or other professionals who deal in such high-stakes matters as life, liberty, and death. *Id.*

[FN194]. *Id.* at 48.

[FN195]. Both deontological and utilitarian ethics also are concerned with the morality of the agent, but primarily as it concerns the social rules by which they should govern their relations with one another.

[FN196]. Aristotle, *supra* note 176, at 93. Aristotle, of course, was not only concerned with personal morality. Because "man is by nature a social being," *id.* at 74, Aristotle was also keenly interested in the political environment conducive to human fulfillment. As Michael White notes, Aristotle regarded the polis as prior to the individual, but not in the sense that the "'state'

[is] a sort of organism for the sake of which individual persons exist and function." Michael J. White, *Political Philosophy: An Historical Introduction* 48 (2003). Rather, "the polis ... is constitutive of the very identity of its citizens as human persons and supplies the necessary conditions for their living up to that identity." *Id.*

[FN197]. Hursthouse, *Virtue Ethics*, supra note 182.

[FN198]. See, e.g., Hursthouse, *On Virtue Ethics*, supra note 176, at 5-6 (noting the "obvious gap" in contemporary virtue ethics concerning questions of justice as a "central topic in political philosophy"); Crisp & Slote, supra note 176, at 24-25 (discussing the challenges of extending virtue ethics into political morality and citing some recent attempts). Although some commentators have suggested that communitarian political arrangements are most consistent with a commitment to virtue, at least some liberal theorists have argued that virtue ethics is also compatible with liberalism. See Daniel Statman, *Introduction to Virtue Ethics*, in *Virtue Ethics* 3, 17-18 (Daniel Statman ed., 1997) (aligning virtue ethics with communitarianism). But see generally William Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (1991) (making the case for a liberal theory of virtue); Martha Nussbaum, *Aristotelian Social Democracy*, in *Liberalism and the Good* 203 (R. Douglas et al. eds., 1990) (same).

[FN199]. See, e.g., Charles Babington, *Senator Critical of Focus on Prisoner Abuse*, *Wash. Post*, May 12, 2004, at A18 ("I'm probably not the only one up at this [Senate hearing] table that is more outraged by the outrage than we are by the treatment."); *id.* ("I am also outraged that we have so many humanitarian do-gooders right now crawling all over these prisons looking for human rights violations while our troops, our heroes, are fighting and dying."); *The Rush Limbaugh Show: Babes Doing the Torture in Iraq* (Premiere Radio Networks, May 3, 2004), available at [http://mediamatters.org/items/200405050003?is\\_gsa=1&final=1](http://mediamatters.org/items/200405050003?is_gsa=1&final=1) ("[I]f you look at these pictures, I mean, I don't know if it's just me, but it looks like anything you'd see Madonna, or Britney Spears do on stage. Maybe [you can] get an NEA grant for something like this.").

[FN200]. Interview by Alhurra TV with President George W. Bush, supra note 17; see also *id.* ("[T]he actions of these few people do not reflect the hearts of the American people."); Press Release, *The White House, Remarks by President on Iraq and the War on Terror* (May 24, 2004), [www.whitehouse.gov/news/releases/2004/05/print/20040524-10.html](http://www.whitehouse.gov/news/releases/2004/05/print/20040524-10.html) ("[Abu Ghraib] became a symbol of disgraceful conduct by a few American troops who dishonored our country and disregarded our values.").

[FN201]. Interview by Alhurra TV with President George W. Bush, supra note 17.

[FN202]. Sontag, supra note 17, at 126.

[FN203]. *Id.* at 29.

[FN204]. Remarks by Al Gore, *Political Action: Democracy in Action*, <http://www.moveon.org/pac/gore-rumsfeld-transcript.html> (last visited Nov. 20, 2005).

[FN205]. Andrew Sullivan, *Picture Frame*, *TNR Online*, May 25, 2004, [www.tnr.com](http://www.tnr.com).

[FN206]. *Id.*

[FN207]. John Stuart Mill, *Considerations on Representative Government*, in *On Liberty*, supra note 20, at 427; see also Immanuel Kant, *Anthropology from a Pragmatic Point of View* 225-36 (Victor Lyle Dowdell trans., S. Ill. U. Press 1978)

(1804) (identifying national character in terms of common roots, self-identification, and inheritance from ancestors); Montesquieu, *The Spirit of the Laws* 310 (Anne M. Cohler et al. eds., 1989) (1748) ("Many things govern men: climate, religion, laws, the maxims of government, examples of past things, mores, and manners; a general spirit is formed as a result.").

[FN208]. Pericles Lewis, *Modernism, Nationalism, and the Novel* 66 (2000).

[FN209]. [Gregg v. Georgia, 428 U.S. 153, 182 \(1976\)](#).

[FN210]. [Trop v. Dulles, 356 U.S. 86, 101 \(1958\)](#); see also [Woodson v. North Carolina, 428 U.S. 280, 304 \(1976\)](#) (noting the "fundamental respect for humanity underlying the Eighth Amendment").

[FN211]. [Furman v. Georgia, 408 U.S. 238, 273 \(1972\)](#) (Brennan, J., concurring) ("The infliction of an extremely severe punishment... from which 'no circumstance of degradation [was] omitted,' may reflect the attitude that the person punished is not entitled to recognition as a fellow human being." (quoting [Weems v. United States, 217 U.S. 349, 366 \(1910\)](#) (alteration in original))).

[FN212]. [Woodson, 428 U.S. at 304](#); see also [Furman, 408 U.S. at 413](#) (expressing worry that the decision would produce mandatory death statutes that would eliminate "the element of mercy") (Blackmun, J., dissenting).

[FN213]. Fried, *supra* note 24, at 682-83.

[FN214]. *Id.* at 687-88.

[FN215]. Martha Nussbaum, *Compassion: The Basic Social Emotion*, 13 *Soc. Phil. & Pol'y* 27, 38 (1996).

[FN216]. *Id.* (describing Rousseau's *Emile*).

[FN217]. Rich Lowry, *The Shame of Our Prisons*, *Townhall.com*, May 9, 2003, <http://townhall.com>; see also Dickey, *supra* note 96 (describing a running joke on a Los Angeles radio station regarding prison rape); Robert Teesdale, *Project Exile Promotes Prison Rape*, *FreeRepublic.Com*, May 11, 2001, <http://www.freerepublic.com/forum/a3afbfe4a6fa0.htm> (describing public service announcements in Colorado that "make a deliberate point of suggesting that if you are sent to Federal prison under Project Exile, prison rape will be an expected part of your future").

[FN218]. John 8:7.

[FN219]. Matthew 7:1-11.

[FN220]. Matthew 18:23-35.

[FN221]. See Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ*, in *Passions of Law* 149, 160 (Susan Bandes ed., 1999).

[FN222]. Friedrich Nietzsche, *Thus Spoke Zarathustra*, in *The Portable Nietzsche* 103, 212 (Walter Kaufmann trans., 1970).

[FN223]. See generally Friedrich Nietzsche, *On the Genealogy of Morals*, in *Basic Writings of Nietzsche* 439 (Walter Kaufmann trans., 1967) [hereinafter Nietzsche, *Genealogy*]; see also Moore, *Moral Worth*, *supra* note 110, at 106 (describing the "reactive affects" that, according to Nietzsche, constitute resentment).

[FN224]. Nietzsche, *Genealogy*, supra note 223, at 501.

[FN225]. *Id.* at 455, 472-75.

[FN226]. Martha Nussbaum, *Equity and Mercy*, in *Punishment and Rehabilitation*, supra note 12, at 212, 229; see also [Johnson v. Phelan](#), 69 F.3d 144, 152 (7th Cir. 1995) (Posner, C.J., dissenting) (warning against the tendency to draw a sharp distinction between the law-abiding ("us") and criminal offenders ("them"), reserving our compassion only for those with whom we most readily identify).

[FN227]. Nussbaum, supra note 226, at 227.

[FN228]. This seems an apt characterization of Bill Lockyer's response to the alleged wrongdoing of Enron's Ken Lay--hoping (publicly) that Lay might be raped in prison. See supra notes 3, 96 and accompanying text. A particularly vivid historical illustration is related by Seneca:

Lysimachus... [was not] a whit more kind when he himself became king... for Telephorus the Rhodian, his own friend, he completely mutilated, and when he had cut off his ears and nose, he shut him up in a cage as if he were some strange and unknown animal and for a long time lived in terror of him, since the hideousness of his hacked and mutilated face had destroyed every appearance of a human being; to this were added starvation and squalor and the filth of a body left to wallow in its own dung; further more, his hands and knees becoming all calloused--for by the narrowness of his quarters he was forced to use these instead of feet--his sides a mass of sores from rubbing, to those who beheld him his appearance was no less disgusting than terrible, and having been turned by his punishment into a monster he had forfeited even pity. Yet, while he who suffered these things was utterly unlike a human being, he who inflicted them was still less like one.

Seneca, 1 *Moral Essays* 299-301 (John W. Basore trans., Harvard Univ. Press 1958) (55 A.D.).

[FN229]. [Johnson](#), 69 F.3d at 150.

[FN230]. *Id.*

[FN231]. See, e.g., Aristotle, supra note 176, at 93 ("Now questions of conduct and expedience have as little fixity about them as questions about what is healthful; and if this is true of the general rule, it is still more true that its application to particular problems admits of no precision.").

[FN232]. See Pogge, supra note 45, at 194 (suggesting that unlike private wrongdoing, people tend to see governmental violation of rights as "everyone's concern and feel implicated in, and experience shame on account of, what their government and its officials do in their name").

[FN233]. Hursthouse, *Virtue Theory and Abortion*, in *On Virtue Ethics*, supra note 176, at 217, 227.

[FN234]. See, e.g., Morris, supra note 125, at 166 ("Punishments that are aimed at degrading or brutalizing a person are not conducive to moral awakening but only to bitterness and resentment.").

[FN235]. Kant, *Metaphysical Elements*, supra note 116, at \*363.

[FN236]. Waldron, supra note 13, at 38.

[FN237]. R.A. Duff, *Penance, Punishment and the Limits of Community*, 5 *Punishment & Soc'y* 295, 304 (2003).

[FN238]. See Pogge, *supra* note 45, at 198 (observing that "especially in democratic societies... the people are [the] ultimate guardian on which [the] fulfillment [of human rights] crucially depends"); *id.* (noting that the protection of human rights significantly "depends on the character of [a society's] people").

[FN239]. [42 U.S.C. §§ 15601-09](#) (2003).

[FN240]. *Id.* § 15602(1).

[FN241]. *Id.* § 15603(b).

[FN242]. *Id.* § 15603(a)(6).

[FN243]. *Id.* § 15604(a)(1).

[FN244]. See, e.g., Robert Weisberg & David Mills, *Violence Silence*, *Slate*, Oct. 1, 2003, <http://slate.msn.com/id/2089095> ("The reason you've never heard of the Prison Rape Elimination Act is probably that no one who knows our criminal justice system believes it will do much of anything to eliminate prison rape.").

[FN245]. See, e.g., Neil Chandler, *Sheriff Joe on the Run*, *Daily Star* (U.K.), Feb. 20, 2005 (noting that in Arizona, Maricopa County Sheriff Joe Arpaio has saved money by "slashing spending on jail food" and boasting that "he spends more on grub for the guard dogs"). Sheriff Joe Arpaio is the most popular elected official in Arizona:

Sheriff Joe Arpaio has dominated Arizona's popularity ratings in the O'Neil Associates Valley Monitor since he was first elected. His "most popular" status has continued in the poll that was just completed. Arpaio's overall approval (excellent/good ratings) of 69% is substantially higher than that of Janet Napolitano (59%) and massively higher than that of Governor Jane Hull (32%).

O'Neil Associates, Inc., *Arpaio Still Most Popular Arizona Elected Official*, *O'Neil Associates Valley Monitor*, <http://www.oneilresearch.com/> (last visited April 13, 2005); see also Michael Lockwood & Rachel Alexander, *What's Really Happening in Arpaio's Jail?*, <http://www.intellectualconservative.com/article1005.html> (last visited Oct. 27, 2005) (characterizing Sheriff Arpaio's critics as preferring that he "coddle prisoners by giving them *Hustler* magazine and cable television").

[FN246]. See, e.g., *No Escape*, *supra* note 9, at pt. VIII ("Prisoners have no political power of their own, and impunity for abuses against prisoners does not directly threaten the public outside of prison."); Dickey, *supra* note 96, at 44 ("Helping inmates is nuclear waste politically." (quoting Vincent Schiraldi, President of the Justice Policy Institute)).

[FN247]. *No Escape*, *supra* note 9, at pt. VIII.

[FN248]. *Id.* Consider, for example, the case of "M.R.," documented in Human Rights Watch's 2001 report on the problem of prison rape in the United States. *Id.* at pt. V. After M.R. reported to prison officials that he was raped by his cell mate, his complaint was dismissed by prison investigators as a "lovers' quarrel." *Id.* M.R. was repeatedly victimized for a period of several months with increasing violence each time. *Id.* In the final attack, M.R. was set upon by his attacker in the prison's common room; he was raped and severely beaten in front of dozens of other inmates, sustaining a broken neck, jaw, and collarbone as well as two serious concussions and bleeding of the brain. *Id.* Despite M.R.'s efforts to have his attacker prosecuted, no criminal charges were ever brought. *Id.* Instead, the attacker reportedly received fifteen days in segregation for rape and attempted murder. *Id.*

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