Innocents Lost:
Proportional Sentencing and the Paradox of Collateral Damage

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DRAFT COPY: NOT TO BE CIRCULATED, CITED, OR QUOTED WITHOUT PERMISSION OF AUTHOR (REVIEWERS EXCEPTED)
Or else the man has a family . . . [I]n killing him you strike the head from the entire
family. And once again you punish innocents.

Victor Hugo

I. Introduction

- In California, someone convicted of three felonies could spend the rest of his days in
  prison, even if two of his felonies are non-violent.2

- The penal code of Montana authorizes judges to impose a life sentence upon a first
  conviction for distributing any quantity of marijuana.3

- In Manhattan, those who commit misdemeanors, such as vandalism and disorderly
  conduct, are often arrested. Some are prosecuted, convicted, and sentenced. One of the reasons
  the city gives for pursuing petty criminals so vigorously is that it wishes to send a “zero
  tolerance” message, thereby deterring those who would commit more serious crimes.4

Aggressive measures against crime are popular with many politicians and voters,5 but the
policies also have vocal critics. Some question whether the policies live up to their reputations
for effectively controlling crime.6 Many also advance objections from desert. The most

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1The Last Days of a Condemned Man and Other Prison Writings, Geoff Woollen trans. (Oxford:
3Montana Code Annotated 45-9-103 (2005). The U.S. Supreme Court has upheld a forty-year
prison sentence for distributing, and possessing with intent to distribute, less than nine ounces of
4George L. Kelling and William J. Bratton, "Declining Crime Rates: Insiders' Views of the New
6For doubts about New York’s policy, see Bernard E. Harcourt, Illusion of Order: The False
common type of desert objection concerns proportionality. Critics condemn laws such as California’s and Montana’s for mandating or permitting sentences that exceed what the criminal deserves. Some critics also consider it morally wrong for Manhattan to treat the prospect of deterring serious criminals as a reason to punish petty offenders. Even if Manhattan’s penalties are not excessive, in themselves, critics object that the city inflicts them for immoral reasons – reasons other than giving the individual offender what he deserves.

These objections assume the validity of retributive restrictions – principles of justice according to which what a convict deserves, on account of his individual conduct and character, restricts how states are morally permitted to treat him. Retributive restrictions are often understood as reflecting or extending Kant’s famous punishment axioms. The most popular type of retributive restriction is:

**Minimal Retributivism ("minimalism")**

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9“Punishment by a court . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only because he has committed a crime. For a man can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: His innate personality protects him from this, even though he can be condemned to lose his civil personality.” Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), pp. 140-41. See also Jeffrie G. Murphy, "Does Kant Have a Theory of Punishment?," *Columbia Law Review* 87 (1987): 509-32.

10Minimal retributivism dictates what the state may not do (i.e. telish), but gives no positive
The state is morally forbidden to impose on anyone a sentence more severe than he deserves for crimes he has committed.

A more constraining type of restriction is:

Exclusive Retributivism ("exclusivism")

The only reason for which the state is morally permitted to impose a sentence on someone is in order to give him what he deserves for crimes he has committed.

Exclusivism calls Manhattan’s policy into question. However severely petty criminals may deserve to be punished, the fact that they deserve it is not the only reason for which police officers, prosecutors, and judges in Manhattan are seeing to it that punishment is imposed. Rather, these officials are also trying to control more serious crime. If exclusivism is true, then they act for unjust reasons, even if the petty criminals deserve what they get.


ascertaining the upper limit of what each category merits. However, we need not settle on a specific theory of desert in order to see that minimalism has policy implications. On any of a wide range of theories of desert, no one deserves forty years in prison for distributing nine ounces of marijuana. If one of these theories is true, along with minimalism, then Montana’s law is unjust. Likewise, on most theories of desert, the man whose third felony is stealing golf clubs does not deserve a life sentence. If one of these theories is true, then California’s law is unjust, according to minimalism.

Few philosophically informed writers in the past twenty years have seriously questioned retributive restrictions. Minimalism, in particular, is the most widely endorsed principle in modern punishment theory. It is accepted, I submit, by at least ninety percent of contemporary punishment theorists. Exclusivism is less popular than minimalism, but still very popular. I estimate that no fewer than seventy-five percent of punishment theorists today accept

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15See, e.g., Davis, To Make the Punishment Fit the Crime; Duff, Punishment, Communication, and Community; Moore, Placing Blame; Morris, On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology; Primoratz, Justifying Legal Punishment; Sadurski, Giving Desert its Due; Hirsch, Censure and Sanctions.
exclusivism, in addition to minimalism. These restrictions play central roles in the overwhelming majority of punishment theories that have developed in the past several decades. Theories incorporating retributive restrictions include not only those explicitly identified as “retributivist,” but also hybrid theories, moral education theories, societal defense theories, and others.

Some people find the validity of retributive restrictions intuitively self-evident. They need no argument to persuade them that it is wrong to punish someone in excess of desert, or to punish him for reasons other than giving him what he deserves. Others demand arguments for retributive restrictions, and theorists try to provide them. The main arguments offered involve thought experiments in which the state practices “telishment,” pursuing its goals by deliberately

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16Commitment to exclusivism implies commitment to minimalism. One cannot rationally impose an excessive sentence for the purpose of giving the convict what he deserves.
19Hampton, "The Moral Education Theory of Punishment."
inflicting severe penalties on someone who has committed no crime whatsoever.\textsuperscript{22} The earliest arguments of this type were presented as \textit{reductiones ad absurdum} of act utilitarianism. They now serve as staples of introductory curricula in moral and legal philosophy. Monographs on punishment theory often begin by rehearsing a telishment reductio.\textsuperscript{23} Such reductiones\textsuperscript{24} are now used to discredit all forms of consequentialism.\textsuperscript{25}

My interest in these thought experiments does not concern their use in reductiones of consequentialism, but their use in support of retributive restrictions. In order to derive restrictions from telishment scenarios, one needs to engage in moral argument from generalization. I shall argue that generalization arguments of the same form can be used, subversively, to derive morally unacceptable conclusions from other scenarios in which the state intentionally inflicts undeserved coercion. I proceed from the observation that we approve of


\textsuperscript{24}Plural of ‘reductio.’

\textsuperscript{25}Until the late twentieth century, the dominant theoretical approaches to legal punishment were consequentialist. Mark A. Michael, "Utilitarianism and Retributivism: What’s the Difference?," \textit{American Philosophical Quarterly} 29 (1992): 173-82, p. 173; Duff, \textit{Punishment, Communication, and Community}, p. 7.
policies that inflict *collateral damage*, such as the ubiquitous policy of excluding the family members of inmates from prison facilities, outside visiting hours. I present a generalization argument for the conclusion that these policies are unjust. I argue that, if we firmly believe that these policies are not unjust, then we should put less stock in generalization arguments. We should not use them to derive restrictions from telishment scenarios. In fact, I shall argue, our moral convictions give us at least as much reason to reject restrictions as to accept them. Although aggressive crime-control policies are morally questionable for other reasons, I conclude that theorists should advance retributive objections only with caution, if at all.

**II. Recent Developments in Ethical Theory**

The telishment scenarios have been widely discussed, so readers might wonder if they merit the extended reexamination that this article undertakes. I think they do, because recent developments in ethical theory shed new light on the scenarios, deepening our understanding of their powers and limitations. Two such developments inform my discussion.

First, and foremost, in the period since the reductiones gained widespread acceptance, the method of moral generalization has come under scrutiny. Philosophers have recently disputed the assumption that the intrinsic features of actions and policies have fixed moral valences across varying contexts. Suppose the fact that an action constitutes a lie is an intrinsic feature of the action. According to the invariance assumption, if lies are wrongmaking, pro tanto, in some

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26 I mention some of these in section XVI.
contexts, then lies are wrongmaking, pro tanto, in all contexts (see footnote on terminology). 28 Philosophers have challenged the invariance assumption. 29 If it is false, then moral generalizations must proceed with caution. The derivation of retributive restrictions from telishment scenarios constitutes such a generalization, so this move warrants reconsideration.

The second theoretical development that inspires my analysis is the rise of moral theories that combine aspects of consequentialism and non-consequentialism in new ways. These include theories that posit a pro tanto reason to promote the good which, while not invariably overriding, is stronger than most anti-consequentialists accept. 30 One might say that such theories, which I call beneficence theories, abandon the “letter” of consequentialism while carrying forward its “spirit.” 31 The emergence of beneficence theories is significant, I shall argue, because the derivation of restrictions from telishment scenarios assumes that any non-consequentialist theory must incorporate such restrictions. The possibility of non-consequentialist beneficence theories reveals this assumption as a false dichotomy. I suggest that beneficence theories of punishment

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28 The familiar Rossian distinction between “pro tanto” or “prima facie” duties (reasons, wrongs) and “all-things-considered” duties (reasons, wrongs) plays an important role in this paper. My default usage is all-things-considered. I add the qualifier, ‘pro tanto,’ whenever it applies.


31 See [reference to author’s published work].
could, perhaps, survive all versions of the reductio that have yet been devised, and do so without incorporating restrictions.\(^\text{32}\)

### III. The Classic Telishment Reductiones

I shall begin by reviewing the classic reductiones. They purport to demonstrate, vividly and decisively, the moral bankruptcy of act utilitarianism. In standard form, a reductio posits a society in which public welfare is at grave risk, for some reason. The nature of the threat varies from one version of the reductio to another. In some versions, the society has suffered a wave of serious crime and the authorities have been unable to apprehend the perpetrators, no matter how hard they try. Unless the authorities can persuade the public that the perpetrators are in custody, their perceived impotence will encourage other potential criminals. In other versions of the reductio, a heinous crime has been committed and vigilantes are prepared to commit a series of lynchings unless their desire for a scapegoat is satisfied. In either version, the opportunity arises for the authorities to frame, convict, and execute an innocent scapegoat who just happens to be a convenient target.\(^\text{33}\) If the authorities can conceal the scapegoat’s innocence and publicize his conviction, as the hypothetical stipulates, then they will deter potential criminals. It is stipulated that the expected benefits to society of deterring crime to that extent would outweigh the expected disutility to the scapegoat. Therefore, act utilitarians must support telishing the scapegoat. However, all reasonable people, regardless of their theoretical commitments, have

\(^{32}\)See section XIII.

\(^{33}\)E.F. Carritt observes that “if some kind of very cruel crime becomes common, and none of the criminals can be caught, it might be highly expedient, as an example, to hang an innocent man, if a charge against him could be so framed that he were universally thought guilty.” Carritt, *Ethical and Political Thinking*, p. 65. H.J. McCloskey imagines “a sheriff fram[ing] an innocent Negro in order to stop a series of lynchings which he knew would occur if the guilty person were not immediately found, or believed to have been found.” McCloskey, "A Non-Utilitarian Approach to Punishment,” p. 255.
strong convictions that such telishment would be wrong, all things considered. Hence, the reductio concludes, we must reject act utilitarianism.

IV. The Decline of Consequentialism and the Rise of Reductiones

Until the late twentieth century, utilitarian rationales for punishment were considered so compelling that there was scarcely a market for alternatives. Today, by contrast, punishment theorists often seem desperate to distance themselves from any form of consequentialism, utilitarian or otherwise. The reductio surely deserves some credit for this dramatic shift in theoretical opinion.

However, chronology suggests that the reductio cannot provide the entire explanation. The reductio first appeared in the early twentieth century, but utilitarian theories of punishment remained popular for many decades thereafter. Anti-utilitarians repeated the reductio, in print, throughout the century, but a majority of theorists did not embrace it until the last three decades. Why did it take so long for the reductio to prevail, and what accounts for its ultimate acceptance?

I think the answer lies in social trends taking place outside the academic discipline of punishment theory. By the late seventies, members of the general public had become...

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36Bradley, Ethical Studies; Carritt, Ethical and Political Thinking; McCloskey, "A Non-Utilitarian Approach to Punishment; Ross, The Right and the Good.
disenchant with rehabilitation, concluding, rightly or not, that “nothing works” to rehabilitate felons.  

In response, they rekindled their retributive impulses, which had never really extinguished.

Theorists, too, lost some enthusiasm for rehabilitation during this period, although they did not abandon it as thoroughly as did the general public. Theorists were less distressed by the perceived futility of rehabilitation than by ethical concerns about coercive techniques. Many theorists, along with members of the general public, were horrified by what they learned about the use on convicts of psychiatric surgery, psychoactive pharmaceuticals, and aversion therapy.  

Many concluded that it is immoral for the state to practice coercive rehabilitation, especially if it involves exceeding desert.

However, theorists have abandoned more than just coercive rehabilitation. In the seventies, they began steadily repudiating utilitarianism, and all forms of consequentialism. This observation applies, at least, to scholars in philosophy departments and law schools. 

Simultaneously, theorists have restored retribution to intellectual respectability as a moral

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41 Excluding those affiliated with the law-and-economics movement.
rationale for punishment, a development which may have further encouraged the rekindling of popular retributive sentiments.

So theorists and the general public share renewed support for retribution and misgivings about rehabilitation. They differ, however, in one fundamental respect. For all its renewed enthusiasm for retribution, the general public has never abandoned its belief that punishment can, and should, serve to control crime. Although the public became frustrated with the ineffectiveness of crime control in the seventies, it has never wavered from the idea that this is at least one purpose of the criminal justice system. Having largely forsaken rehabilitation, the public has embraced anew the methods of deterrence and incapacitation, calling for harsher penalties and more effective law enforcement. Voters support these measures as means to both crime control and retribution. Theorists, meanwhile, have abandoned all forms of consequentialism, a trend that has no counterpart in the thinking of ordinary people.

What explains this divergence between theorists and the general public? I can only speculate. Some intellectuals associate utilitarianism with the injustices perpetrated by communist and fascist regimes in the name of the greater good. Other intellectuals associate it

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42A report that was influential at the early stages of the retributivist revival is Hirsch, Censure and Sanctions. This report has been credited with launching the “just deserts” movement. Stephen P. Garvey, "Punishment as Atonement," UCLA Law Review 46 (1999): 1801-58, p. 1840, n.165.

43Garvey mentions, without endorsing, the view that “the widespread embrace of the rhetoric of retributivism – of just deserts and righteous indignation – has tended to sponsor extreme policies and practices that thoughtful retributivists themselves might well renounce.” Garvey, "Punishment as Atonement, p. 1839.

44See Mauer, "Why Are Tough on Crime Policies So Popular?"

45A few theorists have even concluded that the state is morally forbidden to punish, at least until it develops more humane and effective methods. See Ted Honderich, Punishment: The Supposed Justifications (London: Hutchinson, 1969); Golash, The Case Against Punishment.

46The role of these associations in intellectuals’ rejection of consequentialist theories of punishment is discussed in Binder and Smith, "Framed: Utilitarianism and Punishment of the Innocent,” p. 224.
with laissez-faire economics and/or with the political prerogative of majorities against disadvantaged minorities. Many have also been influenced by the provocative work of Michel Foucault. It is no coincidence that Foucault’s emblem of the menacing power wielded by the modern penal state is the “panopticon,” designed by the grandfather of utilitarianism, Jeremy Bentham.47

Whatever factors may actually explain punishment theorists’ rejection of consequentialism, however, the arguments they offer us are variations on the reductio. I now turn to these arguments.

V. Analyzing Reductiones

In this section, I extract what I see as the core of the reductio. Then, in stages, I add layers of material to the core, producing successively more powerful versions. The core is:

Draconia 0

Innocent Ian is arrested, prosecuted, and convicted of a felony in the State of Draconia. The Draconian government sentences him to severe punishment, such as execution or years in prison. Ian does not deserve such severe punishment. He has committed no crime whatsoever (or, at most, misdemeanors).

As I use the terminology, Draconia telishes\(^{48}\) Ian: it punishes him in excess of what he deserves. All reasonable people agree that Draconia’s actions are objectively unjust.\(^{49}\) But we can identify different features of the case as the wrongmaking ones. Which of these accounts is correct has implications regarding why, and to what extent, the state is permitted to punish.

Act utilitarians, for example, can easily explain what is wrong with Draconia’s telishment: it lowers Ian’s welfare, and *Draconia 0* mentions no positive effects, so telishing Ian fails to maximize long-term welfare.

However, this act-utilitarian reply does not apply to the more interesting:

*Draconia 1*

Same as *Draconia 0*, with the specification that telishing Ian maximizes long-term welfare. Perhaps it controls crime to such an extent that Ian’s welfare loss is outweighed by the gains of others.

*Draconia 1* stipulates that telishment maximizes long-term welfare, in this case. Yet reasonable people condemn *Draconia 1*, according to anti-utilitarians. If this is so, as I shall assume, then *Draconia 1* reveals a conflict between act utilitarianism and our considered moral

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\(^{48}\)I use the term more broadly than Rawls. I define ‘telishment’ as the deliberate imposition of a disadvantage on someone without reasonable belief that her actions deserve such a disadvantage. It is a matter of definition that the goal of telishment, when one exists, cannot be that of delivering retribution to the individual. Rawls defines ‘telishment’ as an institution that authorizes officials to condemn an innocent man whenever they believe that doing so will serve the best interests of society. Rawls, "Two Concepts of Rules," p. 11.

\(^{49}\)That is, the Draconian officials’ actions are objectively wrong. If the officials do not reasonably believe that Ian deserves such punishment, then their actions are also subjectively wrong or “blameworthy.” See subsection VI.A. The objection to telishment arises equally with respect to “over-punishing” the guilty, or punishing them for non-desert reasons. See Goldman, "The Paradox of Punishment," p. 46; Schedler, "On Telishing the Guilty."
convictions. Some utilitarians respond that Draconia’s actions are not, in fact, unjust, but retributivists mock them, sarcastically referring to this as the “outsmarting” move.50

Writers first introduced the reductio in order to refute act utilitarianism, which was the most familiar form of consequentialism at the time.51 So far, the reductio has done all it was originally designed to do. But theorists quickly extended the scope of the reductio to other forms of consequentialism.52

A. Retributive Value Theory

Consider, first, combining act consequentialism with a non-welfarist value theory.53 According to some value theories, it is non-derivatively bad for an individual to suffer undeserved disadvantage. Understand “disadvantage” as anything that reduces welfare, so any of these could constitute disadvantage: death, bodily injury, physical pain, discomfort, emotional distress, frustration of aims, deprivation of resources, et cetera. Disadvantage is bad on all plausible theories of value. But the axiologies I have in mind hold that it is worse, intrinsically, primitively, and non-instrumentally, when disadvantage is undeserved. Call these retributive value theories. According to these theories, the badness of undeserved disadvantage goes

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51See Bradley, Ethical Studies, p. 29; Ross, The Right and the Good, pp. 56-64.

52These developments are discussed in Duff, Punishment, Communication, and Community, pp. 3-14; Moore, Placing Blame, pp. 94-102, 155-88; Primoratz, Justifying Legal Punishment, pp. 33-65; Ten, Crime, Guilt and Punishment, pp. 7-37.

beyond its negative effect on the victim’s welfare. A theory that combines act consequentialism
with a retributive value theory will, at least sometimes, permit agents to choose an action that
fails to maximize welfare, if it prevents sufficient quantities of undeserved disadvantage.
Michael Moore calls this consequentialist retributivism.\(^{54}\)

How does consequentialist retributivism evaluate Draconia 1? Although telishing Ian
maximizes welfare, it may not maximize value, according to retributive value theory. The
badness of a telishment event can outweigh the goodness of the welfare it generates. For any
amount of negative welfare, there is a value theory which entails that a single telishment event is
still worse. Therefore, no matter how much welfare telishing Ian generates, there is a value
theory such that consequentialist retributivism condemns it. Therefore, there is a version of
consequentialist retributivism that coincides with our considered convictions about Draconia 1.

A version of consequentialist retributivism might satisfy some anti-utilitarians, if
consequentialism itself was never their target and all they really wanted was an alternative to
welfarism. Most punishment theorists today, however, have grander ambitions. They are not
just anti-utilitarians, but anti-consequentialists. They can challenge consequentialist
retributivism with

Draconia 2

Same as Draconia 0, with the following specification. If Draconian officials refuse to
telish Ian, some other officials (in another state, perhaps) will telish two other innocent
victims. Therefore, telishing Ian minimizes cases of telishment.

\(^{54}\)Moore, Placing Blame, pp. 155-59. See also Braithwaite and Pettit, Not Just Deserts: A
Republican Theory of Criminal Justice. Consequentialist retributivism resembles what Robert
Nozick calls a “utilitarianism of rights.” Robert Nozick, Anarchy, State, and Utopia (New York:
Basic Books, 1974), p. 28a
No version of consequentialist retributivism condemns *Draconia 2*. Whereas, our considered convictions do condemn it, according to anti-consequentialists.

We can generalize this point. However we define the good, a principle that promotes good states of affairs, above all, will permit telishment, in some possible world. Therefore, for any value theory, combined with act consequentialism, one can fashion a reductio.\(^{55}\)

**B. Rule Consequentialism**

Instead of (or in addition to) proposing non-welfarist value theories, one could abandon act consequentialism in favor of rule consequentialism, or some other form of indirect consequentialism.\(^{56}\) This is the most popular consequentialist response to the reductiones.\(^{57}\)

Consider a principle that directs public officials to follow those rules which, if widely internalized, promote the good.\(^{58}\) Does rule consequentialism, so understood, condemn *Draconia 2*? Perhaps. *Draconia 2* specifies that telishing Ian minimizes cases of telishment. But rule consequentialism does not evaluate *Draconia 2* by asking whether the act promotes the good. Rather, rule consequentialism asks what rule would authorize the act in question, and whether that rule, widely internalized, promotes the good. Consider a rule that instructs officials to telish whenever they believe that doing so will promote the good. Could this rule be widely internalized by the officials in *Draconia 2* and, if so, would it promote the good? In practice, it would not. Officials will probably misapply the rule, telishing when doing so does not promote

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\(^{57}\)See Rawls, "Two Concepts of Rules."

the good. Also, in realistic societies, public awareness that officials accept the rule generates anxiety, fear, perhaps panic, even if there is no reason to believe that officials have actual plans to telish anyone.\footnote{Braithwaite and Pettit make this point in their defense of “dominion” as “knowledge of assured absence of constraint” in Braithwaite and Pettit, \textit{Not Just Deserts: A Republican Theory of Criminal Justice}, pp. 61-69.} Therefore, rule consequentialism condemns \textit{Draconia} 2, after all.

In response, anti-consequentialists could introduce

\textit{Draconia} 3

Same as \textit{Draconia} 2, with the specifications that the Draconian officials are extremely virtuous and competent and the Draconian populace is extremely imperturbable. If the Draconian officials internalize rules that authorize them to punish whenever they believe that doing so will promote the good, then doing so really will promote the good, in the long run. The officials internalize the rule and telish Ian, for that reason.

Rule consequentialism does not condemn \textit{Draconia} 3. This remains true when rule consequentialism is conjoined with any reasonable value theory. However, the anti-consequentialists insist, our considered convictions still condemn it. A conflict remains.

\textbf{C. Fantastic Counterexamples}

Notice, however, that the further the consequentialist departs from act utilitarianism, by incorporating retributive values into her axiology, or shifting to rule consequentialism, the more fantastic must the reductio become in order to discredit the resulting theory.\footnote{See Ten, \textit{Crime, Guilt and Punishment}, pp. 18-37.} At some point, the required scenario may become so fantastic that the intuitions of anyone but the most committed retributivist cease to condemn telishment in such a scenario. The corresponding consequentialist theory would no longer conflict with our considered convictions. It would reflect them.
I shall not press this point. I merely remind retributivists to respect this constraint as the dialectic progresses: a reductio only works if our convictions really do condemn the challenged practice in the scenario described. In the remainder of this article I shall assume, arguendo, that Draconia’s treatment of Ian is impermissible in all of the reductiones. If it is not, then there is a version of consequentialism that survives the reductiones, and the rest of my argument becomes otiose. My argument is addressed to those who believe that the reductiones reach all versions of consequentialism.

Instead of denying that our convictions condemn telishment, in all the reductiones, consequentialists often reply as follows. They concede that all versions of consequentialism permit telishment in the Draconia cases, but then they attempt to blunt the impact of these concessions by appeal to the

\textit{Reality Principle}

As a methodological matter, reductiones must use realistic scenarios, not fantastic ones.

The thought underlying the Reality Principle is that fantastic scenarios differ from the real world in ways that render unreliable our moral intuitions about them. Consequentialists use the Reality Principle as follows. There are versions of consequentialism that never permit any act of telishment that our considered convictions condemn, in any realistic scenario, even if they permit such telishment in fantastic scenarios. Those versions of consequentialism match our considered convictions concerning realistic scenarios, even if they conflict with our convictions
concerning fantastic scenarios. Therefore, by the Reality Principle, no reductio succeeds against those versions of consequentialism.\textsuperscript{61}

Anti-consequentialists typically reject the Reality Principle as an artificial, ad hoc limitation. They insist that normative theories must accommodate our considered convictions about unrealistic scenarios.\textsuperscript{62} Considering our reactions to a wider range of scenarios teaches us more about our own convictions, they claim. This knowledge allows us to construct theories that reflect our deepest beliefs more accurately, and to falsify theories that fall short in this regard. I think that is a good reason to reject the Reality Principle.\textsuperscript{63}

For example, our conviction that Draconia’s actions in \textit{Draconia 3} are impermissible, all things considered, has implications regarding \textit{Draconia 1}. \textit{Draconia 1} shares many features with \textit{Draconia 3}. The fact that we think Draconia acts impermissibly in both cases gives us some reason to infer that the wrongmaking features of \textit{Draconia 1} are among those it shares with \textit{Draconia 3}.

Which features do the cases share? Only these: in both cases, Draconia subjects Ian to an undeserved execution or prison sentence, for its own purposes. This is an important implication for theory choice, because no version of consequentialism considers these features to be wrongmaking features of \textit{Draconia 1}. If these are, indeed, the wrongmaking features of \textit{Draconia 1}, then all versions of consequentialism are false, not because they fail to match our


convictions about fantastic scenarios, but because they misidentify the wrongmaking features of realistic scenarios. This is what anti-consequentialists mean when they complain that, even if some version of consequentialism manages to match our convictions about the deontic status of telishment actions, no version accurately reflects what is wrong with such actions.64

Since I agree with anti-consequentialists that fantastic scenarios can teach us about our moral beliefs, I shall reject the Reality Principle in this article. I think this is also the reason why anti-consequentialists reject it. If we reject the Reality Principle, then theories of punishment must match our moral convictions regarding Draconia 0, 1, 2, and 3. Even rule consequentialism, combined with retributive value theory, fails to condemn Draconia 3, as our convictions do. So the reductiones teach a broad lesson: no consequentialist theory reflects our considered convictions, regardless of what value theory we conjoin to it. I shall accept this lesson, arguendo.65

D. Generalizing from Reductiones

I have accepted, for the sake of argument, that the reductiones establish that all versions of consequentialism conflict with our considered convictions. This lesson, while important, is entirely negative. The reductiones teach that consequentialism is false, but they do not explain why. They do not identify any general moral principles with which consequentialism conflicts. Retributivists often move, silently, from the negative lesson of the reductiones to the positive embrace of retributive restrictions. They do this without giving the argument that takes them to

64See, e.g., Matravers assertion that “what is wrong with sacrificing the innocent is not that it will endanger the dominion of others, what is wrong with it is that an innocent person is sacrificed.” Matravers, Justice and Punishment, p. 29. Matravers is criticizing Braithwaite and Pettit, Not Just Deserts: A Republican Theory of Criminal Justice. See also Ten, Crime, Guilt and Punishment, pp. 21-22.

65I shall not entertain the suggestion that we should reject our convictions, rather than consequentialism, in case of conflict. For consequentialists who favor “outsmarting,” my argument is otiose. My argument addresses those who refuse this path.
that conclusion. They seem to help themselves to *generalization arguments*. These have the following structure:

1. Act $\Phi$, performed by a certain agent at a certain time, has feature $f$;
2. $f$ is an intrinsic feature of $\Phi$;
3. $f$ is a wrongmaking feature of $\Phi$;
4. If a feature, $x$, is an intrinsic feature of an act, $\Psi$, and $x$ has a certain kind and degree of moral valence, then $x$ has that same kind and degree of valence when possessed by any act; ("generalizability")
5. Therefore, for any act, $\Psi$, that has $f$, $f$ is a wrongmaking feature of $\Psi$; (1, 2, 3, 4)
6. Therefore, any act, $\Psi$, that possesses $f$ is wrong.

Suppose one hopes to use generalization arguments to support certain general principles on the basis of a particular case. To do so, one must identify, as morally relevant, the very features of the case that one proposes to incorporate into the supported principles. Every additional feature that one treats as morally relevant will further limit the scope of the resulting principles. Consider the following generalization argument for minimalism:

1. The fact that Ian’s sentence exceeds what he deserves for his crimes is an intrinsic, wrongmaking feature of Draconia’s act;
2. If certain intrinsic features of an act have moral valence of a certain kind and degree, then those features have that same kind and degree of valence when possessed by any act; ("generalizability")
3. Therefore, the intrinsic features of Draconia’s act that are wrongmaking in *Draconia* are also wrongmaking when possessed by any act;
4. Therefore, it is wrong to inflict on anyone a sentence exceeding what he deserves for his crimes (i.e., minimalism is true).

The first premise of this argument identifies just one feature of Draconia’s act as wrongmaking: the fact that Ian’s sentence exceeds what he deserves for his crimes. The principle stated in the conclusion is, accordingly, very general.

We can also formulate a generalization argument for exclusivism by substituting for the first premise, above, the premise that Draconia’s infliction of a sentence on Ian for reasons other than giving Ian what he deserves, for crimes he has committed, is an intrinsic, wrongmaking feature. So modified, the generalization argument supports exclusivism.66

VI. Tu-Quoque Arguments

Generalization arguments are logically valid, and their major premise is supported by our considered convictions about the Draconia cases. Using these arguments, however, exposes retributivists to a certain kind of dialectical reply – a tu quoque.67 Sections VI-X exploit this vulnerability. A tu quoque is a reductio of an argument that uses a reductio. Instead of denying the intuitive injustice of the Draconia cases,68 a tu quoque tries to block the derivation of restrictions from these cases, via a reductio of generalization arguments. A generic tu-quoque argument has the following form:

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66Generalization arguments are implicit in Goldman, “The Paradox of Punishment”; Schedler, "On Telishing the Guilty."
67I adopt David Dolinko’s term for this kind of argument. David Dolinko, "Three Mistakes of Retributivism," UCLA Law Review 39 (1992): 1623-57, p. 1632. Michael Davis calls it a “you too” argument. Davis, To Make the Punishment Fit the Crime, p. 325. Do not confuse this form of argument with the logical fallacy, known as “tu quoque.” The fact that one’s opponent uses invalid reasoning does not entitle one to use that same reasoning. The arguments I discuss do not have this form.
68See section V, above, on “outsmarting.”
1. $f$ is an intrinsic, wrongmaking feature of an unjust telishment policy (e.g., Draconia’s);

2. If certain intrinsic features of a policy have moral valence of a certain kind and degree, then those features have that same kind and degree of valence when possessed by any policy; (“generalizability”)

3. $f$ is a feature of policy $\Phi$;

4. Therefore, $f$ is a wrongmaking feature of $\Phi$; (1, 2, 3)

5. Therefore, $\Phi$ is wrong. (4)

Here is how to use a tu quoque to block the use of generalization arguments to derive restrictions from the Draconia cases. First, identify a substituend for $\Phi$ that meets two criteria: 1) it must share the intrinsic, wrongmaking features of at least one act of unjust telishment; and 2) it must not be unjust, according to our considered convictions. If a substituend for $\Phi$ exists that meets these criteria, then we must conclude that generalization arguments are fallacious, or else reject the authority of our considered convictions.

A. The Standard Version of the Tu Quoque and its Inadequacy

A successful tu-quoque argument requires a substituend for $\Phi$ – a policy that shares the intrinsic, wrongmaking features of Draconia’s policy and that is not unjust, according to our considered convictions. The substituends that I shall consider are policies that cause *systemic damage*: undeserved disadvantages suffered on account of the imperfect nature of actual penal systems. Systemic damage occurs in every legal system, however just, that has ever existed. It will occur in any legal system that will exist in our lifetime. According to our moral convictions, however, most policies that cause systemic damage are permissible.
In subsection VI.B, I shall present my own version of the tu quoque. In this subsection, I examine a more familiar version from the literature and explain why I prefer not to rely upon it. This version depends upon the following form of systemic damage:

**False Positive**

The State of Florida maintains a criminal justice system that adheres to the highest standards of procedural justice. Defendants enjoy due process, presumption of innocence, competent legal representation, confrontation of witnesses, trial by impartial jury, et cetera. Florida prosecutes, convicts, and sentences Leo for a felony. The factfinder, judge, and sentencing authority all reasonably believe that Leo deserves his sentence. However, they are mistaken. Either Leo did not commit the criminal act, or he has objectively adequate moral and legal defenses. Unluckily for Leo, the available exculpatory evidence does not appear, or does not persuade the factfinder. His conviction is a false positive.

All real criminal justice systems generate false positives. This is a statistical certainty. According to one estimate, over 10,000 factually innocent defendants are convicted annually in the United States.\(^69\) Consider this version of the tu quoque:

Tu Quoque - False Positive Version

1. If certain intrinsic features of a policy have moral valence of a certain kind and degree, then those features have that same kind and degree of valence when possessed by any policy; (“generalizability”)

2. If a hypothetical policy of unjust telishment shares every intrinsic feature of a certain policy, then the latter policy is unjust.

3. There exists a hypothetical policy of unjust telishment (e.g., Draconia’s) that shares every intrinsic feature of Florida’s policy.

4. Therefore, Florida’s policy is unjust.

The false-positive version of the tu quoque promises to generate a paradox for those who wish to derive retributive restrictions from Draconia cases. Either 1) Florida’s policy is unjust; or 2) Draconia’s policy is not unjust; or 3) generalizability is false, in which case generalization arguments fail.70

The false positive argument shifts the burden of persuasion back onto the supporters of generalization. However, I think they may be able to shoulder this burden. Draconia’s policy

and Florida’s do not share all morally relevant intrinsic features, as the false-positive argument assumes. True, neither Ian nor Leo deserves his sentence, so both Draconia’s act and Florida’s are objectively wrongful. But how subjectively wrongful an agent’s action is – how blameworthy she is – often depends on what precautions she takes against performing objectively wrongful actions. The proponents of generalization could argue that Florida takes reasonable precautions against false positives. If Florida’s precautions are reasonable, then Florida does not act negligently, even when Leo slips through its protective net. Although Florida wrongs Leo, it is not blameworthy. Draconia cannot use this defense, as it takes no precautions against telishing Ian, so Draconia wrongs Ian in a blameworthy way.

Because I am not confident that the false-positive argument generates the paradox I need, I shall not rely upon this version of the tu quoque.

B. Collateral Damage

There is, however, a version of the tu quoque that is not vulnerable to the reasonable-precautions objection. This version, which supplements the false-positive argument, uses a different kind of systemic damage – the damage suffered by friends, close family members, and other members of a felon’s community, when he serves his sentence. I refer to these third parties, collectively, as affiliates. Bentham calls damage to affiliates, “derivative evil.” I prefer the term, collateral damage.

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It would be convenient if every felon happened to be a reclusive, unattached, unemployed, childless orphan, because then the state could punish him without inflicting collateral damage. In reality, however, felons have affiliates. For affiliates, the collateral damage of incarceration is real. It can be psychological, reputational, financial, or a combination. Someone loses his or her partner to prison. Households lose potential breadwinners. Children lose parents. Parents lose children. These losses, whether temporary or permanent, are almost always damaging. Empirical studies find that partners and children, in particular, often suffer very substantially, in all of these ways. (I shall focus on incarceration in the remainder of this article, although execution obviously inflicts still greater collateral damage, in most cases.)

I shall argue that, insofar as incarceration inflicts collateral damage, in the real world, it shares many of the intrinsic features of unjust telishment that minimalism and exclusivism classify as wrongmaking. This presents a dilemma: either incarceration, as practiced in the USA, is generally impermissible, all things considered, or (as I believe) minimalism and exclusivism mischaracterize the wrongmaking features of telishment, and should be rejected.


Collateral damage differs in several respects from the damage endured by mistakenly convicted defendants. Unlike the mistakenly convicted, the victims of collateral damage are identifiable, *ex ante*. States cause collateral damage knowingly and foreseeably. In subsection IX.E, I shall argue that some policies, which our considered convictions support, even inflict collateral damage intentionally.

It is also significant that states take few “precautions” against collateral damage. States refuse to compromise their penal goals to more than a very limited degree in order to avoid inflicting collateral damage. Everyone has a moral right to marry, and to remain in close, uninterrupted, physical proximity to her spouse.75 The U.S. Supreme Court has recognized a general constitutional right to marry, including the right of inmates and non-inmates to marry one another.76 When the state incarcerates a husband, it restricts his wife’s exercise of her constitutional right to associate with him. Federal courts have upheld virtually complete restrictions on the exercise of this right by spouses of inmates.77 As legal justification, courts invoke the state’s “valid penological objectives” and the “exigencies and operational considerations of our penal system.”78 No state permits spouses and inmates to cohabit.

I am not the first to worry that collateral damage may be difficult for retributivists to justify. As A.C. Ewing notes,

it is obvious that in most cases the punishment of an offender brings suffering on his family and those closely connected with him, though they are innocent of the offence in

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75 *Universal Declaration of Human Rights* (1948), arts. 12, 16, 20.
question. A retributively just punishment for one person . . . would thus involve a retributively unjust punishment for several.79

And Joel Feinberg, a retributivist, observes that it is usually impossible to punish an offender without inflicting suffering on those who love or depend upon him and may themselves be entirely innocent, morally speaking. In that way, punishing the guilty is self-defeating from the moralistic retributive point of view. It will do more to increase than to diminish the disproportion between unhappiness and desert throughout society.80

Ewing and Feinberg raise these concerns about collateral damage, in passing, but decline to develop them into tu-quoque arguments. Few punishment theorists have done so, a failure that calls for explanation. I suggest two explanations. First, to modern people, prisons seem as inevitable as hospitals and schools. Prisons, as we know them, often cause collateral damage. This apparent inevitability can make the damage seem morally unimportant, akin to death from natural causes. Most people give little thought to the fact that the convict’s friends and family members suffer when he serves his sentence. People seem only grudgingly prepared to acknowledge that punishment damages affiliates, as though it were distasteful to dwell on this reality.81

81Anthropologist Donald Braman notes how rarely collateral damage is discussed by legal scholars and policymakers in Braman, Doing Time on the Outside: Incarceration and Family Life in Urban America, p. 5. Some exceptions to my generalization are close-range witnesses to
Secondly, we must consider chronology. Minimalism and exclusivism did not become popular, even with theorists, until the middle of the twentieth century. Before then, only much weaker restrictions had been accepted, as manifested in the expanding implementation of such legal principles as the presumption of innocence, in the nineteenth century.\(^{82}\) By the end of that century, however, long-term punitive incarceration was well-established in Anglo-American legal systems, rationalized by utilitarian arguments. Incarceration rates continued to rise, dramatically, throughout the twentieth century.\(^{83}\) These societal trends coincided with the development of reductiones and generalization arguments. Only then did minimalism and exclusivism become popular with theorists.

Since the seventies, theorists have used these restrictions to criticize policies of obviously utilitarian pedigree, but they have largely declined to consider whether these restrictions are compatible with the most prevalent utilitarian institution of all: the prison. It would not be surprising to discover a fundamental conflict between generalization arguments supporting restrictions and practices that inflict collateral damage, such as punitive incarceration. This is to say that our acceptance of collateral damage can be used to construct tu-quoque arguments. My version of this argument uses ordinary cases of punishment in the modern world, such as:

_Nebraska_


\(^{83}\)Between 1925 and 1980, the number of inmates in state and federal institutions rose from 91,669 to 315,974. The incarceration rate rose from 79 to 138 per 100,000 residents during the same period. _Prison 1925-1981_, (Washington, DC: Department of Justice, Bureau of Prison Statistics, 1982).
George commits a felony in the State of Nebraska. Nebraska arrests him, gives him a fair trial, convicts him, and sentences him to twenty years’ incarceration, under applicable law. George’s wife, Martha, suffers severe financial, reputational, and psychological distress as a result, as do George’s parents and children.

Although we sympathize with George’s family, we do not condemn the State of Nebraska. On the contrary, we understand Nebraska to be doing justice, albeit with regrettable side effects. The fact that we see Nebraska’s actions as completely permissible generates the paradox of collateral damage. Suppose we substitute for $f$, in the generic tu-quoque argument from section VI, the fact that Draconia’s policy intentionally inflicts undeserved disadvantages on Ian. This substitution yields:

*Tu Quoque – Collateral Damage Version*

1. The fact that Draconia’s policy intentionally inflicts undeserved disadvantages on Ian is an intrinsic, wrongmaking feature of Draconia’s policy;
2. If an intrinsic feature of a policy has moral valence of a certain kind and degree, then that feature has that same kind and degree of valence when possessed by any policy; (“generalizability”)
3. Nebraska’s policy intentionally inflicts undeserved disadvantages on Martha;
4. Therefore, Nebraska’s policy has a wrongmaking feature; (1, 2, 3)
5. Therefore, Nebraska’s policy is wrong. (4)

**VII. Responses to the Paradox of Collateral Damage**
There are several possible responses to the collateral-damage argument. First, one could conclude that it is, in fact, unjust to punish anyone using methods that intentionally inflict collateral damage on his affiliates, as Nebraska does. I shall return to this response in subsection XI.B. For now, I simply note that this conclusion entails radical policy reforms which virtually no one supports.

Alternatively, one could reject the second premise, generalizability. This is the course I will take most seriously, but not until subsection XI.C.\textsuperscript{84}

For retributivists, the more appealing responses are those challenging the first or third premises. Retributivists will argue that I have either mischaracterized Nebraska’s policy, or misunderstood why Draconia’s is wrong. Most people find it obvious that Nebraska’s policy is just and Draconia’s, unjust. Draconia’s policy recalls racist “justice” in the southern United States and human rights violations in oppressive dictatorships. Nebraska’s policy, by contrast, is that of a civilized jurisdiction, pursuing justice under law. In the terms of T.M. Scanlon’s hypothetical contractualism, one would expect that Ian could “reasonably reject” Draconia’s policy, whereas Martha cannot reasonably reject Nebraska’s.\textsuperscript{85}

The important question, however, is why Ian’s rejection, but not Martha’s, would be reasonable. One might expect the moral difference between the cases to reflect underlying differences in the intrinsic features of the two policies, in which case the third premise of the collateral-damage argument would be false. I shall argue otherwise – that the moral differences between Nebraska’s policy and Draconia’s reflect extrinsic differences, not intrinsic ones.

In sections VIII-X, I consider, seriatim, the most promising apparent differences between Nebraska’s policy and Draconia’s. Some of these distinctions rest on features that Nebraska’s

\textsuperscript{84}One could also take the “outsmarting” route mentioned in section V, above.

\textsuperscript{85}T.M. Scanlon, \textit{What We Owe to Each Other} (Cambridge: Harvard University Press, 1998).
policy actually shares with Draconia’s (section VIII). Others succeed in marking a moral
distinction between the policies, but appealing to similar features also allows one to distinguish
Draconia’s policy from policies forbidden by retributive restrictions (section IX). Finally, I
consider features that distinguish Nebraska’s policy from Draconia’s, but not from other
telishment policies that we also regard as highly unjust (section X).

In sections VIII-X, I try to identify intrinsic differences between Nebraska’s policy and
all unjust telishment policies, but my search fails. My failure suggests, though it does not prove,
that there are no such intrinsic differences. If there are none, then the fact that aggressive crime-
control policies that flout retributive restrictions share the intrinsic features of unjust telishment
policies gives us no reason to condemn aggressive policies. This is because the extrinsic features
of aggressive policies also differ from those of unjust telishment policies. I cannot identify
features that distinguish Nebraska’s policy from all unjust telishment policies without also
distinguishing aggressive anti-crime policies from unjust telishment policies. We are left with
the conclusion that retributivists have yet to neutralize the paradox of collateral damage. To this
extent, the Draconia cases provide much weaker support for retributive restrictions than is
generally believed, if they provide any at all.

Before continuing, I must warn the reader against a potential misinterpretation of the
remainder of this article. My ultimate position entails that inflicting substantial quantities of
collateral damage is justifiable, all things considered, just as common sense suggests. Although I
bemoan the nonchalance with which democracies inflict collateral damage in the name of justice,
my project is not a crusade to raise awareness of the plight of affiliates, as the “forgotten
victims” of the criminal justice system. Rather, I propose to use collateral damage as the basis
for a new, and more powerful, tu quoque. I contend that no one who tolerates as much collateral
damage as we do can consistently use telishment hypotheticals to support minimalism or exclusivism.

Tu-quoque arguments are confusing, because they are doubly indirect. In sections VIII-X, the reader may find herself thinking, perhaps with exasperation, that there are *obviously* morally significant differences between *Nebraska* and the *Draconia* cases. I will often appear to be arguing for the implausible conclusion that Nebraska’s policy is as unjust as Draconia’s. But that equation is the antithesis of my thesis. I believe there *are* moral differences between these policies. I simply think that these differences reflect extrinsic features of the two policies, not intrinsic features. The question is not whether one can reconcile the injustice of Draconia’s policy with the justice of Nebraska’s. I agree that one can, and offer my own reconciliation in subsection XI.C. Rather, the central question is whether one can reconcile these two claims in ways that do not also allow one to reconcile the injustice of telishment policies with the justice of policies that violate minimalism and exclusivism, such as (arguably) the aggressive policies of California, Montana, and Manhattan. That reconciliation, I claim, is difficult, and perhaps impossible.

**VIII. Accidental Features of Telishment Cases**

In this section, I examine some features of Draconia’s policy that are wrongmaking, pro tanto, and that Nebraska’s policy does not share. These turn out not to be necessary wrongmaking features. Although these features, when present, make a policy morally worse, their presence is not necessary to the wrongfulness of policies that punish in excess of desert, or for non-desert reasons.

**A. Severity**
Ian endures a severe sentence, as the scapegoat typically does in classic presentations of the reductio. H.J. McCloskey, for example, sends his scapegoat (a hapless “Negro”) to the gallows. Collateral damage in the real world seems mild by comparison. Nebraska does not hang or imprison Martha, it merely deprives her of her husband. Retributivists could try to distinguish Draconia’s policy from Nebraska’s by the fact that Ian suffers more severe damage at Draconia’s hands than Martha suffers at Nebraska’s.

This will not work. The generalization arguments that support restrictions do not identify the absolute severity of Ian’s sentence as a necessary wrongmaking feature of Draconia’s act. The major premise of the argument for minimalism identifies as a wrongmaking feature only the fact that Ian’s sentence exceeds what he deserves. But Martha’s suffering also exceeds what she deserves. If retributivists wish to support minimalism, then they cannot distinguish between Nebraska and Draconia on the basis of severity. They would need to adopt weaker restrictions (see section XIII, below).

B. Deception

When Draconia frames Ian, it deceives the public about his guilt. Nebraska deceives no one. One might conclude, therefore, that deception distinguishes Draconia from Nebraska in the required way.

This appeal to deception fails. The generalization arguments do not identify deception as a necessary wrongmaking feature of Draconia’s act. Moreover, there are completely non-

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86McCloskey, "A Non-Utilitarian Approach to Punishment, p. 255. Writing in 1965, he also aims to maximize his readers’ moral outrage against the utilitarian state, by making his scapegoat a black man.

87The minimal retributivist can claim, moreover, that if a certain sentence promised to cause death or bodily harm to an affiliate, she would refuse to inflict that sentence.

deceptive forms of telishment that we condemn. If retributivists wish to support restrictions, then they cannot distinguish Nebraska from Draconia on the basis of deception.

**IX. Features that Collateral Damage Shares With the Damage of Telishment**

In subsections IX.A-E, I consider five more apparent contrasts between Nebraska’s policy and Draconia’s. In each case, the contrast proves illusory: the policies turn out to share the features that seem, at first, to distinguish them.

**A. Benefits of Punishment Policy**

Martha suffers when Nebraska punishes George, but in other ways she also benefits from Nebraska’s policy. First, via general deterrence and incapacitation, the policy reduces Martha’s chances of being a crime victim. Secondly, it increases the extent to which criminals in Nebraska get what they deserve. Suppose that Martha values, for its own sake, living in a society in which criminals get what they deserve, and that her welfare increases when her government implements her values. In that case, Nebraska’s policy benefits her in this way, as well. Because Nebraska’s policy benefits her, one could argue that it does not treat her unjustly, collateral damage notwithstanding.

The problem, however, is that parallel arguments support the conclusion that Draconia’s policy does not treat Ian unjustly, either. Draconia’s policy controls crime, thereby reducing Ian’s chances of being a crime victim. It also increases the extent to which criminals get what they deserve. It is easy to overlook these facts, because Ian’s telishment obviously inflicts undeserved damage. One must remember that a policy of telishing individuals such as Ian has a

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89Punishment theorists have long recognized this fact. Alan Goldman emphasizes that the over-punishment of the guilty is just as wrong as pure telishment. Deliberately punishing a guilty person beyond desert just is, to that extent, partial telishment. Goldman, "The Paradox of Punishment.” See also, Schedler, "On Telishing the Guilty”; Jeffrie Murphy, "Marxism and Retribution," *Philosophy and Public Affairs* 2 (1973): 217-43, pp. 218-19.
general deterrent effect, ex hypothesi. It reduces everyone’s chances, ex ante, of being a crime victim. That includes Ian, if we consider his ex ante life prospects, rather than his ex post prospects as a telishment victim. Draconia’s policy also increases the extent to which criminals get what they deserve. Holding resources constant, the lower the crime rate, the more effectively can Draconia concentrate its resources on apprehending, prosecuting, and punishing the remaining criminals. Insofar as Ian values this for its own sake (as we assumed in Martha’s case), Draconia’s policy benefits him. For these reasons, one could argue that Draconia’s policy does not treat Ian unjustly, despite the fact that he suffers telishment himself.\textsuperscript{90} So we cannot distinguish between Nebraska and Draconia by comparing the benefits enjoyed by Martha and Ian.

**B. Choice to Associate**

Of course, it was Martha’s choice to marry a future felon. Had she not married George, his punishment would not have caused her emotions, reputation, and economic status to suffer. Perhaps Martha’s choice to marry George entails that Nebraska’s policy does not treat her unjustly, whereas Ian made no such choice.

This claim is mistaken. The availability of choice at an earlier time does not justify inflicting undeserved disadvantages. It would not be reasonable to expect Ian to avoid telishment by emigrating or hiding from the police, even if he knew in advance that they planned to telish him, and had opportunities to flee. Likewise, it is not reasonable to expect Martha to have refused to marry George, even if, as is unlikely, she could have predicted that her fiancée

would proceed to commit crimes after they wed. Nor is it reasonable to expect George’s parents
to have given him up for adoption, or to have chosen not to bring him into the world, simply
because of the possibility that he would become a criminal. Most obviously, George’s offspring
did not choose their emotional attachments to him, nor did they, when dependent children,
choose their material dependence on him.

C. Shared Guilt or Benefit from Crime

One might argue that affiliates do, in fact, deserve to suffer when the convict is punished. Perhaps they benefited from his crimes, or knew about them and declined to report them, or acted as co-conspirators. A bank robber or tax evader may share his “take” with his family members and friends. For these reasons, one might suppose, they deserve to suffer alongside the convict.

This assumption is very common, reinforced by stereotypes of criminals’ friends and
“business associates.” But most crimes do not benefit the criminal’s affiliates at all. Consider assault, homicide, rape, driving under the influence, solicitation, disorderly conduct, and arson. These crimes almost never benefit the criminal’s affiliates. Even when affiliates benefit, they do not always know that this is the case, nor is it always reasonable to expect them to know.91

Yet affiliates suffer when we punish convicts. Faced with this reality, we apologists for legal punishment must not ease our consciences by dwelling exclusively on stereotypes of “deserving” affiliates.

D. Intention

91In very limited circumstances, failing to report a crime or knowingly benefiting from criminal activity constitutes a crime in itself. If an affiliate is convicted of such a crime then the state should punish her, of course. But in such cases there is no retributivist justification for supplementing the punishment with collateral damage.
I turn, next, to some distinctions with more philosophical substance. First, Draconia telishes Ian intentionally, whereas Nebraska merely knows or foresees that its actions inflict collateral damage on Martha. Nebraska does not intend that damage.

No one denies that the intention/foresight distinction can possess at least derivative moral significance. Within that consensus, philosophers and theologians have debated for centuries how significant it is, and whether that significance is more than derivative. At one extreme, the doctrine of double effect holds that action taken with the intent to cause harm is forbidden, while action foreseen to cause harm is permitted, if the goal served is itself permissible. Double effect is controversial and variously interpreted. But if double effect is valid then perhaps it can distinguish Draconia from Nebraska in a completely general way. Indeed, several commentators have suggested that retributivists need double effect in order to answer the false positive version of the tu quoque. Despite the rich literature on double effect, no one has explored its capacity to serve this purpose.

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93Duff, “In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara,” pp. 423-24; Amarasekara, "The Errors of Retributivism,” pp. 144-47; Dolinko, "Three Mistakes of
Agents can intend to bring about states of affairs as means, or as ends. Consider, first, the suggestion that Draconia intends to damage Ian as an end. This claim is false, because sadists do not run Draconia. Draconia’s final end is not to torment Ian, but to promote the good, via crime control. Draconia intends that potential offenders be deterred by the thought of being treated as Draconia treats Ian.\textsuperscript{94} It does not intend to disadvantage Ian as an end.

**E. Coercive Means**

Consider, instead, the distinction between harm produced as an *effect* or *aspect* of an end and harm produced as a *means*. F.M. Kamm defends a “principle of permissible harm,” which permits the first kind of action but forbids the second. Kamm’s principle states, in part:

\begin{quote}
it is permissible to cause lesser harm as a means to a greater good just in case the lesser harm is an effect or aspect of the greater good itself that one produces. One may do (greater) good even though (lesser) harm will come of it. One may not . . . do harm in order that good will come of it as a causal effect of the harmful event.\textsuperscript{95}
\end{quote}

Retributivists could argue that Draconia intends to disadvantage Ian as a means to its end – so that good will come of the disadvantage as a causal effect. This proposition is initially plausible, but properly evaluating it requires characterizing the disadvantage more precisely.

\textsuperscript{94}This subsection adapts general difficulties with double effect explored in Bennett, *The Act Itself*, pp. 194-225.

\textsuperscript{95}For discussion of the principle of permissible harm, see Kamm, *Morality, Mortality: Rights, Duties, and Status*, pp. 172-204.
Suppose we characterize it subjectively, in terms of emotional distress. Does Draconia intend to inflict emotional distress on Ian as a means to its end? Surprisingly, it does not. Draconia telishes Ian, not in order to cause him distress, but in order to motivate potential offenders to imagine how such treatment would distress them. Imagine that Ian actually enjoys prison life and prefers it to liberty. Draconia would not change Ian’s sentence, in that case, nor would it fail to achieve its goals. As long as most potential offenders fear prison, it makes no difference whether Ian does. Therefore, Draconia does not intend Ian’s distress as a means to its end. Rather, Ian’s distress is an “effect or aspect” of the greater good that Draconia produces.

What the retributivist needs is a functional characterization of disadvantage, in terms of coercion, rather than a subjective characterization. When Draconia telishes Ian, it uses physical force against him. Corrections officers shackle him, force him into a locked vehicle, transport him to prison, and push him into a cell. Attempts to escape bring injury or death at their hands. Draconia clearly intends to use coercion against Ian as a means to its end of deterring crime. It coerces Ian so that good will come of the coercion as a causal effect. Potential criminals fear being treated as Draconia treats Ian.

By contrast, Nebraska does not incarcerate, fine, or execute Martha, nor does it subject her to corporal punishment. So it may seem that we have finally identified a wrongmaking feature that distinguishes Draconia from Nebraska: Draconia coerces Ian as a means to an end, whereas Nebraska does not coerce Martha as a means to an end.

This appearance is subtly misleading, and this fact is important to my argument. Nebraska does coerc Martha. It prevents her from assisting, rescuing, or protecting George, and from visiting him outside legally defined times of day. Picture a prison guard, forcibly escorting Martha off the prison grounds at the end of visiting hours. Martha begs for five more minutes
with George, but the guard continues to drag her toward the exit. The guard’s actions, which physically separate Martha from George, facilitate George’s punishment. The state carries out his sentence in part by having its employees perform such actions.\textsuperscript{96} Surprisingly, much of Martha’s misery results not from George’s own incarceration, but from Nebraska’s standing threat of force against her if she tries to interact with George in the proscribed ways. It is Martha, not George, whom the guard subjects to physical coercion. This means of punishing George may harm Martha even more than it harms George. It is easy to overlook these facts. Some libertarians make a similar mistake when they ignore the state’s use of coercion to prevent, for example, homeless people from trespassing on “private property” in search of shelter or food.\textsuperscript{97}

Furthermore, although Nebraska excludes Martha as a means to George’s punishment, her exclusion is not even a necessary means to that end. Nebraska could limit its threats to inmates themselves, while allowing affiliates to do whatever they wanted: visit at all hours, supply the convict with steak knives, firecrackers, and beer. In fact, historical states threaten

\textsuperscript{96}My point is not that prison guards are a heartless bunch. The guard can insist, correctly, that he performs his duties with no malice toward Martha. He can deny that he delights in her misery, and we can hope that this is true. But that does nothing to change the fact that the state has coerced Martha to her detriment. After all, the same guard might be a gentle, kindly fellow who regrets George’s own suffering and does what he can to make George’s life more pleasant. The state cannot then point to the guard’s kind thoughts and gestures to deny that the state has coerced George! The fact is, prison guards use physical force to administer penalties, whatever their subjective motives. When the state sentences the convict it issues a standing threat to use physical force against his affiliates, as well as him. The state threatens to use force against anyone who attempts to visit the convict outside visiting hours, or to provide him with an item classified as contraband.

affiliates, too, with overwhelming coercion, lest they do these things. This is good policy, of course, but it is a means to an end.

Retributivists might object that Draconia’s coercion of Ian differs, morally, from Nebraska’s coercion of Martha, because Nebraska criminalizes attempts to assist, rescue, protect, or visit convicts, or otherwise to interfere with the state’s penal operations. Positive law authorizes Nebraska to coerce Martha when she tries so to interfere, and she commits independent criminal offenses in so doing.98

However, positive law cannot render morally permissible a restriction on liberty if that restriction violates preinstitutional rights. That is why the fact that a statute authorizes Draconia to telish Ian cannot render the policy morally permissible. So the moral difference between Nebraska’s policy and Draconia’s cannot be that Nebraska’s positive law authorizes the coercion associated with collateral damage, but not the coercion associated with telishment.

Retributivists could now point out that Nebraska’s laws, prohibiting interference with the state’s penal operations, apply to everyone on an equal basis. By contrast, Draconia singles out Ian for telishment.

This will not work, either. True, laws against interfering with state penal operations apply to everyone equally, ex ante. Ex post, however, these laws burden the affiliates of prison inmates much more than others are burdened by them. The ex post perspective is the relevant one, in this debate. For comparison, imagine a Draconian statute that randomly selects Ian for telishment, for some public purpose. Such a policy burdens everyone equally, ex ante. But our convictions condemn it, as forcefully as ever, because of the ex post burden.

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98Kent Greenawalt argues that, if the state has legitimate authority, citizens are virtually always morally obligated not to interfere with the enforcement of its commands. Kent Greenawalt, *Conflicts of Law and Morality* (New York: Oxford University Press, 1987), p. 55.
X. Features that Collateral Damage Policies Share with Other Unjust Policies

We have yet to identify features that distinguish *Draconia* from *Nebraska* in a way that neutralizes the paradox of collateral damage. In each of subsections X.A-E, I present new variations on the *Draconia* cases. In each subsection I accept, arguendo, that the features in question have the moral significance attributed to them by my opponents. Then I show how a generalization argument allows us to derive from that premise certain judgments that conflict with our considered convictions about the new cases that I introduce.

The variations I introduce are unrealistic. But retributivists cannot consistently object on this basis, as they rejected the Reality Principle in subsection V.C. They challenge consequentialists with hypothetical cases that are as fantastic as mine, if not more so. Therefore, I am entitled to use such cases for my purposes.

A. More on Coercive Means

We have seen that Nebraska does, indeed, coerce Martha. The question now arises whether Nebraska coerces her *as a means*. Retributivists could deny this, claiming that Martha’s coercion is merely an *effect or aspect* of the greater good of punishing George. Perhaps part of George’s punishment consists in his having to live with the knowledge that his affiliates suffer as a result of his crime. Those who believe this might resist the suggestion that there is anything morally problematic about the suffering of affiliates. Such an assumption may, in fact, begin to explain theorists’ historical neglect of collateral damage.

In fact, most convicts do not deserve to have their affiliates suffer, as a supplement to their own sentences. But let us accept, arguendo, that some convicts do deserve to have their
affiliates suffer with them. In pre-modern times, states sometimes penalized a convict’s family members instead of, or in addition to, the convict himself. Consider:

**Homicidal Dad**

Same as *Draconia 0*, with the specification that Ian is the beloved son of a convict who has murdered several children. In order to approximate more closely the suffering that Ian’s father deserves, Draconia telishes Ian (in addition to punishing his father by conventional means).

We condemn Draconia’s actions, again, however much Ian’s homicidal father might deserve to have his son suffer. We do not consider Ian’s coercion an “effect or aspect” of his father’s punishment. Nor should we consider Martha’s coercion an “effect or aspect” of George’s, just because George might deserve to have her suffer, too.

**B. Confinement**

Draconia severely confines Ian’s physical movement, whereas Nebraska merely excludes Martha from the prison grounds, leaving her free as ever to roam the rest of the earth. That, retributivists could suggest, is why we condemn Draconia, but not Nebraska.

Draconia’s use of confinement does mark a difference between the cases. However, our convictions do not condemn only those forms of telishment that involve confining the victim. To lay the groundwork for this argument, consider the following thought experiment, which concerns punishment, not telishment:

**Separatia**

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99For certain criminals the uniquely fitting penalty might be “punishing” an affiliate. What better punishment for a child kidnapper than to “kidnap” his own child? I would not be surprised to find the parent of a kidnapped child contemplating this as the only adequate form of retribution (as opposed to revenge) for the kidnapper (“He should have to feel what I’ve felt . . .”).
Ricky is convicted of a felony he committed in the State of Separatia. In Separatia, convicts are sometimes punished by “separation”: forced to endure the subjective experience of physical separation from their affiliates. Perhaps Ricky’s separation is simulated: he enters an “experience machine” which rapidly simulates for him the experience of being separated from his wife, Lucy, for ten years. Or suppose Separatia gives Ricky and Lucy a choice between a twenty-year prison term for Ricky, on the one hand, and ten years of separation, on the other. Separatia will offer Lucy attractive accommodations for the decade in distant Tahiti. Ricky is not confined at all, but simply goes about his business in his community. Lucy is permitted to visit Ricky once a week for a few hours. Then she returns to Tahiti, where Ricky may not visit her. Lucy prefers ten years in Tahiti without Ricky to twenty years at home without him, so they both freely choose separation as Ricky’s punishment.

Most societies obviously have decisive policy reasons not to adopt Separatia’s strange sentencing scheme. But neither Lucy nor Ricky can charge Separatia with injustice. Ricky deserves punishment for his crimes. Home beats prison. But now consider:

Telishment in Separatia

Separatia decides to practice telishment by means of separation. It frames Ricky for a crime and telishes him by sending Lucy to Tahiti for ten years, as described in Separatia.
Telishment in Separatia constitutes serious, pro tanto injustice to Ricky, for exactly the same reason that incarcerating him would—Ricky is innocent of any crime. Depriving Ricky of Lucy’s company and consortium for ten years harms him severely, without confining him.\textsuperscript{100}

Of course, in this paper I am questioning the view that telishment is unjust, as a matter of principle, so it may seem odd that I should offer my own telishment scenarios and dwell on how intuitively unjust they are. My point, however, is dialectical. Whatever force a telishment hypothetical has, it retains this force even if we imagine that it involves only separation, not confinement. Yet the affiliates of prison inmates in our society suffer \textit{at least} as severely as Ricky suffers, and in the exact respect in which Ricky suffers, and in the exact respect in which Ricky suffers.\textsuperscript{101} If this form of telishment harms Ricky, then exclusionary incarceration harms affiliates in the real world even more severely. Ricky’s case illustrates that unjust telishment need not involve confinement.

C. Enabling/Disabling

Although, as we have seen, unjust coercion need not involve confinement, retributivists could still object that Nebraska does not use Martha as means to an end, because Martha’s presence on the scene does not in any way facilitate Nebraska’s goals, but rather interferes with them. Nebraska could punish George at least as effectively if Martha did not exist, or did not visit. Whereas, Draconia could not pursue its goals as effectively without exploiting Ian, or

\textsuperscript{100}This policy obviously mistreats Lucy, too, but this fact is not relevant to my point. The injustice to Ricky is not \textit{a function} of the injustice to Lucy.

\textsuperscript{101}In fact, real affiliates suffer additional collateral harm from the knowledge that the convict suffers so severely in his primary punishment. Ricky, at least, knows that his beloved Lucy is enjoying Tahiti in his absence.
someone similarly situated. Retributivists could insist that coercing “enablers,” such as Ian, is impermissible, while coercing “disablers,” such as Martha, can be permissible.\(^\text{102}\)

However, the enable/disable distinction cannot serve this purpose. With some imagination, we can describe a case in which the process of bringing a felon to justice requires violating the rights of two innocent bystanders, by forcibly separating them, but only as a side-effect, not as a means to an end. Consider:

**Blue Lake**

Sam has committed violent felonies in Draconia. He is now retired from crime and poses no further danger to anyone. But he has never been captured and his whereabouts are unknown. The Draconian authorities could bring Sam to justice by great expenditure and effort on a massive manhunt. But there is a much less expensive method that will also succeed. Luna, a bystander, knows where Sam is hiding. But Luna is extremely superstitious. She has just formed the belief that Blue Lake is a sacred body of water, and must not be crossed by anyone for the next ten years. She refuses to cooperate with the authorities unless they guard the lake, preventing all crossings for a decade. At the end of the decade, Luna will divulge Sam’s location. Unfortunately, Fred lives in a unique, self-sufficient medical facility located on an island in the middle of Blue Lake. He will die if he leaves the island. Ginger, Fred’s beloved wife, needs to live on the shore, where she receives daily, life-sustaining medical treatments that are available only at the hospital on the shore (not on the island). Ginger spends her waking hours with

Fred on the island, crossing daily by boat. Luna was unaware of Fred and Ginger, but she does not change her mind when their situation is explained to her. She still insists on having Blue Lake guarded. The Draconian authorities forcibly restrict access to Blue Lake for ten years, thereby separating Fred from Ginger, placating Luna, and apprehending Sam.

The presence of Fred and Ginger does not enable Draconia to apprehend Sam. Luna is indifferent to the couple’s existence. Draconia could apprehend Sam just as easily if Fred and Ginger did not exist. Their separation is merely a side-effect of the means by which Draconia apprehends Sam. Ginger is an innocent bystander, with a preinstitutional, moral right to associate with her husband. Perhaps Draconia does not “use Ginger as means,” as Ian is used, but its actions still restrict her exercise of her rights. Analogously, coercing Martha restricts her exercise of her rights, whether or not she is “used as means.”

I expect most readers will find that their considered convictions condemn Draconia’s decision in Blue Lake. They will conclude that bringing Sam to justice, even at great savings, does not justify restricting Ginger’s exercise of her right to be with Fred. In that case, they should agree that punishing George, even at great savings, does not justify restricting Martha’s exercise of her right to be with him.

I recognize that some readers will not condemn Draconia so confidently. Perhaps, if the savings are great enough, separating Ginger from Fred could be justified. But then we face the issue of Draconia’s residual duties to Ginger. If Draconia proceeds with its plan, then it is morally obligated, at a minimum, to provide Ginger with reasonable monetary compensation for her emotional distress, lost income, et cetera. By contrast, we do not regard Nebraska as
obligated to compensate Martha. Martha and Ginger are both disablers, but a moral asymmetry remains, which we have yet to explain.

D. Stigma

Many theorists emphasize the expressive function of punishment. Telishment has the same public expressive meaning as punishment, whereas collateral damage has a very different meaning. A conviction publicly stigmatizes the convict – it denounces him, condemns him, expresses disapproval, ostracizes him, shames him, et cetera. Retributivists could insist that Martha suffers few, if any, expressive harms, while Ian suffers many. The expressive component of telishment makes it worse than the equivalent bare harm (e.g. loss of liberty) if it were suffered by a convict’s affiliate. Therefore, one might conclude, telishment is morally worse than collateral harm.

This reasoning proceeds from a dubious premise. At most, I think we could say that affiliates suffer stigma to a lesser degree than does the convict himself. Even this strains credulity. Some affiliates suffer more than the convict does in this regard, living in the outside world as they do and having to contend with contemptuous looks and whispers from neighbors.

But at least the state does not publicly denounce affiliates. What the state “says” about a convict when it incarcerates him is much more condemnatory than what it concurrently “says” about his affiliates. Of course, the state knows that affiliates feel the effects of punishment, but it takes no official position with respect to those effects. The state is not passing any sort of


104 We can either conceptualize stigma as an intrinsic harm, or focus on the psychological harms associated with stigmatizing treatment.
judgment on affiliates. It is not sending them any individualized message. Nor is the state communicating to other citizens any message about the affiliates themselves. It is not announcing to us that these affiliates are shameful or worthy of avoidance or deserving of anything in particular. We might draw such conclusions on our own, but the state takes no responsibility for them.

I do not deny that punishment and telishment, as such, inflict additional psychological injuries (stigma and shame) beyond the primary harms of physical pain and injury and the deprivation of personal liberties, resources, and/or legal rights. Denunciation may, indeed, serve as an important component of punishment, on any of several theories. These injuries may be more severe if the convict believes herself to be innocent, and more severe still if she believes that the state knows of her innocence. But consider the following hypothetical:

*Nikita*

Draconia has a high rate of tax fraud which it has been unable to control. As a result, public health programs are being cut. Nikita is a talented young patent attorney. Draconia secretly determines that it can credibly frame Nikita for tax evasion. The case will be well-publicized for the sake of general deterrence. Telishing Nikita will promote the good. Draconia prepares to arrest her, but then realizes that telishing Nikita in this way would stigmatize her, which Draconia does not wish to do. Draconia also realizes that it can still prevent tax fraud cost-effectively by “drafting” Nikita into the tax fraud division of the justice department, so long as it pays her minimum wage for her services (which she would never accept on the open market). Draconia approaches Nikita with a clandestine deal – five years as a tax fraud investigator at minimum wage. As it happens,

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105 It sends them nothing beyond the generic message which any occasion of state punishment sends to its citizens at large (e.g. “Justice is being done, today”).
Nikita would prefer a year in prison to five years as a tax fraud investigator. She asks for a prison sentence, instead, but Draconia refuses. Nikita consents, under these conditions, to five years of indentured servitude. She earns the admiration of all in this capacity, finding that she receives more respect in the community than she did as a patent attorney. But she detests the job itself and the meager pay. She feels “like a prisoner in her own life.” Yet Draconia has genuinely promoted the good by drafting her. She prosecutes cases of tax fraud, enriches the state treasury, and saves the public health programs. These benefits to society (we can suppose) outweigh the harm which the “draft” inflicts upon her.106

What Draconia does to Nikita harms her severely. It is worse, from Nikita’s perspective, than a one-year prison sentence. If telishing Nikita with a year in prison is unjust, then so is “drafting” her into a five-year tenure as a tax fraud investigator. Yet the latter position inflicts no stigma or public shame on Nikita whatsoever.

Nikita illustrates that the force of the reductio does not rely on the additional injuries associated with the distinctive expressive content of punishment. It does not depend on the notion that the injustice to the victim consists in the state’s deliberate, public denunciation of her, knowing her to be innocent. If telishment is an outrage, then it must be an outrage even if we factor out its denunciatory aspects.

We can see this by reconsidering Ian’s case. Ian does not deserve the secondary injuries of denunciation, subjectively perceived injustice, and disrespect. But neither does he deserve the

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primary injuries of punishment (confinement, loss of wages, physical pain, loss of voting rights, et cetera) or the secondary injuries of separation from his affiliates.

The point that has emerged is that the reductio highlights a general feature of consequentialism – its willingness to sacrifice an individual’s rights and interests for the sake of the greater good – not any specific features of telishment, such as its denunciatory impact. It is therefore irrelevant that Nebraska does not publicly denounce or condemn Martha. It would be worse if Nebraska stigmatized Martha as severely as it stigmatizes George, but stigma is not the real issue.

E. Necessary Means to Justice

I turn, in this subsection, to a final distinction between Nebraska and Draconia. Nebraska inflicts collateral damage on Martha in the process of giving George, a guilty convict, what he deserves. Martha’s innocence gives the state a pro tanto reason not to punish George, but George’s guilt gives the state a contrary pro tanto reason.107 Retributivists could insist that, in most cases, George’s guilt provides a stronger reason in favor of punishing him than Martha’s innocence provides against doing so. So the state has reason to punish George, collateral damage notwithstanding.

By contrast, telishing Ian gives no one his just deserts. The pro tanto reason not to inflict undeserved disadvantages on Ian prevails, unopposed, as a reason not to telish him. Therefore, the retributivist concludes, Draconia acts impermissibly while Nebraska acts permissibly.108

This argument cannot serve retributivist purposes. First, the argument is only consistent with exclusivism if we interpret exclusivism as permitting states to inflict undeserved

107 This is a basic tenet of “permissive” or “positive” retributivism. See Ten, "Positive Retributivism."
108 Alec Walen suggested this argument in conversation.
disadvantages on someone for the purpose of giving someone else what he deserves. So interpreted, exclusivism does not forbid policies such as Manhattan’s.

Secondly, we can modify Draconia so that telishing Ian does, in fact, give someone his just deserts:

*Gangster Dad*

Same as Draconia 0, with the specification that Ian is the son of a powerful gangster who has fled to a non-extradition country, leaving Ian behind. If Draconia frames Ian, but only then, Ian’s father will surrender to the authorities and testify against his subordinates, resulting in many important convictions. Telishing Ian maximizes the apprehension (or conviction, or sentencing) of actual criminals, thereby promoting the good, in this case. Draconia frames and telishes Ian for that reason.¹⁰⁹

*Gangster Dad* generates a paradox for retributivists who would defend Nebraska’s policy in terms of George’s guilt. These retributivists claim that giving the guilty what they deserve is a pro tanto rightmaking feature, with the potential to override the pro tanto wrongness of inflicting undeserved disadvantages. If this is true then, according to generalization arguments, the guilt of the gangster and his subordinates gives Draconia a reason to telish Ian, and that reason is strong enough to outweigh the reason against telishment provided by Ian’s innocence. This entails that Draconia’s actions are permissible in *Gangster Dad*, yet our considered convictions condemn

¹⁰⁹See the similar hypothetical in Duff, *Punishment, Communication, and Community*, p. 6.
them. So this way of distinguishing *Nebraska* from *Draconia* itself generates a conflict with our convictions.\textsuperscript{110}

Sections VIII-X have failed to identify adequate bases for distinguishing between Nebraska’s policy and all unjust telishment policies – bases that do not also permit us to distinguish between unjust telishment policies and some of the policies prohibited by retributive restrictions, such as aggressive crime-control policies. The paradox of collateral damage remains.

**XI. Viable Solutions to the Paradox of Collateral Damage**

In sections VIII-X, I have considered and rejected a series of possible solutions to the paradox of collateral damage. For each set of features of Nebraska’s policy that I have considered, I have formulated at least one case of unjust telishment that shares those features, and that our moral convictions condemn. Of course, I have not considered all the features of Nebraska’s policy. It may have some intrinsic features that I have overlooked, and that are not shared by any policy that our convictions condemn. If Nebraska’s policy has such features, then retributivists can resolve the paradox of collateral damage. Until they identify these features, however, I suggest seeking alternative solutions.

**A. Outsmarting**

One could, as always, discount our conviction that Draconia acts unjustly in *Draconia 3* (and subsequent hypotheticals). Outsmarting denies the major premise of the generalization

\textsuperscript{110}Retributivists could try to distinguish *Nebraska* from *Gangster Dad* by observing that Nebraska inflicts damage on the very individual whose wrongdoing justifies the infliction, whereas the state in *Gangster Dad* inflicts damage on someone other than the individual whose wrongdoing justifies the infliction. But this purported contrast overlooks the very fact of collateral damage. Nebraska inflicts damage on both the individual whose wrongdoing justifies the infliction (George), and on his affiliates. Draconia, in *Gangster Dad*, does likewise.
arguments from subsection V.D. I shall neither advocate nor criticize the outsmarting move, here, but it remains a conceptual option.

**B. Biting the Bullet of Radical Prison Reform**

Here is another solution. Suppose we accept the lesson of sections VIII-X: for any morally relevant, intrinsic features of Nebraska’s policy, we can formulate at least one unjust policy that shares these features. Suppose, also, that these policies are unjust, in virtue of their intrinsic features, and that the invariance assumption is true: intrinsic features of policies have context-invariant valences. That would entail that Nebraska’s policy is also unjust. To embrace this conclusion is to endorse a response to the paradox which I postponed from section VII. This response concludes that the collateral-damage argument is sound – that it is, in fact, impermissible to punish anyone using methods that inflict certain levels of collateral damage on his affiliates. As I mentioned earlier, this conclusion has radical policy implications, some of which I shall now describe.

Consider current incarceration policies. These include coercive affiliate exclusion, which constitutes collateral damage of a forbidden sort, according to the collateral-damage argument. If the collateral-damage argument is sound, then justice requires the state to reduce or eliminate this form of collateral damage. It must either empty its prisons (putting all convicts under house arrest, perhaps), or else grant unrestricted visitation privileges to family members and friends. More dramatically, it must allow family members, if they so desire, to cohabit in prison with the remaining inmates. At the very least, the state must offer affiliates reasonable monetary compensation for their losses, or permit inmates to work for wages and send the money to their families.
I shall neither criticize nor endorse these radical proposals. I invite resolute retributivists to embrace them. I simply note the radicalism of such reforms, and the fact that no retributivist known to me believes that the state is morally obligated to implement them.111

C. Abandoning Generalizability

I now turn to a somewhat less radical solution to the paradox of collateral damage, one which I think merits serious consideration. The fact that Nebraska’s policy inflicts undeserved disadvantages on affiliates is an intrinsic, pro tanto wrongmaking feature of the policy. However, one might deny that it is an all-things-considered wrongmaking feature of the policy, by appealing to extrinsic, contextual factors. This suggestion requires abandoning generalizability: the principle that the intrinsic, morally relevant features of policies have context-invariant valences. If we abandon generalizability, then we can make the following three claims: 1) the policies of Draconia and Nebraska both inflict undeserved disadvantages, intentionally and coercively; 2) this fact is an intrinsic, wrongmaking feature of Draconia’s policy; 3) this fact is also an intrinsic feature of Nebraska’s policy, but not a wrongmaking one, because of contextual factors that distinguish Nebraska’s policy from Draconia’s.

The contextual factors I have in mind are simple. When a publicly financed enterprise becomes more expensive, while revenue remains constant, the state must reallocate funds from other projects, if the enterprise is to continue. The less restrictive Nebraska makes its policy on affiliate exclusion, the more expensive it becomes for Nebraska to maintain equally effective prisons. One purpose of prison is to subject each inmate to a certain total quantity of

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111 Even German prisons have not gone this far, despite being officially committed to a “principle of normalcy” (Angleichungsgrundsatz) which attempts to approximate life on the outside for inmates. For an illuminating discussion of the German system, see James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (New York: Oxford University Press, 2003), pp. 86-92.
unpleasantness, as his sentence dictates. But every day someone spends in prison has social costs. Running prisons costs money. Inmates cannot contribute much to the lives of people on the outside, or themselves enjoy what life on the outside has to offer. Because Nebraska separates inmates from affiliates, a unit of time in prison is much more unpleasant than it would be without separation. Also, if Nebraska allowed affiliates unlimited interaction with inmates, the cost of maintaining prisons, per unit time, would rise substantially. Prisons would have to invest much more heavily in maintaining discipline, preventing escape, et cetera. By separating inmates from affiliates, Nebraska can deliver more unpleasantness to inmates at the same social cost.

Now, one could continue this argument in the following way, although I would not recommend it. One could argue that, if Nebraska adopted a less restrictive policy, the cost of prisons would rise so much that someone would suffer greater disadvantages, as a result, than Martha (or anyone else) suffers as a result of the more restrictive policy. Suppose the less restrictive policy costs so much that the state must stop funding a medical research program that would have yielded a cure for a fatal disease, from which Debra suffers. The cure would have extended Debra’s lifespan by twenty years. Although the less restrictive policy protects Martha from the undeserved disadvantage of twenty years’ separation from George, it indirectly subjects Debra to an undeserved disadvantage of greater magnitude: Debra loses twenty years of life. Therefore, one could argue that Martha cannot reasonably reject the more restrictive policy, while Debra can reasonably reject the less restrictive policy.

There are several reasons to eye this argument with suspicion. First, it assumes that there is someone in Debra’s position: someone who suffers a greater loss from the less restrictive policy than Martha suffers from the more restrictive policy. We have no reason to believe that
such individuals actually exist. Secondly, our intuitive judgment that the more restrictive policy is morally permissible does not seem in any way contingent on the existence of someone in Debra’s position. Thirdly, there is a related, but much more plausible, rationale for the permissibility of the more restrictive policy. Instead of assuming that someone occupies Debra’s position, which is highly speculative, one could concentrate on contextual factors in which one has much greater confidence. One could argue, with confidence, that the aggregate expected benefits of Nebraska’s policy substantially outweigh the expected costs (or that some function of these two values is positive). Even if no one exists in Debra’s position, the aggregate cost of adopting the less restrictive policy is borne by all Nebraskans. The less restrictive policy does not disadvantage any single Nebraskan as severely as the more restrictive policy disadvantages Martha, but if we aggregate the advantages and disadvantages, the more restrictive policy is far superior. That, I suggest, is the unremarkable reason why inflicting undeserved disadvantages is not an all-things-considered wrongmaking feature of Nebraska’s policy (despite its being pro tanto wrongmaking).

D. Actualism

Now I must explain why inflicting undeserved disadvantages is wrongmaking when it belongs to Draconia’s policy, but not when it belongs to Nebraska’s. My explanation begins with the familiar, rule-consequentialist argument that policies such as Draconia’s would not promote the good, if implemented in the real world. Imagine that a state legislature, in one of the United States today, granted prosecutors and judges the legal authority to telish whenever they believed, beyond a reasonable doubt, that doing so would promote the good. It is extremely unlikely that such a policy would actually promote the good, because virtue, knowledge, and
rationality are too limited, in the real world. We cannot trust law enforcement to use such powers to promote the good. Some will try to promote the good, but will fail, due to inadequate knowledge and rationality. Less virtuous officials will use the power to promote their own interests, at the expense of the greater good. Even if we could trust law enforcement with such power, ordinary people would continue to fear otherwise. They would lose faith in government and refuse to cooperate with law enforcement. They might even agitate for revolution or emigrate.

Retributivists will now object that I already rejected rule consequentialism in section V.B. *Draconia 3* stipulates that the overwhelming majority of Draconians are so virtuous, informed, and rational that Draconia’s policy actually promotes the good in Draconia. Have I forgotten this stipulation?

Appearances to the contrary, I have not reverted to rule consequentialism. Rather, I am considering (although not endorsing) the unorthodox suggestion that, because Draconia’s policy would have such negative consequences in the actual world, it is also wrong to implement it in the State of Draconia, despite the fact that the policy actually promotes the good in Draconia. This is an actualist account of moral permissibility. Actualism entails that the intrinsic and extrinsic features of Draconia’s policy, in conjunction, render the policy wrongful, all things considered, in Draconia. Actualism also entails that Nebraskans’ policy is not wrongful, all things considered, in most societies, because it does not share the aforementioned extrinsic feature: Nebraskans lack the extreme virtue and rationality of Draconians. To see this, let us compare the policies. Nebraskan officials are authorized to punish criminals, even if doing so inflicts collateral damage on affiliates, effectively “telishing” them. However, Nebraskan officials have no discretion to decide which affiliates to telish. They cannot select their victims on the basis of
their own prejudices or delusions. They just get to telish whoever happens to be affiliated with convicts. They have nothing like the power enjoyed by Draconian officials. We can trust ordinary public officials to implement Nebraska’s policy. Nebraska’s policy may, indeed, promote the good.

Actualism may seem like a strangely parochial account of moral permissibility. Why should the fact that a policy would have bad consequences in our society make it wrong to implement it in the society stipulated in *Draconia 3*, where it has good consequences? Is this not like Alaskans insisting that Hawaiians buy snow tires?

Perhaps. But it is important to recognize that one is only driven to actualist accounts if one is committed to one’s conviction that telishing Ian really is unjust, even in bizarre cases such as *Draconia 3*, which stipulate that it promotes the good. Giving so much weight to *our* moral convictions about extremely unrealistic cases is already a “parochial” method of moral theorizing. Theories generated by that method, such as actualist accounts, may reflect that parochialism, evaluating policies in hypothetical societies by reference to the actual world.\(^{112}\)

I should emphasize that my aim is not to persuade readers to accept actualism. My point is that one may need to accept it if one wishes to reconcile one’s intuitive condemnation of a wide range of *Draconia* cases with one’s intuitive approval of *Nebraska*. Actualism resolves the paradox of collateral damage, without resort to outsmarting or radical prison reform.

**XII. Moral Phenomenology**

\(^{112}\)Nor should the counterfactual component of actualism cause concern. Most moral theories evaluate an act performed in one scenario by examining some other scenario. According to rule consequentialism, for example, an act is wrong if any rule permitting it *would* fail to promote the good in a scenario in which that rule were widely obeyed. (One of the few exceptions to this counterfactual focus is a version of consequentialism that evaluates each act on the basis of its consequences in the future that proceeds from that very scenario.) Actualism goes one step further, evaluating rules in any given world with respect to consequences in the actual world.
Some readers will be dissatisfied with contextual accounts of what is rotten in the State of Draconia, because contextualism seems not to reflect the phenomenology of our reactions. Our outrage seems to flow from what Draconia does to Ian – violating his rights, ignoring his innocence, treating him unfairly. In our moral phenomenology, these facts seem sufficient to render Draconia’s actions wrong. However, according to contextualism, this appearance is misleading: these facts do not actually suffice to make Draconia’s actions wrong. In order to make Draconia’s actions wrong, these facts must be “enabled”\(^{113}\) by some considerations pertaining to the effects the actions would have in our world. The phenomenology does not reflect this requirement. To judge that Draconia acts wrongly, it seems that we need not consider these contextual factors, at least not consciously. To this extent, our phenomenology suggests that there is something in\(\text{variantly}\) wrong about telishment, whereas contextual accounts seem to deny this, insisting that telishment is only contextually wrong.

This reaction to contextual accounts reflects a subtle misunderstanding. Contextual accounts are consistent with the claim that some features of the Draconia cases are in\(\text{variantly}\) wrongmaking, pro tanto.\(^{114}\) Deliberately inflicting undeserved disadvantage is one such feature. What contextual accounts deny is simply that this feature is wrongmaking, all things considered. This is what sets contextual accounts at odds with retributive restrictions. I suggest that our phenomenology reflects the fact that telishment is in\(\text{variantly}\) wrongmaking, pro tanto, but we mistake features that are in\(\text{variantly}\) wrongmaking for those that are wrongmaking, all things considered.


\(^{114}\)In fact, one might claim that deliberately inflicting damage, simpliciter, is pro tanto wrongmaking, whether the damage is deserved or undeserved.
Confusion sets in, I think, because so much happens at once in the Draconia cases. Contextual accounts hold that Draconia’s actions belong to a type that is invariantly wrongmaking, pro tanto. Moreover, as everyone agrees, Draconia’s actions are wrong, all things considered, in that context. I think this coincidence can mislead even very careful thinkers. It is extremely easy to confuse invariant wrongness with wrongness, all things considered. Draconia’s actions are tokens that belong to a type that is invariantly wrongmaking, but only pro tanto wrongmaking. If contextual accounts are correct, then these actions are not invariantly impermissible, all things considered, but only impermissible, all things considered, in certain contexts. Although it is easy to misperceive these actions as belonging to a type that is invariantly impermissible, all things considered, my arguments suggest that they do not belong to such a type.

If my arguments are correct, then some common retributivist attitudes come into question. Retributivists believe that Draconia’s telishing of Ian is intrinsically worse than Nebraska’s depriving Martha of George’s companionship. If contextual accounts are correct, then this claim is false. The moral difference between these policies, if any, is an extrinsic matter, not an intrinsic one. I, myself, have become comfortable with this conclusion. The claim that Nebraska’s policy is intrinsically less objectionable than Draconia’s now strikes me as a disingenuous, or unexamined, conviction of convenience. Middle-class people tend to have little sympathy for the affiliates of incarcerated felons. We know that separation is unpleasant for the inmate, and we want prison to be unpleasant, even at enormous cost to innocent bystanders. We also believe that our security and comfort depend on prisons, and we understand, intuitively, that equally effective and secure prisons would be many times more expensive to maintain if they did not exclude affiliates. So we very much want to believe that there is nothing whatsoever
objectionable about coercive affiliate exclusion. For all these reasons, we want Nebraska’s policy to be intrinsically better than Draconia’s.\textsuperscript{115} I have tried to remind us that both policies deprive innocent individuals of something irreplaceable and fundamental to their flourishing. Martha’s fate may not be as tragic as Ian’s, but it is tragic, nevertheless. Perhaps we should not feel as uncomfortable about what Nebraska does to Martha as we do about what Draconia does to Ian, but we should feel uncomfortable, to some degree, about both. I would analogize Martha to the wife of a conscripted soldier, wounded while fighting a war of national necessity. Complacency about Martha’s plight is nearly as inappropriate as complacency about the soldier’s wife.

Again, my position does not entail that causing collateral damage is wrong (see subsection XI.C). Nor does it entail that Draconia’s policy is ordinarily permissible. In the real world, telishment is almost always wrong, while inflicting collateral damage is often justifiable. But these are contextual judgments, not to be mistaken for the notion that collateral damage is intrinsically less objectionable than the damage inflicted by telishment.

XIII. Revising Retributive Restrictions

We have seen how contextualist accounts resolve the paradox of collateral damage, by contradicting generalizability. If generalizability is false, then one cannot derive retributive restrictions from telishment hypotheticals by means of generalization arguments. The fact that

\textsuperscript{115}Dolinko remarks that a fair amount of retributivist writing . . . is marred by the presence of a certain moral smugness, a self-satisfied belief that we can have our moral cake and eat it too – we can impose afflictive sanctions on criminal offenders while feeling (unlike utilitarian deterrence theorists) that what we are doing is no regrettable though necessary evil but instead a positive good: respecting persons, doing justice, and generally living up to the most highminded and Kantian ethical demands. Dolinko, "Three Mistakes of Retributivism," p. 1625. Braithwaite and Pettit also note this “smugness.” Braithwaite and Pettit, \textit{Not Just Deserts: A Republican Theory of Criminal Justice}, p. 6.
Draconia’s intentional infliction of undeserved disadvantages on Ian is wrongmaking does not entail that intentional infliction of undeserved disadvantages is invariably wrongmaking, so the Draconia cases do not support minimalism.

Similarly, the fact that it is wrong for Draconia to inflict disadvantages on Ian for reasons other than giving him what he deserves does not entail that it is invariably wrong to inflict disadvantages on someone for reasons other than giving him what he deserves, so the cases do not support exclusivism, either.

Furthermore, minimalism and exclusivism prove difficult to reconcile with our firmly held conviction that Nebraska’s coercive exclusion of Martha is morally permissible. The argument for exclusivism presupposes that inflicting disadvantages on someone for reasons other than giving him what he deserves is wrongmaking. When Nebraska coercively excludes Martha from the prison, it does so in order to give George what he deserves, but also in order to conserve public resources, which is not a desert reason. If the argument for exclusivism is sound, then Nebraska must not exclude Martha for such reasons. I conclude that exclusivism is indefensible.

Minimalism fares little better. The argument for minimalism presupposes that inflicting undeserved disadvantages is wrongmaking. When Nebraska coercively excludes Martha from the prison, it inflicts undeserved disadvantages. If the argument for minimalism is sound, then Nebraska must not exclude Martha. I conclude that minimalism is indefensible.

Minimalism and exclusivism should not be used until an alternative basis for them is found – a basis that does not involve generalizing from our convictions about unjust telishment policies. Retributivists could retreat to a purely intuitionist case for these restrictions, but there
are other options that promise greater theoretical coherence. We could defend weaker cousins of minimalism, such as:

Relaxed/Threshold Minimalism

The state is morally forbidden to implement a policy that inflicts undeserved disadvantages on anyone, unless doing so is necessary to prevent others from enduring some specified level of undeserved disadvantage. The disadvantage inflicted by the state must not exceed the level deserved, by more than a specified amount, in any case.

In another paper, I elaborate relaxed/threshold minimalism, which could be tailored to permit intuitively acceptable levels of collateral damage and to forbid intuitively unacceptable levels. It would then also permit intuitively acceptable levels of telishment and forbid intuitively unacceptable levels.

In my other paper, I also argue that relaxed/threshold minimalism finds support in a moral theory according to which 1) the state has a strong pro tanto reason to promote the good, and 2) the good is defined in non-welfarist terms. That theory is:

Retributive Beneficence Theory

A theory according to which the fact that Φ-ing increases the extent to which individuals suffer deserved disadvantages, or avoid undeserved disadvantages, always constitutes at least a pro tanto moral reason, of proportional strength, to Φ, and the fact that Φ-ing decreases the extent to which individuals suffer deserved disadvantages, or avoid
undeserved disadvantages, always constitutes at least a pro tanto moral reason, of proportional strength, not to \( \Phi \).

Retributive beneficence theory resembles consequentialism, by incorporating a pro tanto reason to promote the good, but it differs in one important respect. Consequentialism entails that no intrinsic feature of an action is invariantly wrongmaking, even pro tanto: if maiming a child promotes the good, for some reason, then act consequentialists must insist that doing so is not wrongmaking, even pro tanto.\(^{116}\) By contrast, retributive beneficence theory allows that certain intrinsic features of actions are invariantly wrongmaking, pro tanto. It merely denies that any intrinsic feature is invariantly wrongmaking, all things considered. Elsewhere, I argue that retributive beneficence theory coheres more fully with our considered convictions than does either consequentialism or retributivism.

XIV. Revisiting Aggressive Crime-Control Policies

Relaxed/threshold minimalism could, in principle, forbid the aggressive policies of California and Montana, just as minimalism does. However, it would forbid these policies only if its threshold fell in precisely the right range. The threshold would have to fall at such a point as to permit Nebraska’s policy regarding Martha, but forbid the aggressive policy in question. One would need to argue that the disproportion between what the criminal deserves and what the state gives him is greater than the disproportion between what Martha deserves and what Nebraska gives her. Since Martha is completely innocent, and could suffer as much as a lifetime of separation from her husband (or his execution), few theories of desert will entail that California’s or Montana’s disproportionality exceeds Nebraska’s. For this reason, I doubt that

\(^{116}\)Similarly, if a policy of maiming children, under such conditions, promotes the good, then rule consequentialists must insist that the policy is not wrongmaking, even pro tanto.
relaxed/threshold minimalism will forbid aggressive crime-control policies. The issue begs for further research.117

XV. Standards of Justification

Michael Davis, a leading retributivist, offers a sweeping response to the first version of the tu quoque, which I discussed and rejected in subsection VI.A: the false-positive version.118 Although I have not relied on the false-positive argument, I shall address Davis’ argument because, if successful, it could call into question the force of all tu-quoque arguments, including the collateral-damage argument, upon which I do rely.

Davis distinguishes between “pragmatic” and “ideal” standards of justification. An ideal justification “proves that the theory in question is true.”119 A pragmatic justification “shows that the theory in question is, all things considered, more likely to be true than any alternative . . . the best available.”120 Davis states that “a theory can be pragmatically justified even if critics can show that the theory leaves many disturbing anomalies.”121

Davis claims that theories of punishment can achieve, and need achieve, no more than pragmatic justification. He never considers the collateral-damage argument. But he admits that the false-positive argument is “unsettling” if one is committed to ideal justification.122 However,

117It does count against aggressive crime-control policies that they inflict undeserved collateral damage, as do most penal policies. Each year of undeserved incarceration that also inflicts undeserved collateral damage is morally worse than it would be if the sentence itself were deserved, holding constant the degree of collateral damage. Taking collateral damage into account reveals that aggressive crime-control policies are even more excessive than they appear to be, if one considers only the convict’s own woe. But the moral difference between excessive and proportional sentences remains one of degree.
118Davis, To Make the Punishment Fit the Crime, pp. 325-26.
119Ibid., p. 323.
120Ibid., p. 324.
122Davis, To Make the Punishment Fit the Crime, p. 325.
he insists that tu-quoque arguments are “not enough reason to switch theories, because retributivism remain[s] as pragmatically justified as ever.”\textsuperscript{123} He states that the “‘you too’ [tu quoque] argument did not show any of the alternatives to retributivism to be in any way better . . . While the average success of theories dropped a little, their relative standing remained unchanged.”\textsuperscript{124}

I think Davis’s response succeeds against tu-quoque arguments, when the latter are used to defend utilitarianism against the reductiones. Tu-quoque arguments show that the state inevitably inflicts undeserved damage, even if it punishes for retributive reasons, because systemic damage is inevitable. To that extent, these arguments show that retributive states are less than perfectly just. However, they do not change the fact that retributive states inflict less undeserved damage than do utilitarian states. Therefore, retributive states act in ways that conflict with our considered convictions to a lesser degree than do utilitarian ones. That is what Davis means when he denies that tu-quoque arguments fail to improve the “relative standing” of utilitarianism in relation to retributivism. Although Davis does not consider the collateral-damage argument, I think his argument succeeds against both versions of the tu quoque, when these are used to defend utilitarianism.

Nonetheless, I do not believe that Davis’s response would succeed if he were to employ it against tu-quoque arguments, when these are used to block the derivation of minimalism and exclusivism. I shall grant Davis that theories incorporating retributive restrictions generate fewer anomalies than theories, such as utilitarianism, that incorporate no such restrictions. Still, theories that incorporate weak restrictions, such as relaxed/threshold minimalism, may generate still fewer anomalies than those that incorporate minimalism and/or exclusivism. As does

\textsuperscript{123}Ibid., p. 325.
\textsuperscript{124}Ibid., pp. 325-26.
minimalism, relaxed/threshold minimalism can condemn Draconia’s policies. Unlike
minimalism, however, relaxed/threshold minimalism is compatible with intuitively acceptable
levels of collateral damage.

As I noted in section XIV, it is not obvious that relaxed/threshold minimalism condemns
aggressive crime-control policies. To many retributivists, this will be unsatisfying, because they
want to condemn such policies, on retributive grounds. The point of my argument is that they
can do this only at the cost of bringing their theory into conflict with our convictions. We know
that we currently tolerate substantial collateral damage, with few moral qualms. We like to think
that we oppose telishment in all scenarios, but we cannot be nearly as confident about the
correctness of our intuitive judgments concerning fantastic scenarios as we are about our
currently wholehearted acceptance of collateral damage. We have a choice between 1)
relaxed/threshold minimalism, which captures our undeniable current tolerance of collateral
damage, but not our allegedly categorical opposition to telishment; and 2) minimalism, which
captures our allegedly categorical opposition to telishment, but not our undeniable tolerance of
collateral damage. It is not irrational to prefer relaxed/threshold minimalism over minimalism,
simpliciter, and it may be irrational to prefer the latter over the former.\textsuperscript{125}

\textsuperscript{125}It would be nice to find a theory that elegantly captured \textit{all} of our moral intuitions across \textit{all}
possible worlds. Such a theory would be preferable to both of our actual options. But such a
theory is not forthcoming. Given this conundrum, we are epistemically warranted in accepting
that we may be unable to find anything better than a theory that captures our intuitions in \textit{this}
world. If this theory supports intuitively unacceptable policies in fantastic possible worlds, we
may simply have to dismiss these recalcitrant intuitions as “mistaken data” and accept the theory,
at least provisionally, until something better comes along. Coherentist epistemology has always
left our concrete considered judgments open to revision, when no coherent alternatives are
available that respect them all.
XVI. Conclusions

In the current theoretical climate, anyone who questions retributive restrictions invites ridicule by punishment theorists, as uninformed, naive, or worse. The telishment hypotheticals shock the conscience. Retributive restrictions seem to reflect our moral intuitions, but I have argued that they mischaracterize the injustice of telishment. They entail that telishment is invariantly impermissible, all things considered. I have concluded that telishment is invariantly wrongmaking, pro tanto, but not invariantly impermissible, all things considered.

Many of us, including major punishment theorists, will resist this qualification. We do not want to believe that the injustice of telishment depends, in any way, on contextual factors. We want its injustice to derive exclusively from its blatant disregard for individual innocence. That disregard becomes the focus of our outrage and anxiety when we contemplate telishment.

However, a successful tu quoque reveals that our deepest moral commitments are more complicated than our outrage indicates. We strongly favor punishing the guilty, even when doing so causes substantial collateral damage. We do not really take proportionality as seriously as we seem to take it in the heat of our reaction to cases of unjust telishment.\textsuperscript{126} Strong retributive restrictions embody an absolutism that we may find ennobling, in the abstract, but that we do not uphold consistently. At most, we seem to accept weaker retributive restrictions, such as relaxed/threshold minimalism. I suspect this principle does not forbid aggressive crime-control policies, such as California’s “three-strikes” law.

Many of us, myself included, are dismayed by the spread of these policies. They often seem shortsighted and cruel. We are tempted to seize the moral high ground in opposition.

Perhaps we do not relish the difficult and uncertain work (some of it empirical) required to show that these policies inflict more undeserved damage than they prevent. We want to condemn them a priori, using retributive restrictions. I fear we are not entitled to that intellectual shortcut. Purely retributivist objections to aggressive crime-control policies may be less compelling than many would like to believe. However, my conclusions do not prevent us from raising non-retributive objections to these policies, such as the following: 1) they are ineffective; 2) they compromise respect for the rule of law; 3) they express vindictive attitudes, which civilized states should disavow; 4) they systematically disadvantage low-income individuals and members of ethnic and racial minorities; 5) they exacerbate ethnic and racial tensions. I shall endorse none of these objections, here. I list them only to illustrate the existence of other challenges to aggressive crime-control policies, ones that do not require retributive restrictions.

Although I conclude that objections from retributive justice are philosophically weak, I do not deny that such objections can be effective as political rhetoric. The general public easily registers that life in prison for stealing cheap videotapes is “too harsh.”\textsuperscript{127} Appeals to this reaction may, in fact, be more persuasive to the average person than arguments from ineffectiveness or distributive justice, even if the latter are superior, philosophically. If aggressive crime-control policies are bad, for whatever reason, and retributive arguments help to mobilize political opposition, then I do not object to making such arguments in public, whether or not they are sound. I have addressed theorists seeking intellectual precision, not political activists with predetermined goals.

If my arguments have merit, then how should theorists proceed? First, I suggest that we should not be so quick to reject any theory that justifies punishment as a way of promoting good states of affairs, or that fails to rule out undeserved punishment, as a matter of moral principle. Secondly, we could develop theories that diverge from consequentialism just to the extent necessary to survive the reductiones, but not so far as to generate conflict with our convictions about collateral damage. Beneficence theories represent a step in that direction.

Retributive restrictions are humanitarian pieties with great intuitive appeal. Knowing the evils of which governments are capable, it is comforting to picture these principles shielding us from state power, run amok. They strike a reassuringly categorical note. But retributive restrictions may be revealed as dogmas, sustained mostly by our collective horror at the evils perpetrated by historical governments in the name of the general welfare. We may discover that we cannot defend these restrictions while retaining the rest of our moral beliefs. The more disquieting this possibility, the more important for us to face it, openly.128

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