Justice as a Theory of Right Relationships:

The Role of Criminal Justice Agencies in Building Just Communities

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I. Introduction

Thank you very much for inviting me to present the 1997 Virginia Geiger Lecture in Ethics and Society. It is an honor and a privilege.

It is also an opportunity -- and a challenge. The opportunity lies in the occasion to think more deeply about some issues in criminal justice that have been lurking at the edges of my mind as I have been observing and trying to influence the development of criminal justice agencies over the last decade or so.

The challenge lies in dealing with the ideas seriously as philosophical ideas, as well as ideas that might be practically useful in the real world, particularly as the issue of crime and the performance of the institutions of the criminal justice system become increasingly important in the social life of the nation.

II. The Basic Argument

Let me get right to the heart of what I want to argue. It is this.

For at least the last three decades, the conventional view has been that it is both morally wrong and practically ineffective for society to try to "legislate morality:" morally wrong because the establishment of a hegemonic morality enforced by the power of the state is inconsistent with the important goals of maximizing individual liberty, and respecting the divergent moral views of a pluralist, immigrant society; practically ineffective because state power can never reach the human heart to shape the moral character of individuals. People are what they are; they reveal who they are through the choices they make. The important influences in their lives are the intimate institutions of family, religion, and community -- not the necessarily abstract and remote operations of the state. The best that society can do is to sort imperfectly those who are good and bad on the basis of their acts.

In the background of these commitments, of course, is a deeper worry:

if society should ever think that it was entitled to legislate morality, the moral passions unleashed would lead to fascism and repression. Innocent victims would be sacrificed on the altar of too particular and too powerful a conception of morality.

For those who love liberal democracies, there are powerful arguments and observations. Preserving liberty and respecting cultural diversity are important and worthy goals of a liberal, democratic society. Intimate, informal institutions such as family, community, religion, and workplace do shape character and moral dispositions more powerfully than more remote and formal state institutions. Atavistic passions, once aroused and linked to the power of the state, have led to some of the greatest crimes of the century. So, one draws away from these basic commitments only cautiously.

What concerns me, however, is that these broad philosophical commitments have quite naturally encouraged a particular view of the role of criminal justice institutions in the society. In this view, these institutions -- the criminal law, the police, the courts, the corrections agencies -- and the important processes they manage -- criminalizing acts, investigating offenses, arresting offenders, adjudicating guilt and innocence, and recommending and producing particular sanctions -- have been separated from moral discussions of what we owe to one another. The institutions and processes are seen as far away from the moral life of individuals, communities and the broader society. In short, instead of viewing the institutions and processes of the criminal justice system as closely aligned with citizens' natural desires for justice, and closely linked to both informal mediating institutions such as family, community, and local government, the institutions were deliberately held apart as a neutral, technically competent "criminal justice system" whose job it is to process criminal offenders efficiently and effectively to produce public safety.

I think these ideas about the criminal justice system have had very bad consequences for the ways that these institutions operate, and for the contribution that they can make to society. More specifically, I think these views have made it difficult for these institutions to act with integrity because these technical views of the system do not, in fact, incorporate all the important values society wants them to express in their activities. These views have also made it difficult for these institutions to engage and interact

effectively with the powerful, intermediate institutions of the society -- what one prosecutor calls "the ethics infrastructure of society" -- to accomplish their goals. The result is inevitably that these institutions have done less than they could to produce just and secure communities.

My belief, or at least the view I would like to test, is that if these institutions thought about their work in a different way -- if they thought of their own purposes in terms of achieving just relations within liberal democratic communities rather than achieving particular practical goals such as a reduction in crime; if they thought of themselves operating forums which engaged public discussion of what we owed to one another as a matter of both law and morality, and processes within which we tried to realize just relationships among citizens, and between citizens and the state, then they could make a far more valuable contribution to the society than they now do, and incidentally establish themselves as more just and effective institutions as well.

I'd like to illustrate this idea and make it plausible by discussion some particular examples drawn from: 1) how the police should police public spaces such as parks; 2) how we should understand the process of a criminal trial, and what kinds of punishments can be just and effective; and 3) what the real purpose of the juvenile and family court should be. But before turning to these concrete examples, I'd like to locate my discussion in ethical theories of three particular kinds: utilitarian, deontological, and communitarian.

III. Utilitarian, Deontological, and Communitarian Views of Criminal Justice Institutions and Processes

Part of my complaint about the way that we currently think about the institutions and processes of the criminal justice system is that we think about them in ways that are far too utilitarian for my tastes. We consider whether or not to criminalize conduct not simply in terms of a moral judgment about whether an act is sufficiently morally objectionable to justify criminalizing it, but also in terms of whether passing the law would be effective in reducing or eliminating the objectionable behavior at a reasonable economic cost. We inform the decision to retain or abandon the rule that makes illegally seized evidence inadmissible at trial by trying to

ascertain how many cases are lost as a consequence of the rule. We try to gauge whether we are punishing too harshly by comparing the costs of imprisonment to the (monetized) benefits that result from avoiding the costs of particular crimes that would (probably) have been committed if the offender had been free to commit the offense rather than "incapacitated" by imprisonment.

Of course, as a person with strong commitments to the principles of liberal democracy, and as someone who is trained as a social scientist and policy analyst, I can find a great deal of virtue in making utilitarian calculations of precisely the type described above. Indeed, much of my life is spent making just such calculations. I like the cool rationality and objectivity of the calculations, and the way in which they allow reliable facts rather than unreliable passion and feeling to determine important matters of public policy. I like the power of the tools of social science and policy analysis in revealing and allowing us to take responsibility for the full set of aggregate consequences of actions taken by policy-makers. I even like the "economizing" idea that makes a virtue of trying to reduce costs of policies so that we have more resources available for other purposes. All this seems consistent with the desire to find and establish good policies that can serve society well.

Yet, in criminal justice policy as elsewhere, a pure commitment to utilitarian principles leads to some morally unacceptable positions. For example, I find it hard to morally justify the idea that some individuals should be punished to make an example to others. Yet this is part of the general idea that lies behind deterrence as a means for controlling crime. I also find it hard to justify increased punishment for individuals based on predictions that they will commit many offenses in the future. (I find this particularly hard when the predictions themselves are based on characteristics over which the individual has little control such as age or race.) Yet, this is what justifies some forms of what has come to be called "selective incapacitation." And so on.

To a great degree, I don't have to be too concerned about the power of utilitarianism in influencing the design of criminal justice processes and institutions. After all, many people working in the field are trained as lawyers rather than economists; and much of the reasoning in the field is rooted in

deontological rather than utilitarian principles. The whole idea of a crime, for example, is a deontological idea: namely, that there are some acts that and individual should not do; that it would be morally wrong as well as criminally culpable for them to do so. Equally important is the idea that there are important rights that individuals have vis-à-vis the state that should not be compromised even if there was some utilitarian advantage in doing so. These rights are enumerated in the constitution and include rights against cruel and unusual punishment, against self-incrimination, against double jeopardy, and against unreasonable searches and seizures. I take it for granted that these rights exist not only as legal rights, but also as moral understandings that citizens have about what they can expect of the state as a moral agent.

So, the tension between utilitarian and deontological principles is hardly alien to discourse about the organization of criminal justice institutions and processes. Indeed, one might say that the criminal law is one of the last and most important bastions of deontological principles: they hold greater sway here than in almost any other social domain. Indeed, one could go further and view the entire structure of law in the society -- both criminal and civil -- as a set of social understandings about what citizens owe to one another and to the state, and what the state owes to individuals. In this sense, the whole fabric of law could be viewed as an expression of deontological ideas of obligation: of rights and duties.

But it is precisely the fact that these different ethical systems confront one another so directly, and so often without a satisfactory resolution, that makes me yearn for some slightly different way of thinking about morality and ethics in the design and operations of criminal justice institutions. For me, the ideas associated with communitarianism offer a new and (in some ways) improved way of integrating ethics in the design of criminal justice institutions and processes. Communitarian ideas resemble deontological ideas in that they define moral actions in terms of specific rights and responsibilities that individuals in particular offices and positions in the society have to one another, and assume that these obligations exist and define right action independently of the consequences of the actions (both in individual circumstances and in aggregate). And, as I mentioned above, I prefer this conception of ethics to the utilitarian when one is thinking about the design of criminal justice institutions and processes.

Yet, communitarian ideas have a feature that deontological reasoning often lacks. Since Kant, the ethical project has been to establish relatively abstract, universal ethical principles, and then to deduce particular moral duties from these abstract, universal principles. Communitarian principles, in contrast, seem to emerge somewhat inductively from human experience. Because human experience accumulates unpredictably, and our ability to discern right action in particular circumstances is imperfect, communitarian principles seem to allow for both more variety and more uncertainty in one's current moral commitments. It remains important to try to justify important principles that are guiding one's actions. But one is allowed to make use of moral intuitions one feels in concrete circumstances, and to recognize that moral views may be held contingently. In this world, social context and process can leave its imprint on our views of morality in a way that Kant's commitment to pure reason tries to banish.

Because communitarian principles make a virtue of social struggles over the definition of right action in particular circumstances, and treat both history and individual moral intuitions with a great deal of respect, they suggest an importantly different idea about the role of criminal justice institutions in society. In this theory, the institutions and processes are neither simply instruments for achieving social goods (as they would be in utilitarian theory); nor as bastions for reliably realizing eternal and universal deontological principles in social life (as they would be in deontological theories); they are, instead, institutions within which the struggle to define right action and right relationships can continue to go forward. The struggle not only expresses, but also changes society's views of what individuals living in the society owe to one another. It gives effect as well as significance and meaning to ideas of what we owe to one another -- that is, to justice.

The position I am arguing here will have a utilitarian flavor in that I will be arguing for a reform of institutions, and will be arguing for that in terms of the potential utility of that reform for society. But, my argument is that the need to make these changes emerges from the aim of reproducing a commitment to deontological principles that define right relationships to one another, and from the idea that criminal justice agencies might be important parts of a communitarian agenda that allows individuals to explore and make commitments to right relationships with one another. In the end, I think my

argument is most fundamentally a communitarian one: that it is important to use criminal justice institutions and processes in the cause of developing shared, communitarian ideas of what we owe to one another. Let's look, then, at what a communitarian philosophical commitment might do to our understanding of some important issues and practices in criminal justice.

V. The Police As Guardians of Liberty and Promoters of Tolerance

My first example comes from discussions held at the Kennedy School on how best to police the nation's cities. As was often the case, our discussions were most interesting when we were discussing concrete examples and the issues they raised.

One police chief brought to the meeting a problem his organization had faced. There was a park near the financial district of his city. The financial district was near a relatively poor area. For a long time, the park had been used by secretaries from the financial offices as a place to have lunch. Then, some homeless drug users had begun using the park as a place to stay during the day and the night. It didn't seem that they were selling drugs in the park. Nor were they mugging other citizens who used the park. But despite their apparent harmlessness, they frightened the secretaries. And so they decided to stay away. Some of them complained to the police. The question before the group was how the chiefs would decide to police that park.

Predictably, the first reaction was to consider what could be done to remove the addicts from the park. There was a certain amount of nudging one another and smirking as the police thought of all the ways they knew to "restore order" in the park by "moving the drug users along."

Suddenly, however, one police chief -- who happened to be African-American and was a very imposing figure -- leaned over the table and said in a loud, authoritative voice: "We remember what 'order maintenance' policing was all about, and we won't have it again!" Chastened by this intervention, the group then began thinking about other solutions to the problem.

It occurred to them that the homeless drug users had a right to use the park. If they had that right, maybe the secretaries had an obligation to be

tolerant of their use. Maybe their job was to try to get the secretaries to toughen up a bit, and understand that the drug users were not really threatening, and that they could use the park in safety.

That soon seemed like both an unjust and an ineffective response, however. Their exhortations alone were unlikely to be successful. The practical effect of these efforts would be to turn the park over to the homeless drug users.

They finally thought that maybe the solution was simply to station an officer in the park near the drug users on those days at those times when the secretaries were most interested in using the park for lunch. They were confident that stationing the officer there would allow the two groups to happily co-exist.

A little reflection about this apparently trivial incident yielded some important ideas about what the police could be expected to produce in society. First, they realized that this situation revealed a fact about life in a democratic society that they had not previously fully appreciated: namely, that citizens in such a society had two fundamental obligations. One of those obligations was to avoid giving offense. That was the obligation that they best understood, and that they were most often in the business of insisting on. That was what they were thinking about when they were considering driving the drug users from the park.

The other obligation, however, was less well recognized: that was the obligation to avoid taking offense. In effect, they thought that citizens had an obligation to overcome their natural inhibitions -- their feelings of distress at the unexpected behavior of their fellow citizens. In short, citizens had a duty of tolerance as well as of restraint. That was what they were thinking about when they were thinking about asking the secretaries to toughen up.

What they recognized was that it was in the space created by the obligation not to give offense on one hand, and the duty not to take offense on the other that the maximum of freedom and security could be found. Yet they also realized that it was hard for citizens to act this way. It was hard for the homeless drug users to stop being threatening to the secretaries. And it was hard for the secretaries not to feel threatened. Yet, by putting an officer

into the park, the situation could be transformed. The drug users might behave less threateningly. The secretaries might feel less threatened. The net result, then, of putting officers in the park was to increase the freedom of both groups, precisely because they could guarantee that right relationships between the two groups would prevail. And, It was reasonable to suppose, that the longer the two groups co-existed peaceably, the more confident they might feel in using the park without conflict.

It wasn't much of a leap to see that incident as a metaphor for the larger role of policing and the law in the society at large. In this view, the park is a metaphor for all public spaces. The drug users are potential criminal offenders. The secretaries are law abiding citizens. The challenge of law and the police is to keep the common public spaces both free and secure by reminding both sides of their duties to one another: that the potential offenders should not offend, and that the potential victims should not be frightened without cause. They could accomplish that result partly by simply reminding citizens of their duties, but also by standing ready to insist that each side live up to their obligations.

VI. Criminal Courts as Managers of Social Standing

Let me take another example from the world of courts and punishment. I am found of saying that discussions of sentencing policy in the United States are made extremely difficult by the fact that both left and right views of appropriate sentencing policies are driven by fantasies. The fantasy on the right is that once one is convicted of a criminal offense, we will never have to think about that person again. They have set themselves forever outside of society. We can "lock em up and throw away the key" or perhaps even kill them. In any case, they won't and shouldn't return to society. The fantasy on the left is that criminal offenders are much like everyone else; that if we provide them with enough educational opportunities or psychotherapy in prison, that they will probably straighten out and be reliable, good neighbors once again.

What is interesting about both of these fantasies is that they both eliminate the problem of having to figure out what kind of a relationship society will have in the future with those who have committed offenses in the past. The right position says the relationship has ended; the person has been

permanently banished. The left position says the relationship will be wholly restored as though nothing had happened; that the crimes were a minor aberration that can quickly be forgotten.

Both these views fly in the face of what I take the fundamental reality to be: namely, that society will be locked into a frustrating, long term relationship with its criminal offenders -- many of whom have not committed serious enough offenses to deserve even long imprisonment to say nothing of execution, and many of whom will continue to offend even after they have served their time. We can't get rid of them, and they won't change -- sort of like the relationship that we have with our adolescent children! If this view is correct, the important question, then, is not how to use imprisonment to deter and incapacitate offenders (subject to a deontological constraint of equity and proportionality in sentencing); the important question is how do we want to structure our relationship with offenders. How much liberty will we grant them? What will we expect and oblige them to do as atonement for their acts, and as preparation for their future? What kinds of procedures might we establish for allowing them to regain their standing with us.

Once one looks at the issue of sentencing in this way, one develops a different view of what a criminal trial is about. The standard view of a criminal trial is that it is an effort to determine the guilt and innocence of an accused person through an adversary legal process regulated by a variety of rules designed to ensure that the rights of the accused to a fair trial will be protected. From a utilitarian perspective, a good trial is one that reliably distinguishes the guilty from the innocent. From a deontological perspective, a good trial is one that operates with rigorous adherence to the rules. From both perspectives, the important outcome is what happens to the individual offender as a result. The utilitarian wants to know what the effect of the trial and sentence is on the future behavior of the offender; particularly, whether the sentence will specifically deter the offender, generally deter others, and incapacitate or rehabilitate the offender. The deontologist wants to know whether the offender got his "just deserts."

Once one sees that society will continue to have a relationship with the offender, one sees trials somewhat differently. In this alternative view, a trial is a ceremony that changes the relationship between the alleged criminal offender, the victim, the victim's relatives, and the rest of society. The trial

takes someone from the status of being a free citizen with all the rights and responsibilities that such a person has to a different status: the status of convicted criminal offender. That status is lower than the status of a free citizen. It also has fewer rights and more responsibilities. A convicted offender cannot vote, and cannot be free from state supervision. He may have special responsibilities to refrain from using drugs and alcohol. And so on.

Viewed from this perspective, some important questions present themselves, however. If we understand that a trial is a ceremony for degrading one's status, one can ask whether there is a corresponding ceremony through which an offender could reclaim his lost status. It seems important to me that such a ceremony seems to be missing from our current criminal justice processing -- at least officially. But it is also hopeful that in some communities such ceremonies are being recreated. I have heard, for example, that in some minority communities, church groups often greet offenders who have been released from prison and returned to their communities. The greeting is something like this: "Congratulations on having served your time in prison and on having your freedom restored to you. We are glad to have you back in our community. We need you to be the wage earners, the husbands, and the fathers who can strengthen our community. While we're glad to have you back, hopeful about your future, and willing to help you start over, we can't quite forget that you committed crimes. Knowing that, we will have to be a little more vigilant with you than with others. But that is only true for a while. As you show us through your acts that you can be trusted, you will be restored to the standing that we want you to have, and that we hope you want to have." Such a greeting is an explication of the kind of relationship the community wants to have with the returning offender.

It is worth noting that this response has developed in communities where the experience of imprisonment is concentrated. A study of those released from prison in New York State found that a large majority of the released inmates returned to a small number of communities. It also turned out that those released from prison constituted a large fraction of males of a certain age living in that community. What happens, I think, is that when convicted offenders constitute a small and easily forgotten portion of the population, they can be treated as bogeymen -- as permanently spoiled goods. One can forget that they are human, that they have loved and worked, and

that that's what they mostly do. When, however, offenders become a large fraction of one's community, one rediscovers -- because one desperately needs them -- that offenders are human. They are the people whom the community needs to be the wage earners, husbands and fathers that can build strong communities. In this sense, the poor communities to which the offenders return teach the rest of us an important lesson about the kinds of relationships that are both practically useful and morally appropriate with prior criminal offenders. One doesn't need to excuse all prior misconduct, nor to lay down one's guard, to extend some hope for an improved relationship with those who have once offended.

VII. Juvenile Courts as Overseers of Family Relationships

Let me turn last to a discussion of the juvenile justice system. I think it is clear that the juvenile justice system is in deep trouble. It has been attacked by the left for overreaching and sacrificing the due process rights of juveniles who come before it. It has been attacked by the right for failing to hold youth accountable for misconduct, and for failing to provide enough community security. The consequences have been to shrink the court's jurisdiction: to eliminate its jurisdiction over so-called status offenses in response to the left critique, and to lower the age of jurisdiction and allow prosecutors to remove serious offenses and persistent juvenile offenders to the adult courts in response to the right critique. Viewed from one perspective, the loss of court jurisdiction, and the transformation of the court into a court whose procedures are little different from those of the adult criminal court is tantamount to a declaration of bankruptcy for the juvenile court. Society seems to be saying that it now has no important purpose. Yet, for all the attacks, the court seems to survive.

I think the reason we are dissatisfied with the juvenile court (but nonetheless continue it) is that we are confused and not reconciled to its real purposes. The confusion comes partly from thinking about it too much in utilitarian terms, and from making an incorrect analogy with the adult criminal court. Let me explain.

To most people, the juvenile court is best understood as a criminal court whose procedures have been adjusted to deal with the fact that some crimes are committed by children rather than adults. The fact that a child

commits the offense matters both to our sense of what would be a just response, as well as what would be an effective response.

To many, it seems unjust to hold a child accountable for a criminal act in the same way that we would hold an adult accountable for the simple reason that we do not think children can form the same kinds of intentions that adults do. They are easily influenced by circumstances. They have not matured sufficiently to be able to direct their own actions, and have them be expressions of their own values and purposes. Thus, they cannot be held accountable.

For some of the same reasons, it seems ineffective to punish children in the same way as we do adults. If their characters are still malleable, it would make sense to intervene now to try to change their dispositions. Perhaps the right kind of intervention at this stage would deflect them from a future of criminal offending. They may even have some kind of a right to this kind of intervention, such a just society might well think it was part of its responsibility to provide every child with some minimum conditions required for them to grow into responsible and productive adulthood. How else could we feel justified in holding them accountable for their conduct when they reached adulthood?

These ideas lead to the conventional idea of the juvenile court as a criminal court for children. We should focus on crimes they commit. But we should also recognize that the offenders are children, and therefore not as culpable, and easier to reform than adults. Because we do not assume their intentions are hostile to the society but more aligned, we can relax some of the due process protections that we would need in the adult court to stem the tide of our indignation and hostility towards accused adult offenders. The judge can come out from behind the bench and sit at the table with the offender to figure out what is best in terms of the child's future development. Etc.

This is a powerful idea. Part of what makes it powerful is that it does embody a particular idea about the relationship of society to children who offend. Yet, I think this set of ideas does not go quite far enough to help us understand why we have created a juvenile and family court, and keep it alive despite the fact that it seems to be failing both against practical,

utilitarian standards (it is neither controlling crime nor rehabilitating offenders), and against deontological standards (it is failing to protect the rights of children and to hold them accountable for their crimes). An important clue about the real purposes of the juvenile and family court lies in the fact that its jurisdiction is not limited to crimes committed by children: it also typically includes crimes committed against children such as parental abuse and neglect, and acts committed by children which are not offenses if they were committed by adults -- the so-called status offenses such as incorrigibility, truancy, and promiscuity. If the court is a court to deal with crimes committed by children, what are the adults who abuse and neglect children doing in this court? And why is it paying attention to conduct by children that is not criminal?

These anomalies can be explained, I think, by changing our understanding of the fundamental purposes of the juvenile and family court. In my view, the juvenile and family court is not a special criminal court for dealing with crimes committed by children; it is, instead, a civil court for overseeing the conditions under which children are being raised, and ensuring that the relationships that exist among children, their parents, and the state are both just and effective in helping children make the journey from the status of defenseless barbarians to resourceful citizens.

One provocative way to describe my idea of the juvenile and family court is to see it as operating like a bankruptcy court for families (and other child care arrangements) that are going bankrupt in the sense that they are unable to meet the demands of their creditors. In this conception, society as a whole are the creditors who have entrusted the important job of raising children to parents, and other caretakers when the parents are unavailable. The parents and other caretakers are the agents of the society in ensuring that children get the care, supervision and guidance to which they are entitled, and which will allow them to become resourceful citizens. They are left to this task until there is concrete evidence that the arrangements are not working well -- that the enterprise is going bankrupt. That evidence comes in three forms: that the kids are committing offenses against others (criminal offenses); that the parents or other caretakers are abusing the kids (child abuse and neglect); or that the kids are engaged in conduct that threatens their future (status offenses). Once such evidence is available, the court is called on to review the arrangements for the care, supervision, and guidance

of the children. As in a bankruptcy court, one option is to liquidate the assets of the current enterprise, and take the child from the current arrangements. Often a better option, however, is to "restructure" the current enterprise. The existing creditors -- the injured victims, the outraged witnesses, etc. -- are told to back off, and give the family or other caretaking arrangements room to function. The court then reminds the caretakers and the children of their duties to one another as well as their rights. It may even bring into the situation additional assets in the form of particular kinds of assistance, which, when added to the existing arrangements, provide more of what kids and parents might be entitled to, as well as what they need to do the important social work of raising the children. And that is the form that the disposition takes: instructions to children, parents, state agencies, victims, neighbors and friends about what each owes to the other as a matter of justice, and in the interests of raising the child. In this way, just and effective relations are recreated among and between children, caretakers, society, and the state.

VIII. Conclusion

In conclusion (ah, those blessed words!) I am increasingly convinced that it is important for criminal justice agencies, and all of us who oversee them and set expectations for them, to change the basic frames we use to define their purposes and set expectations for them. Instead of seeing them as divorced from the moral life of the community, we must seem them as intimately engaged in trying to define and express that moral life. Instead of seeing them as utilitarian instruments designed to achieve practical goals such as crime control subject to deontological constraints designed to ensure the protection of individual rights, we must seem them as institutions that are designed and should be operated to produce just relationships in the community. In my view, this frame would allow the institutions to operate with greater moral integrity, and would help communities operate with greater moral integrity in their own right. That, at least, is the cause that is currently motivating me. Thank you for allowing me to share these thoughts with you.