Free Will Skepticism and Criminal Behavior: A Public Health-Quarantine Model (Presidential Address)

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One of the most frequently voiced criticisms of free will skepticism is that it is unable to adequately deal with criminal behavior and that the responses it would permit as justified are insufficient for acceptable social policy. This concern is fueled by two factors. The first is that one of the most prominent justifications for punishing criminals, retributivism, is incompatible with free will skepticism. The second concern is that alternative justifications that are not ruled out by the skeptical view per se face significant independent moral objections (Pereboom, 2014, p. 153). Yet despite these concerns, I maintain that free will skepticism leaves intact other ways to respond to criminal behavior—in particular incapacitation, rehabilitation, and alteration of relevant social conditions—and that these methods are both morally justifiable and sufficient for good social policy. The position I defend is similar to Derk Pereboom's (2001, 2013, 2014), taking as its starting point his quarantine analogy, but it sets out to develop the quarantine model within a broader justificatory framework drawn from public health ethics. The resulting model—which I call the *public health-quarantine model*—provides a framework for justifying quarantine and criminal sanctions that is more humane than retributivism and preferable to other non-retributive alternatives. It also provides a broader approach to criminal behavior than Pereboom's quarantine analogy does on its own.

I. Free Will Skepticism vs. Retributivism

In the past, the standard argument for free will skepticism was *hard determinism*: the view that determinism is true and incompatible with free will and moral responsibility—either because it precludes the *ability to do otherwise* (leeway incompatibilism) or because it is inconsistent with one's being the "ultimate source" of action (source incompatibilism). Hard determinism had its classic statement in the time when Newtonian physics reigned (e.g., d'Holbach, 1770) but it has very few defenders today.[1] Most contemporary skeptics instead defend positions that are agnostic about determinism—e.g., Derk Pereboom (2001), Galen Strawson (1986), Saul Smilansky (2000), Neil Levy (2011), Richard Double (1991), Bruce Waller (2011), and Gregg Caruso (2012). Most maintain that while

determinism is incompatible with free will and moral responsibility, so too is *indeterminism*, especially the variety posited by quantum mechanics. Others argue that regardless of the causal structure of the universe, we lack free will and moral responsibility because free will is incompatible with the pervasiveness of *luck* (Levy, 2011). Others (still) argue that free will and ultimate moral responsibility are incoherent concepts, since to be free in the sense required for ultimate moral responsibility we would have to be *causa sui* (or "cause of oneself") and this is impossible (Strawson, 1994, 2011).

What all these skeptical arguments have in common, and what they share with classical hard determinism, is the belief that what we do, and the way we are, is ultimately the result of factors beyond our control and because of this we are never morally responsible for our actions in the *basic desert* sense—the sense that would make us *truly deserving* of blame or praise. This is not to say that there are not other conceptions of responsibility that can be reconciled with determinism, chance, or luck. Nor is it to deny that there may be good pragmatic reasons to maintain certain systems of punishment and reward. Rather, it is to insist that to hold people *truly* or *ultimately* morally responsible for their actions—i.e., to hold them responsible in a non-consequentialist desert-based sense—would be to hold them responsible for the results of the morally arbitrary, for what is ultimately beyond their control, which is fundamentally unfair and unjust.

It's important to recognize that the terms "free will" and "moral responsibility" are sometimes used in different ways. But I have argued elsewhere that the sort of *free will* at stake in the free will debate, the sort that is of central philosophical and practical importance, refers to the control in action required for a core sense of moral responsibility (Caruso and Morris, manuscript). This sense of moral responsibility is set apart by the notion of *basic desert* (Feinberg, 1970; Pereboom, 2001, 2014; G. Strawson, 1994; Fischer, 2007; Clarke, 2005; Scanlon, 2013; Caruso and Morris, manuscript). Basic desert moral responsibility is essentially backwards-looking and non-consequentialist. As Derk Pereboom defines it:

> For an agent to be morally responsible for an action in this sense is for it to be hers in such a way that she would deserve to be blamed if she understood that it was morally wrong, and she would deserve to be praised if she understood that it was morally exemplary. The desert at issue here is basic in the sense that the agent would deserve to be blamed or praised just

> because she has performed the action, given an understanding of its moral status, and not, for example, merely by virtue of consequentialist or contractualist consideration. (2014, p. 2)

Understood this way, free will is a kind of power or ability an agent must possess in order to justify certain kinds of desert-based judgments, attitudes, or treatments in response to decisions or actions that the agent performed or failed to perform. These desert-based judgments, attitudes, and treatments would be justified on purely backwards-looking grounds and would not appeal to consequentialist or contractualist considerations. It is this kind of free will and moral responsibility that is being denied by free will skepticism and it's the kind required for retributivism.

Retributive punishment is incompatible with free will skepticism because it maintains that punishment of a wrongdoer is justified for the reason that he *deserves* something bad to happen to him just because he has knowingly done wrong—this could include pain, deprivation, or death (Pereboom, 2014, p. 157). For the retributivist, it is the basic desert attached to the criminal's immoral action alone that provides the justification for punishment. This means that the retributivist position is not reducible to consequentialist considerations nor does it appeal to a good such as the safety of society or the moral improvement of the criminal in justifying punishment. As Douglas Husak puts it, "Punishment is justified only when and to the extent it is deserved" (2000, p. 82). And Mitchell Berman writes, "A person who unjustifiably and inexcusably causes or risks harm to others or to significant social interests deserves to suffer for that choice, and he deserves to suffer in proportion to the extent to which his regard or concern for others falls short of what is properly demanded of him" (2008, p. 269).[2]

Free will skepticism undermines this justification for punishment because it does away with the idea of basic desert. If agents do not deserve blame just because they have knowingly done wrong, neither do they deserve punishment just because they have knowingly done wrong (Pereboom, 2014, p. 157). The challenge facing free will skepticism is to explain how we can adequately deal with criminal behavior without the justification provided by retributivism and basic desert. As Neil Levy explains:

> Traditionally, incarceration is seen as justified, in part, by the *desert* of offenders: because they are *guilty*—morally, and not merely legally, guilty—we can impose significant sanctions on them; the more weighty the sanctions, the more such a

> justification is required.... But if moral responsibility skeptics are right, agents are never deserving of the imposition of such sanctions. Thus moral responsibility skepticism has practical implications: it apparently entails that major elements of the criminal justice system are unjustified. (2012, p. 481)

In response to this challenge, free will skeptics typically point out that the imposition of sanctions serves purposes other than the punishment of the guilty: it is also justified by its role in incapacitating, rehabilitating, and deterring offenders (see, e.g., Pereboom, 2001, 2014; Levy, 2012; Kelly, 2009, 2012; Corrado, 2001, 2013). Free will and moral responsibility skeptics typically maintain that implementing their view would not require closing the prisons (although major reform would likely be required), because these and other justifications would remain valid.

In the following, I will explain and defend my preferred non-retributive approach to dealing with criminal behavior. Since it takes as its starting point Pereboom's quarantine analogy, I will begin by explaining Pereboom's justification for incapacitation and why it is preferable to at least two leading alternatives.

II. Pereboom's Quarantine Analogy

Some critics worry that without retributive punishment the free will skeptic is left unable to adequately deal with criminal behavior. But Pereboom notes that there are several alternative ways of justifying criminal punishment (and dealing with criminal behavior more generally) that do not appeal to the notion of basic desert and are thus not threatened by free will skepticism. These include moral education theories, deterrence theories, punishment justified by the right to harm in self-defense, and incapacitation theories. While Pereboom maintains the first two approaches face independent moral objections—objections that, though perhaps not devastating, make them less desirable than their alternative—he argues that an incapacitation account built on the right to harm in self-defense provides the best option for justifying a policy for treatment of criminals consistent with free will skepticism. Before turning to Pereboom's positive account, let me briefly say something about the first two alternative approaches.

Moral education theories draw an analogy with justification of the punishment of children. As Pereboom points out, "Children are typically not punished to exact retribution, but rather to educate them morally" (2014, p. 161). Since moral education is a generally acceptable goal, a justification for criminal punishment based on this analogy is one the free will skeptic can potentially accept. Despite its consistency with free will

skepticism, Pereboom notes that a serious concern for this type of theory is that it is far from evident that punishing adult criminals is similarly likely to result in moral improvement (2014, p. 161). Children and adult criminals differ in significant respects. For example, "[a]dult criminals, unlike children, typically understand the moral code accepted in their society" (2014, p. 161). Furthermore, "[c]hildren are generally more psychologically malleable than adult criminals are" (2014, p. 162). For these and other reasons, Pereboom sees this approach as less desirable than an alternative incapacitation account.

Deterrence theories, especially utilitarian deterrence theories, have probably been the most discussed alternative to retributivism. According to deterrence theories, the prevention of criminal wrongdoing serves as the good on the basis of which punishment is justified. The classic deterrence theory is Jeremy Bentham's. As Pereboom describes it:

> In his conception, the state's policy on criminal behavior should aim at maximizing utility, and punishment is legitimately administered if and only if it does so. The pain or unhappiness produced by punishment results from the restriction on freedom that ensues from the threat of punishment, the anticipation of punishment by the person who has been sentenced, the pain of actual punishment, and the sympathetic pain felt by others such as the friends and family of the criminal (Bentham 1823). The most significant pleasure or happiness that results from punishment derives from the security of those who benefit from its capacity to deter. (2014, p. 163-64)

While deterrence theories are completely compatible with free will skepticism, Pereboom notes three general moral objections against them. The first is that they will justify punishments that are intuitively too severe: "For it would seem that in certain cases harsh punishment would be more effective deterrents than milder forms, while the harsh punishments are intuitively too severe to be fair" (2014, p. 164). The second concern is that such accounts would seem to justify punishing the innocent: "If after a series of horrible crimes the actual perpetrator is not caught, potential criminals might come to believe that they can get away with serious wrongdoing. Under such circumstances it might maximize utility to frame and punish an innocent person" (2014, p. 164). Lastly, there is the "use" objection, which is a problem for utilitarianism more generally. Utilitarianism "sometimes requires people to be harmed severely, without their consent, in order to benefit others, and this is often intuitively wrong" (2014, p. 165). While some skeptics believe these objections can be met

(e.g., Levy, 2012), Pereboom recommends that free will skeptics seek a different alternative to retributivism.

Luckily for skeptics there is a legitimate theory for prevention of especially dangerous crime that is neither undercut by free will skepticism nor by other moral considerations. This theory is based on an analogy with quarantine and draws on a comparison between treatment of dangerous criminals and treatment of carriers of dangerous diseases. As Pereboom describes it:

> The free will skeptic claims that criminals are not morally responsible for their actions in the basic desert sense. Plainly, many carriers of dangerous diseases are not responsible in this or in any sense for having contracted these diseases. We generally agree that it is sometimes permissible to quarantine them nevertheless. But then, even if a dangerous criminal is not morally responsible for his crimes in the basic desert sense (perhaps because no one is ever in this way morally responsible) it could be as legitimate to preventatively detain him as to quarantine the non-responsible carrier of a serious communicable disease. (2014, p. 156)

It is important to note that this analogy places several constraints on the treatment of criminals.

> [A]s less dangerous diseases justify only preventative measures less restrictive than quarantine, so less dangerous criminal tendencies justify only more moderate restraints. In addition, the incapacitation account that results from this analogy demands a degree of concern for the rehabilitation and well-being of the criminal that would alter much of current practice. Just as fairness recommends that we seek to cure the diseased we quarantine, so fairness would counsel that we attempt to rehabilitate the criminals we detain (cf. D'Angelo 1968: 56-9). If a criminal cannot be rehabilitated, and our safety requires his indefinite confinement, this account provides no justification for making his life more miserable than would be required to guard against the danger he poses. Finally, there are measures for preventing crime more generally, such as providing for adequate education and mental health care, which the free will skeptic can readily endorse. (2014, p. 156)

This is Pereboom's incapacitation account and it provides a more resilient proposal for justifying treatment of criminals than either the

moral education or deterrence theories of criminal punishment.

One advantage this approach has over the utilitarian deterrence theory is that it has more restrictions placed on it with regard to using people merely as a means. Concerns over the "use" objection, for example, count more heavily against punishment policy justified simply on consequentialist grounds than they do against incapacitation based on the quarantine analogy. And this is because, "on the quarantine analogy, as it is illegitimate to treat carriers of a disease more harmfully than is necessary to neutralize the danger they pose, treating those with violent criminal tendencies more harshly than is required to protect society will be illegitimate as well" (Pereboom, 2014, p. 169). Furthermore, "the less dangerous the disease, the less invasive the justified prevention methods would be, and similarly, the less dangerous the criminal, the less invasive the justified forms of incapacitation would be" (2014, p. 170). In fact, for certain minor crimes "perhaps only some degree of monitoring could be defended" (2014, p. 170).

Summarizing Pereboom's proposal, then, the core idea is that the right to harm in self-defense and defense of others justifies incapacitating the criminally dangerous with the minimum harm required for adequate protection. The resulting account would not justify the sort of criminal punishment whose legitimacy is most dubious, such as death or confinement in the most common kinds of prisons in our society (2014, p. 174). Pereboom's account also demands a certain level of care and attention to the wellbeing of criminals, which would change much of current policy. Furthermore, free will skeptics would continue to endorse measures for reducing crime that aim at altering social conditions, "such as improving education, increasing opportunities for fulfilling employment, and enhancing care for the mentally ill" (2014, p. 174). This combined approach to dealing with criminal behavior, it is argued, is sufficient for dealing with dangerous criminals, leads to a more humane and effective social policy, and is actually preferable to the harsh and often excessive forms of punishment that typically come with retributivism.

In the following section I will try to defend and expand on Pereboom's quarantine analogy by considering it within the broader justificatory framework of public health ethics. The resulting account, the *public health-quarantine model*, will not only provide a justification for the incapacitation of dangerous criminals but it will also provide a broader and more comprehensive approach to criminal behavior generally. Its advantages include the prioritization of prevention, a focus on social justice, and a more detailed set of principles for resolving the conflict between individual liberty and public safety.

III. The Public Health Approach to Quarantine and Criminal Behavior

My public health-quarantine model takes as its starting point Pereboom's analogy but places it within a broader justificatory framework drawn from public health ethics. It makes use of the *public health framework* but also places some constraints on it and draws some insights from the *traditional medical ethical approach*. The traditional medical ethics approach emphasizes four key dimensions—autonomy, beneficence, nonmaleficence, and justice (see Beauchamp and Childdress, 1989)—and focuses primarily on the individual (e.g., the patient-doctor relationship). The broader public health framework I have in mind, on the other hand, focuses on groups and larger populations. For example, Ruth Faden and Sirine Shebaya (2015) have detailed a pubic health ethic that weighs such factors as overall benefit to society, fairness in the distribution of burden, and the Harm Principle. While it is not always easy to reconcile these two approaches since conflicts and dilemmas arise (see Phua, 2013), a successful justification of quarantine, not to mention many other medical ethical issues, requires that a resolution be sought. Below I will provide a public health justification for quarantine, one that incorporates (as best as possible) the individualistic concerns of the traditional medical ethics approach but provides a method for conflict-resolution when it cannot.

Let me begin with a brief summary of Faden and Shebaya's framework for a broad public health ethic. At its core, public health is concerned with promoting and protecting the health of populations, broadly understood. "Public health ethics deals primarily with the moral foundations and justifications for public health, the various ethical challenges raised by limited resources for promoting health, and real or perceived tensions between collective benefits and individual liberty" (2015). There are two different ways of viewing the moral foundation of public health ethics:

> One view of public health ethics regards the moral foundation of public health as an injunction to maximize welfare, and therefore health as a component of welfare (Powers and Faden 2006). This view frames the core moral challenge of public health as balancing individual liberties with the advancement of good health outcomes. Consider for example, how liberties are treated in government policies that fluoridate municipal drinking water or compel people with active, infectious tuberculosis to be treated…An alternative view of public health ethics characterizes the moral foundation of public health as social justice. While balancing individuals' liberties with promoting social goods is one area of concern, it is embedded

> within a broader commitment to secure a sufficient level of health for all and to narrow unjust inequalities (Powers and Faden 2006)…. Understood this way, public health ethics has deep moral connections to broad questions of social justice, poverty, and systematic disadvantage. (2015)

Obvious analogies exist here with non-retributive approaches to criminal justice. From the skeptical perspective, we have to reconcile the fact that dangerous criminals do not *justly deserve* to be blamed or retributively punished for their actions with a more general concern for the wellbeing and safety of society. We need, therefore, to confront the moral challenge of balancing individual liberties with the advancement of the public good. Yet the public health-quarantine model I defend also acknowledges that a comprehensive approach to criminal justice needs to be embedded within a broader commitment to social justice and addressing unjust inequalities (see Powers and Faden, 2006). I side with those who believe social justice provides the moral foundation of public health ethics. My public health-quarantine model therefore has deep moral connections to broad questions of social justice, poverty, and systematic disadvantage.

Public health has four unique characteristics: (1) it is a public or collective good; (2) its promotion involves a particular focus on prevention; (3) its promotion often entails government action; and (4) it involves an intrinsic outcome-orientation (Faden and Shebaya, 2015, Sect.1). These four characteristics can equally be applied to the concept of public safety. First, in public health the object of concern is populations not individuals: "Public health is, by its very nature, a public, communal good, where the benefits to one person cannot readily be individuated from those to another" (2015, Sect.1). We can say the same thing for public safety—it too is a communal good. The societal goods we seek in the criminal justice system (e.g., safety, security, justice, etc.) are aimed at the collective good and the policies we employ to achieve them are designed and implemented with the public good in mind.

The second characteristic of public health deals with prevention. In particular, "promoting public health involves a high degree of commitment to the prevention of disease and injury" (Faden and Shebaya, 2015, Sect. 1). In the United States, public health agencies like the Centers for Disease Control and Prevention, the Food and Drug Administration, the Environmental Protection Agency, and the Consumer Protection Agency focus heavily on this preventive task. The primary function of these agencies is to *prevent* disease, food borne illnesses, environmental destruction, injuries, and the like. A non-retributive approach to criminal

justice modeled on public health ethics would similarly focus on prevention. Preventing criminal behavior from occurring in the first place is not only preferable in terms of public safety, it is more consistent with the commitments and beliefs of free will skeptics. Skeptics acknowledge how patently unfair the lottery of life can be—we are not all born with the same set of mental capacities, psychological propensities, economic and educational opportunities, and the like. Instead of focusing on punishing criminals and building more supermax prisons, the public health model would advocate addressing the systemic causes of crime, such as social injustice, poverty, systematic disadvantage, mental health issues, and addiction.

Consider, for example, the alarming number of mentally ill individuals currently behind bars. Studies have shown that about 20 percent of prison inmates have a serious mental illness, 30 to 60 percent have substance abuse problems, and when including broad-based mental illnesses, the percentages increase significantly. For example, 50 percent of males and 75 percent of female inmates in state prisons, and 75 percent of females and 63 percent of male inmates in jails, will experience a mental health problem requiring mental health services in any given year. It also appears that the individuals being incarcerated have more severe types of mental illness than in the past, including psychotic disorders and major mood disorders. According to the American Psychiatric Association, on any given day, between 2.3 and 3.9 percent of inmates in state prisons are estimated to have schizophrenia or other psychotic disorders, between 13.1 and 18.6 percent have major depression, and between 2.1 and 4.3 percent suffer from bipolar disorder. Furthermore, individuals with severe mental illness are three times more likely to be in jail or prison than in a mental health facility and 40 percent of individuals with a severe mental illness will have spent some time in their lives in either jail, prison, or community corrections (Aufderheide, 2014; see also Glaze and James, 2006; Karber and James, 2005).

I think it's safe to say, "our jails and prisons have become America's major mental health facilities, a purpose for which they were never intended" (Aufderheide, 2014). To effectively deal with this problem we need a paradigm shift that conceptualizes mental illness as a public health and public safety issue. We need to develop effective care and management strategies that are humane, just, and non-retributive. On the public health model, the rationale for this is that "individuals with mental illnesses are more likely to be arrested, convicted, and move through the relentlessly revolving door between incarceration and the community" (Aufderheide, 2014). Prevention would therefore be the primary focus of

the public health approach to criminal justice, with the use and justification of incapacitation being limited to those cases we cannot prevent, and only then as a last resort. And in those cases where we do need to incapacitate individuals, the public health and prevention model dictates that treatment and rehabilitation should be our goal. As Aufderheide writes:

> Perhaps the optimal solution to curbing recidivism of the mentally ill would be to conceptualize mental illness as a chronic illness and extend public health services into the prison immediately upon individuals' incarceration. By managing mental illness as a chronic illness—where the severity of the symptoms wax and wane in response to genetic and congenital vulnerabilities, environmental influences, and individual behavior—public health and safety officials can collaborate in developing more effective and efficient strategies for managing mentally ill inmates in America's jails and prisons and after release in to their communities. (Aufderheide, 2014)

A similar approach would be taken for dealing with drug addiction and the kinds of crimes committed by drug addicts to procure drugs. If we want to reduce the rate of recidivism for drug addicts, the best thing to do (not to mention the most humane) would be to prioritize prevention, treatment, and rehabilitation. It should be noted, however, that my claim here is limited to addressing crimes committed by addicts in order to procure drugs, rather than drug possession or consumption. With the latter, possession and consumption, much of the harm to society (especially with regard to non-addictive drugs such as marijuana) actually comes from prohibition. With addiction, however, individuals often commit different crimes to feed their addiction. It is with regard to preventing such crimes that prioritizing prevention, rehabilitation, and treatment would better serve public health and safety.

I should note that while Pereboom acknowledges that free will skeptics can "readily endorse" measures and policies for preventing crime, his quarantine analogy does not require it. His quarantine analogy is narrowly focused on justifying the incapacitation of dangerous criminals. By contrast, my public health model makes prevention a *primary function* of the criminal justice system. Public health ethics not only justifies quarantining carriers of infectious diseases on the grounds that it is necessary to protect public health, it also requires that we take active steps to prevent such outbreaks from occurring. Quarantine, in a sense, is only needed when the public health system fails in its primary function. Since no system is perfect, quarantine will likely be needed for the foreseeable

future, but it should *not* be the primary means of dealing with public health. We should feel the same way about incapacitation. The public health-quarantine model justifies the incapacitation of dangerous criminals but the primary focus should always be on preventing crime from occurring in the first place by addressing the systemic causes of crime. Prevention is always preferable to incapacitation.

The third defining feature of public health ethics highlights the fact that achieving good public health results frequently requires government action: "many public health measures are coercive or are otherwise backed by the force of law" (Faden and Shebaya, 2015, Sect. 1). The same holds true for criminal justice. Criminal justice, like public health, is focused on regulation and public policy, and relies less often on individual actions and services. Any comprehensive approach to criminal justice therefore needs to address potential conflicts concerning justice, security, and the scope of legal restrictions and regulations. While this problem is not unique to the public health-quarantine model (it's a problem for all theories of punishment), there is good reason to think that the quarantine model is better suited than retributivism for dealing with it. As Pereboom has argued, the quarantine model places several important constraints on the treatment of criminals. First, as less dangerous diseases justify only preventative measures less restrictive than quarantine, so less dangerous tendencies justify only more moderate restraints. Secondly, the incapacitation account that results from the quarantine model demands a degree of concern for the rehabilitation and wellbeing of the criminal that would alter much of current practice. Lastly, if a criminal cannot be rehabilitated, and our safety requires his indefinite confinement, the quarantine model provides no justification for making his life more miserable than would be required to guard against the danger he poses (2014, p. 156). Retributivism does not include such constraints and in actual practice often leads to punitive systems of punishment and inhumane treatment of prisoners.

Finally, the last defining feature of public health ethics is that it has a consequentialist orientation. As Faden and Shebaya write:

> Promoting public health means seeking to avoid bad health outcomes and advance good ones. As noted at the outset, in some discussions of public health ethics, this outcome-orientation is viewed as the moral justification and foundation of public health and, as with all consequentialist schemes, is presented as needing to be constrained by attention to deontological concerns such as rights, and by attention to justice-related concerns such as the fair distribution of burdens (Childress et al. 2002; Kass 2001). While public health ethics has to engage

> with the traditional problems raised by its consequentialist commitments, for those who view social justice as the moral foundation of public health, considerations of justice provide the frame within which the moral implications of public health's consequentialist orientation are addressed. (2015, Sect. 1)

The public health quarantine model I defend views social justice as its foundation and seeks to restrict the consequentialist orientation of public health ethics by considering the justification of quarantine within a broader social justice framework. Considerations of social justice and fairness are important foundational principles in my public health-quarantine model and need to be kept in mind at all times. I will say more about the importance of social justice to public health and safety below.

Now that we have a better understanding of the scope of public health ethics, it's time that I turn to the principles of traditional medical ethics: autonomy, beneficence, nonmaleficence, and justice. Below I will provide a justification of quarantine that relies on public health ethics but incorporates (as best as possible) the principles of autonomy, beneficence, nonmaleficence, and justice. Where conflicts arise, as they do with the principle of autonomy, I will provide a method for conflict-resolution consistent with public health ethics. The resulting justificatory framework will serve as the foundation for my public health-quarantine model of criminal behavior.

Autonomy

The individualist approach to "autonomy" places primary emphasis on the liberty, privacy, and informed consent of individual persons in the face of a health intervention carried out by other parties. It acknowledges a person's right to make choices, to hold views, and to take actions based on personal values and beliefs. It's the principle of autonomy that precludes running experiments on humans without their informed consent. It's also the principle of autonomy that grants patients the right to refuse or deny medical treatment—e.g., the right of cancer patients to refuse chemotherapy or the right of Jehovah's Witnesses to refuse blood transfusions. When it comes to quarantine, however, the principle of autonomy needs to be weighed against the broader public health framework that requires us to consider the wellbeing and safety of society. The public health framework maintains that the control of infectious diseases necessitates public health interventions that often infringe on the autonomy of individuals. While such infringement is unfortunate it is also necessary because such diseases can spread from the infected individual to other people, with the young,

the elderly, and the immune-compromised often at highest risk. The broad public health framework therefore justifies quarantine on the grounds that it is needed to prevent harm from occurring to others.[3]

While I accept this public health justification of quarantine, I see the sacrifice of autonomy as regrettable (though necessary). Given that free will skepticism rejects the notion that individuals justly deserve to be punished, I believe the justificatory burden is always on those who want to limit one's liberty and autonomy by means of incarceration or incapacitation. In the case of dangerous criminals who pose a continued threat to society, the public health-quarantine model can meet this justificatory burden without appealing to notions of basic desert and retribution. In those cases where the threat of harm to others is very low, however, I maintain that significant weight should be given to the principle of autonomy. This raises an interesting question: how should we go about deciding when autonomy should be preserved and when it should be overridden? It is here that public health ethics can appeal to J.S. Mill's *Harm Principle*.

As Faden and Shebaya note, "no classic philosophical work is cited more often in the public health ethics literature than John Stuart Mill's *On Liberty* (Mill 1869)" (2015, Sect. 2.4). Mill's famous harm principle maintains that the only justification for interfering with the liberty of an individual, against her will, is to prevent harm to others. As Mill states the principle:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. (1869)

The principle includes two main components: one asserting that self-protection or the prevention of harm to others is sometimes a sufficient warrant for limiting liberty, and the other claiming that the individual's own good is never a sufficient warrant for the exercise of compulsion either by society as a whole or by its individual members.

In public health ethics, the principle is relied upon to justify various infectious disease control interventions including quarantine. In fact, "the harm principle is often viewed as the most compelling justification for public health policies that interfere with individual liberty" (Faden and

Shebaya, 2015, Sect. 2.4). The harm principle is consistent with the public health-quarantine model since it provides one of the main justifications for quarantine. Infectious diseases put at risk not only the carrier but also the health and wellbeing of others, hence self-protection and the prevention of harm to others justifies quarantine. The same is true for the incapacitation of dangerous criminals who pose a continued risk to society. The harm principle, however, can also be used to carve out a protected space for autonomy. If a cancer patient wishes to refuse life-saving treatment, say chemotherapy, the harm principle dictates that we must respect their wishes. Even if the treatment could save the individual's life, their autonomy should be respected since the decision to forgo treatment is self-regarding and poses no significant harm to others. The same can be said for the Jehovah's Witness who refuses a blood transfusion. According to the harm principle, then, autonomy should be preserved when self-protection and the prevention of harm to others is not at issue.

Of course, important questions still remain: How significant must the threat of harm be with regard to both its likelihood and magnitude? How much liberty/autonomy are we justified in limiting in the name of self-protection and the prevention of harm to others? Etc. While such questions are important, it's hard to answer them in the abstract. And instead of going through specific examples, I will simply say that the public health-quarantine model provides a useful set of constraints on how we can answer such questions. When someone fails to heed a stop sign, for example, they put at risk the potential safety of others. The right of self-protection and the harm principle justify liberty-limiting laws backed by the threat of sanctions, but the sanctions in this case would need to be significantly low since my account prohibits treating individuals more harshly than is required to protect society. Just as it is illegitimate to treat carriers of a disease more harmfully than is necessary to neutralize the danger they pose, treating criminals more harshly than is required to protect society will be illegitimate as well (Pereboom, 2014, p. 169). I think a forwarding-looking conception of moral responsibility grounding in future protection and moral formation could justify a suitable fine here, but not more punitive measures. Such small infractions are analogous to common colds.[4] While they do put at risk the health of others, the harm they represent is not significant enough to justify quarantine.

To successfully implement the public health-quarantine model in the criminal justice system, then, we would need to reevaluate the harms posed by various crimes so as to determine the appropriate reaction. Justice and fairness demand that we undertake this reevaluation so that liberty is limited no more than is absolutely necessary. The harm principle allows

for the limiting of liberty when self-protection and the prevention of harm to others is at issue, but this should always be coupled with the *principle of least infringement*, which holds that the least restrictive measures should be taken to protect public health and safety. In the case of "victimless crimes" where no one is harmed save the person engaged in the act, assuming such cases exist, the harm principle would recommend decriminalization. The private use of marijuana may be such a case. But even if its not, one thing is clear: many of the low-level crimes we currently incarcerate people for (sometimes for many years) would be judged from the perspective of the public health model as excessively punitive and unjustified.

It's worth noting here that the public health-quarantine model provides a distinct advantage over rival non-retributive accounts. Critics often argue that only retributivism can guarantee proportionality since it sets an upper bound for harshness of response (see, e.g., Zimmerman, 2011). The public health-quarantine model, however, ensures that harshness will be proportionate to the danger posed by an individual. Any sanctions that exceed this upper bound will be considered unjustified.

Beneficence and Nonmaleficence

The principles of beneficence and nonmaleficence are closely related. The principle of beneficence refers to an action done for the benefit of others. The word "beneficence" comes from the Latin for "doing good." Beneficent actions can be taken to help prevent or remove harms or to simply improve the situation of others. The principle of nonmaleficence, on the other hand, means to "do no harm." This means that physicians must refrain from providing ineffective treatments or acting with malice toward patients. Since many treatments involve some degree of harm (e.g., side effects from drugs, chemotherapy, etc.) the principle of nonmaleficence is typically interpreted as implying that the harm should not be disproportionate to the reasonably expected benefits of treatment. The justification for these principles is drawn from the goals and purpose of health care itself. The goal of health care is to help people get and stay healthy. It exists to do people good and not harm. Health care is an essentially beneficent phenomenon. Public health ethics is also a beneficent phenomenon since it aims at promoting public health.

When it comes to the justification of quarantine, the principles of beneficence and nonmaleficence are applied to society as a whole. Quarantine is consistent with the principles of beneficence and nonmaleficence since it seeks to benefit society and prevent harm from occurring. Of course, when beneficence and nonmaleficence are applied to society rather than individuals, conflicts can arise. This is why the

restrictions outlined above are designed to protect individual autonomy to the fullest extent possible consistent with a concern for public health and safety. Additionally, the principles of beneficence and nonmaleficence further add that quarantine is only justified when (a) the benefits to society (protection from infectious disease) are greater than the burdens placed upon those in quarantine; (b) the burdens placed on those in quarantine cause the least harm possible; and (c) those placed in quarantine are provided with adequate care (including treatment).

Applying these principles to the criminal justice system would require major reform. Consider, for instance, the use of extended solitary confinement in many supermax prisons. Prisoners are isolated in windowless, soundproof cubicles for 23 to 24 hours each day, sometimes for decades. The cell itself is usually smaller than a typical horse stable, approximately 80 square feet, and furnished with a bed, a sink and toilet, but rarely much else. Food is delivered through a slot in the door, and each day inmates are allowed just one hour of exercise, in a cage. Under such conditions, prisoners experience severe suffering, often resulting in serious psychological problems. Supreme court Justice Anthony Kennedy recently stated that, "solitary confinement literally drives men mad"[5] and the United Nations agrees. In 2011 the U.N. issued a report claiming that long-term solitary isolation is a form of torture—a cruel, inhuman, and degrading treatment prohibited by international law.

The practice of solitary confinement is clearly inconsistent with the principles of beneficence and nonmaleficence and the public health approach more generally. If we were to adopt the public health approach to criminal behavior, the practice would need to be ended immediately. While the public health-quarantine model justifies the incapacitation of dangerous criminals, it does not justify treating them cruelly. The principles of beneficence and nonmaleficence require us to do what we can to rehabilitate criminals and perhaps even provide them with continued support upon release. Of course, strong retributivist intuitions often get in the way of such progress. While most reasonable retributivists, and I know many, acknowledge that the United States imprisons far too many people in far too harsh conditions, retributivism nonetheless remains committed to the core belief that criminals *deserve* to be punished and suffer for the harms they have caused. This retributive impulse in actual practice, rather than in pure theory, often leads to practices and policies that try to make life in prison as unpleasant as possible. It was this retributive impulse, for instance, that was recently behind the effort in England and Wales to create a blanket ban on sending books to prisoners. Luckily, the high court declared the book ban unlawful, reasoning that books are often essential to the rehabilitation of criminals.

Justice

The last principle of traditional medical ethics deals with justice. The principle of justice demands that we treat others equitably and distribute benefits and burdens fairly. It's the principle of justice that requires scarce medical resources be distributed fairly and consistently. Organ transplantation is a good example since there is more demand for organs than there is supply. In deciding who should receive a heart or live transplant first, the principle of justice demands that we treat all parties fairly, consistently, and non-prejudicially. Whatever procedural method we agree on, it must be applied consistently across all cases and not discriminate between potential recipients in an unjust manner.

When applied to quarantine, the principle of justice means that decisions for the application of quarantine be made using a fair process, include a publicly available rationale for those decisions, a mechanism for dispute resolution, and a regulatory body to enforce decisions (Baum, Gollust, and Jacobson, 2007). In addition, officials need to exhibit transparency regarding the goals to be accomplished and whether the benefits and burdens of their decisions are expected to be distributed equally throughout the community. Where inequality exists, there must be a rationale and justification for that disparity (Baum, Gollust, and Jacobson, 2007). The principle of justice is therefore extremely important to the proper justification and application of quarantine. Its importance to public health ethics, however, goes far beyond this.

In the version of public health ethics I defend, social justice is a foundational cornerstone. And even for those who do not share this foundational commitment, there is wide agreement that social justice is important:

> Whether social justice is viewed as a side constraint on the beneficence-based foundation of public health, or as foundational in its own right, there is broad agreement that a commitment to improving the health of those who are systematically disadvantaged is as constitutive of public health as is the commitment to promote health generally (Powers & Faden 2006; Institute of Medicine (USA) 2003; Thomas, Sage, Dillenberg & Guillory 2002; Nuffield Council on Bioethics 2007; Kass 2001; Venkatapuram 2011; Gostin 2012). (Faden and Shebaya, 2015, Sect.3)

In public health ethics, a failure on the part of public health institutions to ensure the social conditions necessary to achieve a sufficient level of health is considered a grave injustice. For many in the public health sector, "the

extraordinary disparities in life expectancy, child survival and health that distinguish those living in rich and poor countries constitutes a profound injustice that is the duty of the global community to redress" (Faden and Shebaya, 2015, Sect. 3). An important task of public health ethics, then, is to identify which inequalities in health are the most egregious and thus which should be given the highest priority in public health policy and practice.

The public health approach to criminal behavior likewise maintains that a core moral function of the criminal justice system is to identify and remedy social an economic inequalities responsible for crime. Just as public health is negatively affected by poverty, racism, and systematic inequality, so too is public safety. Faden and Shebaya eloquently describe how health can be affected in this way:

> When inequalities in health exist between socially dominant and socially disadvantaged groups, they are all the more important because they occur in conjunction with other disparities in well-being and compound them (Wolff & de-Shalit 2007; Powers & Faden 2006). Reducing such inequalities are specific priorities in the public health goals of national and international institutions…Whether through processes of oppression, domination, or subordination, patterns of systemic disadvantage associated with group membership are invidious and profoundly unjust. They affect every dimension of well-being, including health. In many contexts, poverty co-travels with the systematic disadvantage associated with racism, sexism, and other forms of denigrated group membership. However, even when it does not, the dramatic differential in material resources, social influence and social status that is the hallmark of severe poverty brings with it systematic patterns of disadvantage that can be as difficult to escape as those experienced by the most oppressed minority groups. Even when these patterns are lessened, the life prospects of persons living in severe poverty or in dominated groups often continue to be far below that of others. A critical moral function of public health is to vigilantly monitor the health of systematically disadvantaged groups and intervene to reduce the inequalities so identified as aggressively as possible. (2015, Sect. 3)

The broad approach to criminal justice provided by the public health-quarantine model therefore places issues of social justice at the forefront. It sees racism, sexism, poverty, and systematic disadvantage as serious threats to public safety and it prioritizes the reduction of such inequalities.

By placing social justice at the foundation of my public health approach, the realms of criminal justice and distributive justice are brought closer together. Distributive justice concerns our collective responsibility for the background social and institutional conditions of individual choice (see Kelly, 2012), and it's hard to see how we can adequately deal with criminal justice without addressing issues of distributive justice. Retributivists tend to disagree since they approach criminal justice as an issue of individual responsibility and desert, not as an issue of collective responsibility. But as Erin Kelly argues, it is a mistake to hold that the criteria of individual accountability can be settled apart from considerations of distributive justice:

> It is not clear… that we should think of criminal justice in retributive terms. I believe our understanding of criminal justice is ethically distorted when we understand criminal justice apart from the framework of premises and principles that comprise a conception of distributive justice and its associated notion of collective responsibility. Criminal justice… can and should be thought of in relation to the requirements of distributive justice. Distributive justice…is a matter of collective responsibility to promote certain basic shared interests. The joint nature of this responsibility and aim bears on the formulation of a defensible conception of criminal justice. This means that criminal justice cannot be individualist in the way proponents of the retributive view suppose. (2012, p. 66)

Making social justice foundational, as my account does, therefore places on us a collective responsibility—which is forward-looking and perfectly consistent with free will skepticism—to redress unjust inequalities and to advance collective aims and priorities such as public health and safety.

IV. Conclusion

In conclusion, I have argued that the public health-quarantine model not only justifies the incapacitation of dangerous criminals, it also demands that we monitor and redress social and economic inequalities and that we prioritize prevention. Placing Pereboom's incapacitation account within the broader justificatory framework of public health ethics, I argued that the right to self-protection and prevention of harm to others justifies incapacitating the criminally dangerous with the minimum harm required for adequate protection. I also argued that a more comprehensive approach to criminal justice, one which views public safety as akin to public health,

requires us to prioritize the prevention of crime and the redress of social and economic inequality. While retributivists have long argued that free will skepticism is unable to adequately deal with criminal behavior, I have proposed an account which is consistent with the denial of basic desert moral responsibility, morally justifiable, and sufficient for good social policy. It is also preferable, I contend, to other non-retributive alternatives, such as utilitarian deterrence theories and moral education theories. The public health-quarantine model therefore offers free will skeptics a way forward and a suitable conception of justice without retribution.[6]

Notes

[1] Most contemporary skeptics remain neutral about the truth of determinism, largely because the standard interpretation of quantum mechanics has been taken by many to undermine, or at least throw into doubt, the thesis of universal determinism. This is not to say that determinism has been refuted or falsified by modern physics, because it has not. Determinism still has its modern defenders, most notably Ted Honderich (1988, 2002), and the final interpretation of physics is not yet in. It is also important to keep in mind that even if we allow some indeterminacy to exist at the microlevel of our existence—the level studied by quantum mechanics—there would still likely remain *determinism-where-it-matters* (Honderich, 2002, p. 5). As Honderich argues: "At the ordinary level of choices and actions, and even ordinary electrochemical activity in our brains, causal laws govern what happens. It's all cause and effect in what you might call real life" (2002, p. 5).

[2] The quotes by Husak and Berman were drawn from Kelly (2012, p. 65).

[3] It's worth noting that quarantine is not the only instance where concerns for public health appear to justify overriding autonomy. Another example would be the mandatory immunization of children with the MMR (measles, mumps, and rubella) vaccine.

[4] Neil Levy has pointed out to me that with regard to running a stop sign we might want to distinguish between first offense and habitual behavior since per incident risk is probably low but aggregates to a high probability of serious harms. Perhaps, then, we could justify increased sanctions over time for repeat offenders, included higher fines and eventually loss of one's drivers license.

[5] He made this statement before the House Appropriations Subcommittee on Financial Services and Federal Government, as reported on in the Huffington Post on 3/24/2015: http://www.huffingtonpost.com/2015/03/24/anthony-kennedy-solitary-confinement_n_6934550.html.

[6] I would like to thank Neil Levy, Derk Pereboom, Bruce Waller, Stephen Morris, Elizabeth Shaw, and Farah Focquaert for helpful comments on an earlier draft of this paper.

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