2003

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NIETZSCHE AND ARETAIC LEGAL THEORY

Kyron Huigens

INTRODUCTION

What do ascetic ideals mean? Nietzsche answered this question regarding artists, women, the disabled, the disgruntled, priests, philosophers, Wagner, Schopenhauer, free-thinkers, and scientists. I want to answer it regarding Anglo-American legal theorists. Nietzsche also offered advice on how to escape asceticism, and I want to show how legal theorists ought to take that advice. Anglo-American legal theory is, in all its present varieties, imbued with slave morality and nihilism. It can be imbued with the aristocratic ideal and master morality. Nietzsche points us in the direction of aretaic legal theory—that is, a legal theory premised on virtue ethics. I will show how Nietzsche does this and what it means in the theory of punishment—a subject that Nietzsche treats at length in the *Genealogy of Morality*. The aretaic is a significant theme in Nietzsche’s work, but it has been neglected by legal theorists. Post-modernists have focused almost exclusively on Nietzsche’s perspectivism and its implications for legal language and the law’s claim to authority. To some, the idea of indeterminacy in language, value, and meaning has proved to be endlessly fascinating. But when it is read in this way, perspectivism is at most a peripheral concern in Nietzsche’s thought. The principal statement of perspectivism in Essay III, section 12 (III.12.) of *Genealogy*, for example, is a digression. The next section, III.13, begins with the sentence “[b]ut to return,” and the subject to which Nietzsche returns is the ascetic ideal’s pitting

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3 See Nietzsche, supra note 1, at 92 (describing objectivity as exercising power over perspective instead of over detached observation).
death against life, inducing nausea in man, and increasing the power of the priestly caste. These are among Nietzsche’s main concerns in the *Genealogy* as a whole, and an exclusive focus on his perspectivism runs the risk of serious misunderstanding. An obsessive concern with indeterminacy in language, value, and meaning effectively aspires to a kind of austerity of thought and commitment that is unambiguously nihilistic and unambiguously condemned by Nietzsche. There is a Yes in Nietzsche’s work, not merely a No, and it is the Yes that I want to emphasize.

The main thrust of Nietzsche’s argument in the *Genealogy of Morality* is familiar to any moderately serious student of his thought. The triumph of Judeo-Christian values and categories is the philosophical equivalent of a successful slave revolt. The classical ideal of man stresses his active, warrior side: man’s power, courage, ruthlessness, his joy at being alive, and his willingness to dominate. The good is that which pertains to this flourishing of human energy and activity. The good is the noble, the successful, the naturally aristocratic. The bad is the lowly, the base, the humble. But this is an ordering of the world that lowly, base, humbled people cannot abide, and the devious genius of Christianity, for Nietzsche, is that it inverts the morality of the aristocratic masters. It identifies the good with the qualities of slaves—the meek, the weak, and the powerless—and promises that they shall inherit the earth. The good becomes a matter of purity, self-abnegation, deprivation—the ascetic ideal—which ultimately leads to self-loathing and nihilism.

Part of the recovery of the aristocratic ideal is indeed the

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4 See id. at 93.
5 Consider this passage from *Genealogy*:
[Modern historiography] rejects all teleology, it does not want to “prove” anything any more; it scorns playing the judge, and shows good taste there,—it affirms as little as it denies, it asserts and “describes”... All this is ascetic to a high degree; but to an even higher degree it is nihilistic, make no mistake about it! You see a sad, hard but determined gaze,—an eye peers out, like a lone explorer at the North Pole (perhaps so as not to peer in? or peer back?...). Here there is snow, here life is silenced; the last crows heard here are called “what for?”, “in vain”, “nada”—here nothing flourishes or grows any more...

Id. at 123. Incidentally, there are remarkable echoes of this passage in the early modernist poems of Wallace Stevens, especially in *The Snow Man*, in which Stevens writes, “[O]ne must have a mind of winter/ To regard the frost and the boughs/ Of the pine-trees crusted with snow” and to be “the listener, who listens in the snow/ And, nothing himself, beholds/ Nothing that is not there and the nothing that is.” WALLACE STEVENS, *The Snow Man*, in THE COLLECTED POEMS OF WALLACE STEVENS 9-10 (1957). Stevens’s later poems, such as *Landscape with Boat*, seem to overcome this nihilism. See id. at 241 (“An anti-master man, floribund ascetic...”).
6 See NIETZSCHE, supra note 1, at 21-27.
7 See id. at 16-20.
8 See id. at 93-94.
recognition of indeterminacy in language, value, and meaning. The choice between master morality and slave morality, between competing sets of good and evil, is a free and fundamental one. The ordering of the moral world is a matter of willing it to be so. However, there is more to Nietzsche’s prescription than this. Because Judeo-Christian religion claims the transcendental warrant of an all-powerful God, to see the possibility of a choice between two kinds of morality—to position oneself, for the moment of choice, beyond good and evil—requires a recognition that God is dead and a rejection of the authority of priests. Twenty-first century readers can manage this step more easily than most of Nietzsche’s nineteenth century readers. But the next steps are much harder, because the ascetic ideal extends well beyond the boundaries of Judeo-Christian religion. The ascetic ideal is replicated in both the deontological morality of Kant and in the scientific morality of the English Utilitarians. If we abjure the certainties of transcendental reason and natural science but replace them with nothing, then we have done nothing more than hasten the slide toward nihilism that is implicit in the ascetic ideal. This dilemma is acute for us because of our democratic distaste for the aristocratic ideal, and it is compounded by the fact that Nietzsche’s descriptions of that ideal—including his references to “the blond beast” and the dominance of the Aryan race—are the passages that the Nazis found most congenial. We need a different way to understand master morality and the aristocratic ideal.

Current Anglo-American legal theory is caught in this very dilemma and displays this same need. American law, at least, is constitutionally cut off from the support of revealed religion. With one exception, which I will discuss below, deontological morality has never played a significant role in Anglo-American law or legal theory. This leaves empirical consequentialism as the mainstay, which takes many forms other than classic English Utilitarianism. One is the crude consequentialism of “policy analysis,” in which the unrecognized and unexamined assumption is that law is a set of prescriptions that serve as incentive structures designed and administered to produce preferred states of affairs. The more self-conscious and rigorous version of this consequentialist legal theory is, of course, law and economics. Nietzsche would have predicted a bad end for law and economics, because its commitment to an austere conception of truth would lead to nihilism. And Nietzsche would have been right. While it might seem that law and

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9 See id. at 26.
economics has conquered the world, the truth is that in the last five years or so it has reached a point of exhaustion and contradiction that, amazingly enough, points us in the same direction that Nietzsche does, that is, toward aretaic legal theory.¹⁰

We have ample reason, then, to stop obsessing over indeterminacy and to take up Nietzsche’s more central concerns. I propose to do this in the three Parts that follow. Part I considers the deontological theory of punishment—the one area in which Kant has had some influence in Anglo-American legal thought—and Nietzsche’s criticism of it. Part II presents a virtue-based, or aretaic, theory of punishment as an alternative to both the deontological theory and the consequentialist theory of punishment. Part III argues that Nietzsche’s analysis of master and slave morality points toward the aretaic theory of punishment and, more broadly, to aretaic legal theory as a relatively unproblematic version of master morality. In sum, to cast the theory of punishment in Nietzschean terms offers an escape from the ascetic ideal and nihilism, an opportunity to recover the aristocratic ideal in Anglo-American legal theory, and a way to give post-modern legal theory a positive as well as a negative critique.

I. THE DEONTOLOGICAL THEORY OF PUNISHMENT

Nietzsche snickers at Kant’s divorce of beauty from interest. The artist is sexually interested in his model, Nietzsche observes, and this has everything to do with the beauty the artist finds there. To suppose otherwise is to display the naivete of a country parson.¹¹ But beneath its comic aspect, Kant’s desiccated account of beauty is significant. The austerity of Kantian aesthetics tells us that it belongs to the ascetic ideal. Kant’s conception of human rationality involves stripping human existence of its vitality and suppressing one’s inclinations to strength, engagement, and dominance in favor of a cool, insipid detachment that is indistinguishable from the weakness of slaves.¹²

Kantian morality is vastly more interesting and complex than the morality of a country parson, but it is no less ascetic than the Kantian account of beauty. Just as Kant detaches interest from

¹¹ See NIETZSCHE, supra note 1, at 79.
¹² See id. at 94-95.
beauty, he detaches the attributes and interests of human beings from his account of the human agent. For Kant, there is a bare will at the center of human agency, a faculty of rational choice that can commit one to action without the aid or influence of emotion, and without reference to one's other attributes such as strength or sexuality. The Kantian account of responsibility rests on this austere conception of the will. Deprived of attributes, the will is unconstrained and free to choose the path that reason determines. This expands the scope of responsibility because it contracts the extent to which the agent might say, "I could not have done otherwise." Nietzsche connects Kantian morality to slave morality and the ascetic ideal with the image of a bird of prey.

No wonder, then, if the entrenched, secretly smouldering emotions of revenge and hatred put this belief [in the agent as an austere subject] to their own use and, in fact, do not defend any belief more passionately than that the strong are free to be weak, and the birds of prey are free to be lambs:—in this way, they gain the right to make the birds of prey responsible for being birds of prey . . . .

In this conception of responsibility, Nietzsche locates the modern apparatus of punishment, including the nuances of intention, accident, and insanity.

Nietzsche does not dispute that punishment as presently conceived turns on Kantian categories; his criticism is that punishments present functioning bears no relationship to punishment's origins. The Kantian account of responsibility and punishment appropriates older forms and practices and has shaped them to new purposes. Nietzsche himself expresses little or no hope for the recovery of the older understanding of punishment, but it is important to see that if it could be recovered the resulting theory of punishment would represent a partial restoration of the aristocratic ideal. In the law that deals most immediately with right conduct and responsibility, we would escape the influence of asceticism, begin to appreciate human beings fully for what they are, and replace the objective of oppressive control with the objective of human flourishing.

The theory of punishment may be the only area in which Kantian morality has had any substantial influence on Anglo-

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13 See id. at 82-85.
14 See id. at 28.
15 See id. at 28-29.
16 Id.
17 See id. at 42-43, 58-59.
18 See id. at 54-56.
American law and legal theory. The reason that this occurred is obscure, but part of the explanation is that Kant’s English contemporary Jeremy Bentham advanced an influential theory of punishment that, while it was Utilitarian rather than deontological, was as strongly voluntaristic as Kant’s theory of punishment. This was especially true of the Kantian and the Benthamite conceptions of criminal fault. Bentham argued that punishment must be confined to those criminal acts that are committed with a \textit{mens rea}, construed as intentional state toward the act constituting the wrongdoing on the occasion of wrongdoing. Otherwise, Bentham thought, the justification of deterrence would not hold: no one can choose not to do something that he is unaware of doing. Kant’s emphasis on the will as the seat of moral agency leads the Kantian theorist of punishment likewise to construe criminal fault in intentional terms. The argument is that one cannot be responsible for wrongdoing that is not freely chosen, and that one cannot choose to do wrong in the way required by responsibility if one is not fully aware of the nature or the consequences of one’s conduct. This accord on the construction of criminal fault as a matter of intentional states made Anglo-American theorists, in their characteristic practical-minded eclecticism, at least tolerant of Kantian ideas that were not, strictly speaking congruent with consequentialism—such as the justification of punishment by duty founded in reason alone. As a result, one finds strained variations on Kantian themes in Anglo-American punishment theory—notably consequentialist reconstructions of retribution as the welfare-enhancing satisfaction of an instinct for revenge. More recently, genuine deontological theories of punishment have appeared in the Anglo-American literature.

The importation of Kantian morality into Anglo-American

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\textsuperscript{20} See Stephen J. Morse, \textit{The “Guilty Mind:” Mens Rea}, in \textit{Handbook of Psychology and Law} 207, 211 (D.K. Kagehiro & W.S. Laufer eds., 1992) (describing the “just deserts” position as holding that “there is no blameworthiness unless there is an appropriate mental state such as intent or knowledge, that marks an actor’s offending conduct as ‘hers’”). \textit{See also} Jerome Hall, \textit{Negligent Behavior Should Be Excluded from Penal Liability}, 63 Colum. L. Rev. 632, 634-35 (1963) (making such an argument).

\textsuperscript{21} See Jerome Michael & Herbert Wechsler, \textit{Criminal Law and Its Administration: Cases, Statutes and Commentaries} 7-8 (1940) (discussing the Kantian theory of retribution as the justification for punishment).

\textsuperscript{22} See 2 Sir James Fitzjames Stephen, \textit{A History of the Criminal Law of England} 80 (1883) (describing retribution as a welfare-enhancing diversion of the instinct toward revenge).

theory of punishment has proved to be significant because, Bentham aside, the Anglo-American construction of criminal fault was not predominantly intentionalist. The fault category of malice, for example, had always included not only express malice—an intention toward one’s wrongdoing—but also implied malice—a depraved disposition resulting in wrongdoing. But the trend in the last century, in America and in England, was toward the eradication of broad, dispositional categories of fault and the substitution of an intentional states analysis. So, for example, mistake of fact is now analyzed as a missing mens rea: The murder defendant who thought he was shooting a deer cannot have had the purpose to kill a human being; the absent-minded professor who takes someone else’s raincoat in the good faith belief that it is his own has not even recklessly taken someone else’s property, and so on. This is by no means an obvious or inevitable way to analyze mistake, and indeed it creates some serious anomalies.


25 See MODEL PENAL CODE § 2.02, cmt. 1 (1985) (explaining that “the Code’s basic requirement that unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained”); Richard H.S. Tur, Subjectivism and Objectivism: Towards Synthesis, in ACTION AND VALUE IN CRIMINAL LAW 213 (Stephen Shute et al. eds., 1993) (assessing the increasing dominance of the intentionalist or subjectivist construction of criminal fault in England).


27 The principal paradox is the acquittal of the unreasonably mistaken rapist, as illustrated in the case of Regina v. Morgan, 1976 A.C. 182 (H.L. 1976). In that case, the defendants claimed that they genuinely believed that the victim of a sequential rape, the wife of their commanding officer, had consented to have sex with them. The defendants claimed that they were extremely drunk, and that the commander persuaded them that his wife was “kinky,” and that she would be “turned on” by being raped. In light of these representations, the defendants interpreted the victim wife’s overt refusals and resistance to intercourse as consent. On an intentionalist construction of mistake and fault, the Morgan defendants were entitled to an instruction to acquit because (if the jury believed their story) the defendants lacked a mental state of purpose, knowledge, or recklessness regarding the victim’s non-consent to intercourse—an essential element of rape. But these defendants were nevertheless at fault, and their fault lay in the combination of their particular circumstances, including their severe voluntary intoxication, their poor choice of friends, their evident ability to make themselves believe whatever they found it convenient to believe, and a general moral obtuseness, as evidenced by their failure to perceive not only a woman’s genuine resistance to forced sexual intercourse but also the fact that even a simulated rape is an act degrading to human dignity. The Morgan defendants were denied a jury instruction to acquit based on their lack of any intentional state regarding nonconsent. This, the Law Lords held, was error, as implied by the intentionalist construction of fault. However, the Lords rejected that construction of fault in their disposition of the case. They affirmed the convictions because conviction and punishment were nevertheless consistent with reason and justice. See id. (appeal from the English
that a broader, dispositional inquiry into the reasonableness of the mistake is able to avoid. Nevertheless, the intentional states construction of fault has dominated the analysis of mistake. Given the increasing frequency with which Kant is cited in the Anglo-American literature over the same period, in spite of his theory's poor fit in most respects, it seems likely that Kantian voluntarism reinforced this trend.

However, the triumph of the intentional states construction of fault is far from complete and, at this juncture, its complete triumph seems unlikely. In spite of the efforts of a legion of reform-minded theorists during most of the last century, the doctrines of criminal negligence, felony murder, depraved heart murder, transferred intent, accomplice liability, unreasonable mistake, strict liability, and intoxication as a limited defense still persist as prominent features in Anglo-American criminal law. They have been neither eradicated from criminal codes nor deprived of their essential characteristic: a non-intentional conception of fault consisting of a broad inquiry into the disposition and character of the accused, as those features might be inferred from his actions and the context in which they occurred. Once recognized, this situation appears as something

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30 Court of Appeals); see id. at 203-04 (Lord Cross); see id. at 214-15 (Lord Hailsham); see id. at 237-39 (Lord Fraser) (affirming rape convictions of several British military officers on these facts, citing the Criminal Appeal Act, 1968, c. 19, § 2(1) (Eng.), and authorizing the affirmance of convictions in spite of error when not inconsistent with justice).

31 See Williams v. New York, 337 U.S. 241, 248 (1949) (reporting, "[r]etribution is no longer the dominant objective of the criminal law").

32 For example, from the point of view of the intentional states construction of fault, deprived mind murder is utterly baffling. See Bernard E. Gegan, More Cases of Depraved Mind Murder: The Problem of Mens Rea, 64 ST. JOHN'S L. REV. 429, 432-37 (1990) (describing some courts' unsuccessful efforts to reduce the doctrine to recklessness). This is because the doctrine addresses a state of character instead of a state of mind. In such cases:

It may become clear that the actor has a character flaw more blameworthy than that shown by a single indiscretion; it may even be established that he simply holds human life without value. This is not a specific mental state formed at the moment of action, such as intent or reckless disregard. Rather, it is an immoral predisposition to harm. ...
of a theoretical crisis: Large portions of the criminal law are simply unexplained and unexplainable under either a consequentialist or a deontological theory of punishment because of those theories’ commitment to an intentional states construction of fault.

II. THE ARETAIC THEORY OF PUNISHMENT

These fundamental difficulties in the criminal law require a fundamental solution—something on the order of an entirely new theory of punishment. Theories of punishment are conventionally said to be of two types: the deterrence theory of punishment and the retributive theory of punishment. This typology is confused. Deterrence and retribution are not theories of punishment; they are functions of punishment—as are incapacitation, the concrete expression of public norms of behavior, the cathartic effect on the public of forcefully condemning violations of those norms, and so on. Neither deterrence nor retribution nor any of the other conceivable functions of punishment serves to justify punishment unless some moral theory grants that function justifying force. Nor does the function of deterrence or retribution explain wrongdoing, ground the excuses, solve the riddle of proportionality, or answer any of the other questions that the practice of punishment poses. Any explanatory power that those functions have comes from a moral theory that weaves them into an explanation. Thus, what is commonly called the deterrence theory of punishment is more accurately described as the consequentialist theory of punishment. Consequentialism gives deterrence and the other social welfare-promoting effects of punishment their justifying and explanatory power. The so-called retributive theory of punishment is better viewed as a deontological theory of punishment in which the duty of imposing retribution justifies punishment, and other, similarly-grounded moral duties lie behind the excuses, the structure and

Id. at 437.

content of criminal wrongdoing, and so on.

If we view the theory of punishment this way, then a gap in the theoretical picture comes into view. Consequentialism and deontological morality are only two of the three major traditions in philosophical ethics. The third is virtue ethics, which begins with Aristotle and which is the subject of a burgeoning modern literature. An aretaic or virtue ethics theory of punishment was advanced as early as the 1970s and several partial accounts of it have been given since then.

This theory of punishment is of interest to the student of Nietzsche because the Aristotelian conception of the responsible agent is richer than that of Kant. Aristotle’s rational agent is deeply deliberative, in the sense that he rationally considers not only how to achieve his desires, and not only whether his desires meet the demands of reason, but also the substance and content of

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36 See Peter Arenella, Character, Choice, and Moral Agency, in CRIME, CULPABILITY, AND REMEDY 59, 61-65 (Ellen Frankel Paul et al. eds., 1990) (arguing that so-called rational choice theory is inadequate to describe the criminal law’s concern with character); Claire O. Finkelstein, Duress: A Philosophical Account of the Defense in Law, 37 ARIZ. L. REV. 251, 252-53 (1995) (relying on Aristotle’s conception of judgment to give an account of duress in terms of states of character); Kyron Huigens, Homicide in Aretaic Terms, 6 BUFF. CRIM. L. REV. (forthcoming 2002) [hereinafter Huigens, Homicide] (considering depraved heart murder and provocation in terms of an aretaic, or virtue-based, theory of punishment); Kyron Huigens, Rethinking the Penalty Phase, 32 ARIZ. ST. L.J. 1195 (2000) [hereinafter Huigens, Rethinking] (examining the constitutional regulation of death sentencing in terms of an aretaic theory of punishment); Kyron Huigens, The Dead End of Deterrence, and Beyond, 41 WM. & MARY L. REV. 943, 948 (2000) [hereinafter Huigens, Deterrence] (examining the nature of criminal fault in terms of an aretaic theory of punishment); Kyron Huigens, Virtue and Inculpation, 108 HARV. L. REV. 1423, 1458-62 (1995) [hereinafter Huigens, Virtue] (examining the justification of punishment in aretaic terms); Edmund L. Pincoffs, Legal Responsibility and Moral Character, 19 WAYNE L. REV. 905, 918 (1973) (arguing that punishment represents a demand that one develop and exhibit certain character traits).

37 This is true on a conventional reading of Kant as advancing a deontological moral theory. Barbara Herman argues persuasively that this conventional reading is a misreading of Kant. BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT (1993). Nancy Sherman argues in a similar vein that Kant’s doctrine of virtue is closer than one might think to that of Aristotle. NANCY SHERMAN, MAKING A NECESSITY OF VIRTUE: ARISTOTLE AND KANT ON VIRTUE (1997).
his desires. Aristotle's rational agent considers the place of each of his desires in the context of his life as a whole. He considers his desires critically; he asks how he came to have them, whether he ought to have them at all, and whether some other desires might not serve him better. The rational agent's good, from this perspective, is much more than the simple satisfaction of desires and more than the rational self-mastery that Kant describes. The rational agent's good, in Aristotle's view, is to be to the fullest extent possible what each human being essentially is: a rational, active, and political being.38

One might ask, why should I create such a life rather than just satisfy my immediate desires? Here we encounter Aristotle's notion of a distinct kind of human flourishing. Our desires have a structure, because they are directed toward one end that we pursue for its own sake: eudaimonia. The word is often translated as "happiness," but eudaimonia, the final end and self-sufficient good, is better translated as "the best possible life" or "human flourishing." The best life or the highest human good depends on the characteristic function—the ergon—of human beings, which Aristotle identifies as the ability to reason. Specifically, he concludes that the ergon of man is the life of rationality in action, as opposed to the mere possession of rationality.39 The centerpiece of aretaic ethics is thus an exemplary practical rationality or practical wisdom—in Greek, "phronesis." Phronesis is the ability to deliberate on and frame an overall conception of the good life—that is, the flourishing life—and to integrate one's particular choices into this all-encompassing conception. The person possessed of phronesis, the phronimos, is a person of mature judgment who has the capacity to identify and pursue the good amid the contingencies of practical human affairs.40

Eudaimonia, then, is not mere contentment or satisfaction, but the attainment of distinctively human ends. We should live a life of rationality in action not to conform with transcendental reason or to comply with duty, but because such a life is the best we can have.41 In this light, to seek the satisfaction of the desires that I just happen to have would be unworthy; self-respect requires me to attend not only to my immediate desires, nor even just to my future desires, but primarily to the human capacities that underlie my desires. It makes sense for me, as a rational agent, to seek a life that draws on the greatest range of those capacities—a point

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39 See id. at 1449-52.
40 See id. at 1454-56.
41 See id. at 1450-52.
that John Rawls, following Aristotle, took as a starting point of his theory of justice.\(^{42}\)

This responsibility to oneself is the ground of all responsibility. Aristotle sees a direct connection between eudaimonia and life among others. The final good is self-sufficient, he argues, in a special sense:

[W]e define something as self-sufficient not by reference to the ‘self’ alone. We do not mean a man who lives his life in isolation, but a man who also lives with parents, children, a wife, and friends and fellow citizens generally, since man is by nature a social and political being.\(^{43}\)

If one is mystified by this intimate connection between one’s final, highest good and political life, the confusion may be due to an unexamined assumption that serving the good of others or of all necessarily detracts from one’s own. Aristotle’s conception of eudaimonia and its connection to the development of human capacities helps us to see an alternative sort of altruism. Aristotle describes friendship as concern for another in himself, because of himself, or because he is who he is. I am concerned with my friend as I am with myself. I care about his development and the scope of his life, just as I do for my own. Indeed, these concerns are indistinguishable: in seeking the good of my friend, I encounter additional opportunities for my own self-realization. Simply because humans live together rather than alone, the complete human life that I seek will entail a significant involvement with others and with the construction of their lives. The same principle extends beyond friendship to political life. “My self-realization requires political involvement because such involvement presents additional, necessary opportunities to draw upon and develop my human capacities.”\(^{34}\) It is in this sense that Aristotle sees humans as essentially political animals. The virtuous life, for Aristotle, is the life of full involvement with the community’s good.

From Aristotle’s conceptions of virtue and responsibility, one can derive a theory of punishment that resolves the longstanding tension between the consequentialist and deontological theories of punishment, with their nearly exclusive emphases on social welfare and retribution, respectively. More importantly, an aretaic, or virtue-based, theory of punishment solves the many doctrinal conundrums produced by the mistaken assumption that intentions

\(^{42}\) Rawls uses what he calls the “Aristotelian Principle” as a principle of motivation in the original position. See JOHN RAWLS, A THEORY OF JUSTICE 427-28 (1971).

\(^{43}\) ARISTOTLE, supra note 35, at I.7.1097b; see id. at IX.9.1169b (reiterating that “man is a social and political being” in the context of discussing the relationship between friendship and happiness).

\(^{34}\) Huigens, Virtue, supra note 36, at 1451-52.
are identical with criminal fault, instead of being merely indicative of criminal fault.

One idea in Aristotelian ethics that modern readers find puzzling is Aristotle's attributing responsibility for character to the agent whose character it is. We tend to assume that we simply have the attitudes, propensities, and values that we have, as a product of our upbringing. From that perspective, responsibility for one's character seems an absurd notion. But Aristotle's richer conception of responsibility helps to make sense of his attribution of responsibility for character. If I have the capacity to reflect on my ends, the means by which I would achieve them, and the relation of both to a whole life, then I have the capacity as well to shape my life in each particular decision that I make. I am responsible for my character to the extent I am responsible for the decisions I make about the ends and effects that shape it. My parents and teachers are responsible for the inculcation of virtue in me initially, but after a certain point that responsibility becomes mine.

The aretaic theory of punishment takes the inculcation of sound practical judgment—virtue, in its correct, technical sense—to be the principal justifying purpose of punishment. Accordingly, criminal liability turns on Aristotle's attribution of responsibility for the state of one's character. The notion is that one deserves punishment if one has failed to internalize legal rules sufficiently and to adjust one's standing motivations accordingly. Where the capacity for this kind of control is absent, as in the case of insanity, we will excuse wrongdoing, but where a capable agent's disordered ends lead him into wrongdoing, we will punish the wrongdoing. The inquiry into fault is precisely an inquiry into whether or not the agent's wrongdoing is a product of flawed or inadequate practical reasoning, including the practical reasoning that goes into making up one's ends. If so, and if the particular wrong done violates a legal prohibition, then punishment is both morally and legally justified.

This conception of just deserts, or retribution, is far more robust than anything in the deontological theory of punishment. It is not premised on a duty to punish arising from another's violation of other, core moral duties. Virtue ethics is not premised on duties grounded in reason alone, but on a much broader notion

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45 See id. at 1445-48 (citing TERENCE IRWIN, ARISTOTLE'S FIRST PRINCIPLES § 182, at 344 (1988)).
46 See id. at 1458-62.
47 See Huigens, Rethinking, supra note 36, at 1245-50.
of human flourishing. It supposes that society engages in a process in which the attitudes and standing motivations conducive to that flourishing are recognized as virtues, and some of the rules that are conducive to the acquisition of these virtues are enacted as laws. Punishment plays a role in the process of habituation to virtue because it instantiates the rules, displays them publicly, provides an incentive to abide by the rules until they are internalized, and secures the peace against those who cannot acquire virtue in order to enable those who can to do so.

As the last two points indicate, consequences are not left out of account in the aretaic theory of punishment, but the theory is a significant advance over consequentialist theories of punishment. The aretaic theory construes deterrence much as H.L.A. Hart did. Deterrence is not an economy of threats; it is a matter of internalized legal rules. The difference is that Hart saw the possibility of this internalization as merely a fortunate feature of rules that extends their consequential efficacy, and viewed not only fault, but the notion of moral justification of punishment in the individual case as a fundamental confusion. The aretaic theory of punishment, in contrast, construes the internalization of legal rules as part of a process of socialization that lies at the core of responsibility, fault, and the justification of punishment.

The aretaic theory of punishment allows us to solve the conundrums created by the Kantian and Benthamite conception of criminal fault as intentional states because it provides an objective or non-intentional construction of criminal fault, and because it places a much greater emphasis on ex post adjudication over ex ante prescription than either the deontological or consequentialist theories of punishment do. To see this, consider the aretaic construction of wrongdoing and fault.

Criminal wrongdoing consists of violating the criminal law's prohibitions. The prohibitory norms that make up the criminal law are generalizations about proper and improper conduct, drawn from generations of shared experience. Action-guiding legislation takes as its models those judgments about the proper course of action in problematic practical situations that are widely regarded

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49 See Huigens, Virtue, supra note 36, at 1454-56; Huigens, Deterrence, supra note 36, at 1025-27.
50 The term “economy of threats” describes deterrence that operates by explicit instrumental reasoning aimed at avoiding pain. H.L.A. HART, Legal Responsibility and Excuses, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28, 40-44 (1994). Hart contrasts this with deterrence that involves the internalization of legal rules as obligations that people incorporate into their other aims and plans. See id. at 44-50.
51 See id. at 35-40.
as sound judgments. The generalizations of these sound judgments are familiar to us, and almost uncontroversial: that property ought to be secure; that life and bodily integrity ought to be preserved; that individual autonomy ought to be respected; and so on. A criminal code is a relatively detailed set of positively enacted ethical generalizations of this kind.\textsuperscript{52}

In the aretaic theory of punishment, fault is an aspect of wrongdoing and its adjudication is a necessary complement to the legislative enactment of these criminal prohibitions.\textsuperscript{53} Because they are generalizations of sound practical judgments in the relevant sphere of human conduct, each of the conduct rules of the criminal law presents an implicit demand that the accused should engage in sound practical reasoning in the circumstances in which such a crime might be committed. The requirement of fault entails a retrospective, adjudicative inquiry into this question. The question before the jury is whether the acts of the accused, in the particular circumstances of the alleged crime, displayed inadequate or flawed practical reasoning, including the deliberations on ends that have gone toward establishing and maintaining his attitudes and standing motivations. This determination by the jury turns on a comparison between the defendant's judgment in the relevant circumstances—as evidenced by the particular manner and circumstances of his wrongdoing—and a sound judgment in the relevant circumstances—as evidenced by the applicable conduct rules. This comparison between the defendant's judgment in the relevant circumstances and the sound judgment that is implicit in the applicable conduct rule leads to the inference of fault or no-fault. In this way, the justifying rationale of the conduct rule is brought to bear on the punishment of the individual offender.\textsuperscript{54}

The inference of fault is a necessary step in the imposition of just punishment. Sound practical reasoning is context-dependent. That is, we cannot say what the right decision in any situation is, or was, unless we know not only what alternatives were available, but also the circumstances under which the choice was made. If part of the question before the jury is whether the defendant engaged in sound practical reasoning on the occasion of wrongdoing, then the conduct rule has to be returned to the level of specific, context-rich practical judgment from which it arose, and in which the offender acted. The jury performs this specification of the conduct rule when it applies the law to the facts before it. This adjudicative

\textsuperscript{52} See Huigens, \textit{Deterrence}, \textit{supra} note 36, at 1024-25.

\textsuperscript{53} See \textit{id.} at 1028-31.

\textsuperscript{54} See \textit{id.}
specification of the norm complements the legislative generalization of the norm. If part of the justification of punishment is the inculcation and maintenance of sound practical judgment, then just punishment cannot be imposed unless and until this step is taken.\(^{55}\)

Fault, then, is a necessary inference drawn in adjudication to the effect that the person who has committed wrongdoing has done so in a way that calls the quality of his practical reasoning into question. Both intentional and non-intentional, or objective, fault work this way. In most cases, an intentional state regarding harm or a risk of harm denotes fault. However, this intentional state does not constitute fault. Fault consists of the way in which the accused has come to do wrong and the particular way in which he has done wrong. This fault may or may not be denoted by an intentional state on the occasion of action.\(^{56}\)

The aretaic theory of punishment’s account of non-intentional fault supplements the manifestly inadequate intentional-states conception of fault that is characteristic of deontological and consequentialist theories of punishment. The main benefit of this addition is not to provide a defense of doctrines such as felony murder or strict liability, but rather to clarify the reason that those doctrines seem unjust. Strict liability, for example, is often said to be criminal liability without fault, and is said to be unjust for that reason. But this is not quite right. In cases of strict liability, some kind of negligence—non-intentional fault—usually can be found in the transaction. The prosecution need not prove this fault explicitly, but therein lies the problem. Any moderately skilled prosecutor can convey this negligence to the jury in his case in chief, and needs no jury instruction to reap the benefit of that proof. Yet the defendant is deprived of any formal avenue of rebutting this implicit case. The problem in strict liability cases is thus neither liability without fault nor liability premised on non-intentional fault. The problem is the covert, one-sided way in which non-intentional fault is proved. The injustice of strict liability is thus a problem pertaining to the principle of legality, not to the nature of fault.

This clarification—that many concerns that have been expressed in terms of the nature of fault are better framed as

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55 See id. at 1029-30. We refrain from punishing those who do wrong without fault because the inculcation of sound practical judgment is one of the principal functions of punishment. It would be expressively irrational—even if it might be consequentially effective—to punish one whose actions do evince sound practical reasoning, even if these actions constitute a nominal violation of the prohibitory norm. See Huijgens, Rethinking, supra note 36, at 1246-51.

56 See Huijgens, Deterrence, supra note 36, at 1029-30.
concerns about legality—is an important one. We write rules about fault in terms of intentional states, not because this reflects anything about the nature of fault, but because such rules serve the rule of law better than rules written in non-intentional terms. This matters because we need to see that nothing in principle stops us from writing legally adequate rules about fault in non-intentional terms. Indeed, the constitutionalization of death sentencing is in large part an effort to do just this. The failures of that initiative are due almost entirely to the Supreme Court’s failure to understand either that this is the objective or to understand the nature of fault itself.

III. NIETZSCHE AND ARETAIC LEGAL THEORY

Much of Nietzsche’s description of punishment before the rise of ascetic philosophies brings to mind an aretaic conception of punishment based on the virtue ethics of Aristotle. Kantian punishment theory is inadequate to the task of explaining criminal fault in all its richness because Kantian morality is slave morality, and because it displays a cramped, desiccated conception of human agency and responsibility. We have to go back to the origins of punishment and retrieve a different conception of agency and responsibility in order to make sense of our actual practices in punishment. The Nietzschean conception of responsibility, like the Aristotelian, is premised on an idea of human flourishing, and both philosophers advance a thick conception of human agency and responsibility strongly with Kant’s construction of the will. Not surprisingly, then, the aretaic theory of punishment fits Nietzsche’s implicit description of an adequate theory of punishment.

First, the aretaic theory of punishment is a product of the aristocratic ideal because it predates the rise of Judeo-Christian religion and subsequent ascetic philosophies, including deontological morality and consequentialism. Second, aretaic legal theory describes punishment and responsibility in terms of the rational governance of desire and motivation, and not merely in terms of the will’s rational mastery. Third, the concept of virtue, the heart of aretaic legal theory, rests on a notion of human flourishing that not only reiterates and expands upon Nietzsche’s

57 See generally Huigens, Homicide, supra note 36 (describing this as a pressing task in criminal law theory and giving recent examples of how it ought and ought not to be done).
58 See Huigens, Rethinking, supra note 36, at 1257-82.
59 See NIETZSCHE, supra note 1, at 28-29, 94-95.
account of master morality, but that also clears the notion of human flourishing of some of the unsavory associations that Nietzsche imposed on the idea.

Nietzsche describes responsibility in terms of the will, but does not construe will as the bare capacity for choice, which is a late Kantian accretion on the idea.\(^6\) Instead, Nietzsche refuses to divorce the will from the other attributes of human beings, and emphasizes the importance of strength and resolve to the will. Responsibility begins with the acquisition of memory and the capacity to make and keep promises.\(^6^1\) The person who displays these attributes can free himself from the morality of custom and act as a sovereign, “an autonomous, supra-ethical individual (because ‘autonomous’ and ‘ethical’ are mutually exclusive).” Responsibility is a matter of strength of will because the only one who can truly keep a promise is one who can withstand reversals of fortune. The strength of will that is required for the making and keeping of promises is conscience.\(^6^3\)

Conscience is acquired through pain and is inculcated through the cruel imposition of suffering. “A thing must be burnt in so that it stays in the memory ... that is a proposition from the oldest (and unfortunately the longest-lived) psychology on earth.”\(^6^4\) Ascetic philosophies obviously partake of these methods, but the methods predate those philosophies. Judeo-Christian religion posits a God to give meaning to suffering, but cruelty was first instrumental in inculcating the rudiments of responsibility. Significantly, this kind of governance takes hold at the level of motivation and desire. Responsibility is not a matter of choosing in accord with the dictates of reason; it substantially predates such a conception of reason.

"Think of old German punishments such as stoning... breaking on the wheel... impaling, ripping apart and trampling to death by horses ("quartering"), boiling of the criminal in oil or wine..., the popular flaying ("cutting strips"), cutting out flesh from the breast; and, of course, coating the wrong-doer with honey and leaving him to the flies in the scorching sun. With the aid of such images and procedures, man was eventually able to retain five or six "I-don't-want-to's" in his memory, in connection with which a promise had been made, in order to enjoy the advantages of society—and there you are! With the aid of this sort of memory, people finally came to

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\(^6\) See id. at 43.
\(^6^1\) See id. at 39-40.
\(^6^2\) Id. at 40.
\(^6^3\) See id. at 41-42.
\(^6^4\) Id. at 41.
“reason”\textsuperscript{65}

One should not overlook the significance of the term “I-don’t-want-to’s.” For Nietzsche, the original conception of responsibility is a matter of what one does and does not want to do—a matter of desire and motivation—not a matter of whether one chooses in accordance with reason’s dictates on the occasion of action.

Just as the Kantian conception of responsibility is a late accretion on a quite different conception of responsibility, so is the Kantian conception of retribution. In the deontological theory of punishment, retribution is required in response to wrongdoing because the wrongdoer has chosen to set himself against society and above his victim, thereby implying a principle of action that applies to himself, which in turn implies his exclusion from the rights of society and his degradation through punishment.\textsuperscript{66}

However, long before this abstract conception of retribution developed, retribution was a matter of payment of debt in which “the creditor takes part in the rights of the masters: at last he, too, shares the elevated feeling of despising and maltreating someone as an ‘inferior’ . . . .”\textsuperscript{67} Even the familiar conception of retribution as revenge that has been tamed and civilized is wrong in Nietzsche’s view. Punishment has to do with the emotions, Nietzsche argues, but not with reactive emotions such as revenge. Instead, it has to do with the active emotions such as a lust for power and possessions. Justice originates with the moral aristocracy, “the strong, the spontaneous and the aggressive,” who “have partly expended their strength in trying to put a stop to the spread of reactive pathos . . . .”\textsuperscript{68}

Everywhere that justice is practised and maintained, the stronger power can be seen looking for means of putting an end to the senseless ravages of ressentiment amongst those inferior to it (whether groups or individuals), partly by lifting the object of ressentiment out of the hands of revenge, partly by substituting, for revenge, a struggle against the enemies of peace and order, partly by working out compensation, suggesting, sometimes enforcing it, and partly by promoting certain equivalences for wrongs into a norm which ressentiment, from now on, has to take into account.\textsuperscript{69}

These efforts on the part of the moral aristocracy turn punishment into the opposite of revenge—into an impersonal

\textsuperscript{65} Id. at 42.
\textsuperscript{66} See Hampton, supra note 23, at 1686-87 (describing retribution as vindicating the victim’s worth in part by degrading the wrongdoer).
\textsuperscript{67} NIETZSCHE, supra note 1, at 45.
\textsuperscript{68} Id. at 53.
\textsuperscript{69} Id.
matter of retribution in which descriptions of "just" and "unjust" exist after the creation of a legal system, and not before it.⁷⁰

Describing roughly the same arc of history—from the origin of punishment in notions of debt to a sophisticated legal retributivism—Nietzsche describes the succession of meanings attributed to the experience of being punished. He describes the experience of those who originally experienced punishment as a kind of resignation to fate or misfortune and claims that they would have felt only sadness at the turn of events.⁷¹ In the first dawns of critical awareness, the moral aristocracy would have sought to turn punishment to other ends:

[W]e must certainly seek the actual effect of punishment primarily in the sharpening of intelligence, in a lengthening of the memory, in a will to be more cautious, less trusting, to go about things more circumspectly from now on, in the recognition that one was, once and for all, too weak for many things, in a sort of improvement of self-assessment.⁷²

However, Nietzsche concludes, all that actually can be accomplished is an increase of fear and a mastering of desires. Punishment cannot make man better; it can only tame him and make him stupid.⁷³ Among the other accretions of meaning on punishment—not only Kantian retribution, but also deterrence, festival, incapacitation, and racial or social purity—Nietzsche singles out one construal of punishment’s purpose as especially disappointing: the inculcation of bad conscience, the feeling of guilt that might enable the convict to govern himself properly in the future. Nietzsche observes how unlikely it is that punishment could lead to such a result. The prisoner either becomes harder and more resistant to change or he is completely debased and acquires "a dry, morose solemnity."⁷⁴

At this point, we ought to set aside Nietzsche’s own pessimism and appreciate the extent to which he has uncovered a conception of punishment that is independent of Judeo-Christian religion and deontological morality. At the conclusion of the Genealogy’s sections on punishment in section 15 of Essay II, Nietzsche focuses on the act of punishment, and it is not surprising that this induces pessimism. But we ought to back up a few sections, to section 11, and recognize, as Nietzsche does there, that it is legal theory and doctrine, not the immediate instrumentalities of punishment, that

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⁷⁰ See id. at 54.
⁷¹ See id. at 59.
⁷² Id. at 60.
⁷³ See id.
⁷⁴ Id. at 59.
matter the most to society. It makes sense, then, temporarily to set aside the problems at the sharp end of the practice and rethink punishment starting at the other, speculative end. We are after a legal theory that meets the aristocratic ideal and that provides a solution to doctrinal problems in the criminal law such as the proper construction of fault. Whether or not punishment can ever do anything but make men stupid is a question that we can set aside for the moment.

What of the sadness that the original offenders are said to have felt? It is, apparently, not yet remorse, but only regret. The law could not inculcate conscience and these offenders did not have it. Their response to punishment was not reflective and they did not engage in the kind of conscientious self-governance that features remorse. But this is not to say they were not governed by law. They were governed, Nietzsche argues, by the experience and image of punishment's cruelty, from which they could acquire a handful of "I-don't-want-to's." That is, they could and did undergo a certain amount of shaping at the level of their desires and motivations.

This level of unconscious obedience cannot be recovered, and we have no need to recover it. We rightly regard the prospect of the law's governing by means of subliminal conditioning with horror. But the next step in the historical progression—the moral aristocracy's conception of punishment as governing us just beneath the level of the rational determination of the will—is eminently recoverable. Indeed, in light of Kant's desiccated conception of the will and the influence it has had on Anglo-American legal theory and doctrine, we would do well to recover this pre-Kantian conception of punishment and responsibility. But if we are to describe governance, not only of the will, but also of desire, then we must employ a richer conception of human agency, one that integrates the other attributes of the human agent—her strength, her sexuality, her imagination—into our conceptions of action and responsibility. This integration will lead us, one hopes, to the moral aristocracy's rich conception of punishment's effects—"the sharpening of intelligence, in a lengthening of the memory, in a will to be more cautious, less trusting, to go about things more circumspectly from now on"—between the original conditioning by cruelty and the "dry, morose solemnity" of Kantian self-mastery.

The moral aristocracy's critically aware assessment of

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75 See id.
76 See id. at 42.
77 Id. at 60.
punishment is just that which Nietzsche describes as unattainable in II.15: the account of punishment’s effects as including the enhancement of memory, a will to caution and circumspection, and a more accurate self-assessment, including a sense of one’s weakness in many areas of life. Nietzsche concludes that these things are not attainable through punishment, and that only the mastery of desire through fear is possible. But again, it is advisable to set aside Nietzsche’s pessimism so that we can examine what is offered here. Nietzsche describes rational governance at the level of desire—not merely the mastery of desire in the Kantian sense of its subjection to reason by will, but the shaping of desire—the deliberate, reflective acquisition of attitudes and dispositions to caution, to circumspection, to modesty, to introspection, and so on. This is a conception of punishment’s effects that falls between the rational governance of the bare will and the conditioning of the agent subliminally through terror. It contemplates the rational governance of desire through the acquisition of a set of standing motivations. It contemplates punishment as a process of inculcating the virtues. In short, the conception of punishment that Nietzsche has invoked here is an aretaic theory of punishment.

We need not share Nietzsche’s pessimism about such an understanding of punishment. Punishment can do no more than to make men stupid. Unlike Nietzsche, we do not live in a society dominated by Christianity; we live in a world that has to a great extent rediscovered an appreciation for the merely human, as Nietzsche advocated. And we have concrete reasons to be more optimistic about the prospects for genuine punishment, especially under the guidance of an aretaic theory of punishment.

For example, the United States has actively promoted the creation of drug treatment courts in local and state jurisdictions around the country. In these courts, the offender pleads guilty to a drug offense, but sentencing is suspended pending his completion of a drug treatment program. Upon successful completion, his conviction is vacated and all charges are dropped. Inevitable lapses during the course of treatment are dealt with by a system of graduated sanctions in which termination of the program and incarceration are the last resort. Political conservatives attack drug treatment courts because the offenders do not seem to

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78 See id.
79 See id.
80 Id. at 59.
receive their just deserts. Political liberals attack drug treatment courts because the loss of liberty and pain inflicted as part of the treatment is degrading to the offender in a way that incarceration is not: it addresses him paternalistically, as an invalid or an incompetent, instead of as a responsible peer. The aretaic theory of punishment answers both sets of objections by portraying drug treatment as genuine punishment inflicted as retribution for past wrongdoing.\(^8^1\)

The key point in this analysis is that an aretaic theory of punishment allows us to draw a distinction between two kinds of rehabilitation. Therapeutic rehabilitation addresses pathology, whereas aretaic rehabilitation consists of habituation to virtue, which is a feature of normal human development. Neither the development of a good character nor our efforts to improve character address illness. Indeed, the possibility of affecting character in these ways as well as the responsibility premised on this possibility presupposes that one is mentally and physically healthy. This distinction is important, because it turns out that drug treatment involves at least as much character-building as it does the medical and psychoanalytic treatment of pathological alcohol and drug use. The former serves as a necessary base of support for the latter. For example, one court-supervised treatment program includes classes in substance abuse and relapse prevention, but it also includes classes in anger management, effective social communication, and ethnic contributions to civilization.\(^8^2\) These latter classes do not address pathologies; they are aimed at improved character: a temperate disposition, the ability to listen to others and to speak without rancor, and the self-esteem that comes from a consciousness of one’s ties to a larger community and history. In short, much of the programming received in drug treatment courts is aimed at enabling the defendant to meet the very responsibility that is at the heart of desert: the responsibility for the state of his character. Given that this is done because of a criminal conviction and against the offender’s will, it is genuine punishment. But it is punishment that does more than make people stupid or morose.

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CONCLUSION

It may seem inconsistent with the grand spirit of Nietzschean philosophizing to give a Nietzschean account of mundane matters such as strict liability or drug treatment courts. The tendency lately has been instead to envision a fundamental shift in human perception as the first step in political reform. But in addition to the manifest futility of that strategy, one ought to be able to see that the way in which aretaic legal theory resolves hardened dilemmas and transcends entrenched political positions is its most Nietzschean feature. Nietzsche sought to overcome nihilism by breaking down existing categories. His perspectivism is an important part of this project, and until now, his perspectivism has played the largest role of any of his ideas in Anglo-American legal theory. The aretaic theory of punishment is part of this tradition, and yet it breaks down existing categories to a purpose beyond reiterating endlessly that language, value, and meaning are indeterminate and manipulable. It offers specific concepts, analyses, doctrinal innovations, and policy prescriptions to replace existing categories with a view to making law contribute more effectively to the good life. To see this as contrary to Nietzsche’s project is to overemphasize his perspectivism and to ignore his concern with overcoming modern slave morality and nihilism through the recapture of the aristocratic ideal. Human flourishing is part of that latter ideal, and it is as solid a basis as any for a new legal order.