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THE SECRET AMBITION OF DETERRENCE

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TABLE OF CONTENTS

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*Dan M. Kahan**

In this Article, Professor Kahan identifies the political and moral economies of deterrence theory in legal discourse. Drawing on an extensive social science literature, he shows that deterrence arguments in fact have little impact on citizens' views on controversial policies such as capital punishment, gun control, and hate crime laws. Citizens conventionally defend their positions in deterrence terms only because the alternative is a highly contentious expressive idiom, which social norms, strategic calculation, and liberal morality all condemn. But not all citizens respond to these forces. Expressive zealots have an incentive to frame controversial issues in culturally partisan terms, thereby forcing moderate citizens to defect from the deterrence détente and declare their cultural allegiances as well. Accordingly, deliberations permanently cycle between the disengaged, face-saving idiom of deterrence and the partisan, face-breaking idiom of expressive condemnation. These dynamics, Professor Kahan argues, complicate the normative assessment of deterrence. By abstracting from contentious expressive judgments, deterrence arguments serve the ends of liberal public reason, which enjoins citizens to advance arguments accessible to individuals of diverse moral persuasions. But precisely because deterrence arguments denude the law of social meaning, the prominence of the deterrence idiom impedes progressives from harnessing the expressive power of the law to challenge unjust social norms. There is no stable discourse equilibrium between the deterrence and expressive idioms, either as a positive matter or a normative one.

I don't say all I think in the opinion. — Oliver Wendell Holmes, Jr.[1]

IN his provocative essay, "The Secret History of Self-Interest," political philosopher Stephen Holmes suggests that classical liberal thought harbors more ambitions than meet the eye.[2] The impetus for Holmes's inquiry is the view that derides the liberal ideal of self-interest as demeaning to our higher ends and corrosive of friendship, public-spiritedness, and other self-effacing virtues. This antiliberal critique, according to Holmes, is naïvely ahistorical. Classical liberals,

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[1] Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (May 12, 1921), *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935, at 262 (Mark DeWolfe Howe ed., Alger Hiss abr. ed. 1963).

[2] *See* Stephen Holmes, *The Secret History of Self-Interest*, *in* STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 42–68 (1995) [hereinafter HOLMES, PASSIONS AND CONSTRAINT].

including Hume and Smith, celebrated self-interest not because they believed it to be a complete moral virtue, but because they saw it as displacing an alternative moral idiom that prized glory and hierarchy and that had produced centuries of violent contention. Exhorted to overcome love of self, individuals are more likely to display heroic *mal*evolence than heroic *ben*evolence. The self-interested pursuit of material wealth, the classical liberals hoped, would calm the violent passions of honor, revenge, and pride. By waging an assault on self-interest, contemporary antiliberals, Holmes suggests, risk inflaming the selflessly *cruel* passions that the classical liberals endeavored to extinguish.[3]

My goal in this Article is to offer a parallel account of *deterrence theory* in American criminal law. I will suggest that the real value of deterrence — its secret ambition — is to quiet illiberal conflict between contending cultural styles and moral outlooks. To attack deterrence theorizing is to invite such conflict.

By "deterrence" I intend to refer broadly to the consequentialist theory, propounded by Bentham and refined by his economist successors, that depicts punishment as a policy aimed at creating efficient behavioral incentives.[4] Deterrence arguments of this sort figure prominently in public debates over capital punishment, gun control, domestic violence, "hate crimes," drugs, and many other criminal law issues.[5]

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[3] *See id.* at 42–59; *see also* ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 32 (1977) (providing an account, on which Holmes draws, of the rise of self-interest as a relatively peaceful alternative to the violent passion for glory); James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 510–14 (1999) (proving that one need not be a classical liberal to see the error of equating self-interest with immorality).

[4] The classic exposition is Jeremy Bentham's *The Principles of Morals and Legislation* (Hafner Press 1948) (1823). *See also* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (providing contemporary accounts).

[5] *See, e.g.*, JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 5–18 (1998) (describing the centrality of deterrence claims to the gun control debate); Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 145 (1983) ("[B]elief in the deterrent efficacy of the death penalty has generally been the rationale most frequently offered by Retentionists."); Ed Hayward, *Sex-Based Hate Crime Proposal Angers Dads*, BOSTON HERALD, Mar. 7, 1997, at 21 (quoting a supporter of legislation that would allow domestic battering to be prosecuted as a "hate crime": "The only real deterrent for batterers is the threat of serious jail time."); Robert L. Jackson, *Study Assails Mandatory Drug Crime Sentences*, L.A. TIMES, May 13, 1997, at A14, *available in* LEXIS, News Library, News Group File, All (reporting the remarks of Rep. Bill McCollum: "The principal value of mandatory minimum sentences is the certainty of punishment and the deterrent message that that sends.").

Deterrence arguments also draw incessant fire from academic theorists. Empirically, deterrence claims are speculative.[6] Conceptually, they are question-begging, because they ignore (or resolve peremptorily) the issue of what state of affairs the law should be trying to maximize.[7] Evaluatively, they are impoverished: we assess actions and laws for their meanings, individuals for their characters, emotions for the values they embody — all features of our moral experience for which the deterrence theory seems to make no allowance.[8]

Each of these criticisms, I believe, is correct; yet it also seems to me that they all completely miss the point. Consistent with Stephen Holmes's defense of classical liberalism, I want to suggest that the real significance of deterrence theory lies not in what it says but in what it stops us from saying. Just as the moral idiom of "self-interest" displaces an illiberal idiom that focuses on glory, so the rhetoric of deterrence displaces an alternative expressive idiom that produces incessant illiberal conflict over status.

Eruptions of controversy are a familiar, if somewhat puzzling, feature of American criminal law. Pivotal elections are decided on the basis of candidates' positions on capital punishment,[9] millions of dollars are spent by lobbying organizations to influence legislation on gun control,[10] state governors reverse ideological field to accommodate the angry demand that they grant clemency to women convicted of mur-

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[6] *See generally* NATIONAL RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 4–7 (Alfred Blumstein, Jacqueline Cohen & Daniel Nagin eds., 1978) (describing the inconclusive nature of data on deterrent effects); Franklin M. Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702, 730–35 (1980) (discussing practical constraints on econometric analysis of deterrence effects).

[7] *See* Alvin K. Klevorick, *On the Economic Theory of Crime*, *in* CRIMINAL JUSTICE: NOMOS XXVII 289, 292–94, 301–04 (J. Roland Pennock & John W. Chapman eds., 1985) (maintaining that the economic theory of deterrence fails to account for societal norms that define licit utility); *see also* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 471–88 (1997) (arguing that the conventional utilitarian conception of deterrence is defective because it neglects to consider how the departure from moral norms diminishes the willingness of citizens to obey the law).

[8] *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 350–57 (1996).

[9] *See, e.g.*, E.J. Dionne Jr., *Bush Is Elected by a 6–5 Margin with Solid G.O.P. Base in South; Democrats Hold Both Houses*, N.Y. TIMES, Nov. 9, 1988, at A1 (crediting George Bush's presidential victory in large part "to the power of the Vice President's advertising, which attacked . . . Governor[] [Michael Dukakis's] opposition to the death penalty"); Kevin Sack, *New York Voters End a Democratic Era*, N.Y. TIMES, Nov. 9, 1994, at A1 ("George Elmer Pataki, a lanky lawyer-legislator from the Hudson Valley who has promised to slash income taxes and restore the death penalty, was elected the 53d Governor of New York yesterday . . . .").

[10] *See* ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 105 (1995).

dering abusive mates,[11] and national politics becomes convulsed over flag-burning laws.[12] The intensity of the debate that these policies excite cannot convincingly be explained in terms of their behavioral consequences, which are patently negligible in most cases and exceedingly ambiguous in the rest.

Rather, these disputes are best understood, I will argue, as battles to control the *expressive capital* of the criminal law. They break out when positions on a criminal law issue are associated with the moral understandings of competing subcommunities — whether regional or racial, cultural or economic. Their resolution is often understood to signal whose stock is up and whose is down in the market for social status. Their permanence reflects the abiding illiberal ambition to see one's own distinctive conception of virtue authoritatively confirmed and one's cultural adversaries' officially repudiated.

Deterrence theory helps to cool these expressive disputes. Its disembodied idiom of costs and benefits elides the points of moral contention that motivate public positions on these disputed issues. Citizens of diverse commitments converge on the deterrence idiom to satisfy social norms against contentious public moralizing; public officials likewise converge on it to minimize opposition to their preferred policy outcomes. Ultimately, the deterrence idiom takes the political charge out of contentious issues and deflects expressive contention away from the criminal law. This condition of suppressed expressive contention persists until citizens are impertinently pushed to signal their motivating commitments on these issues by expressive zealots.

I have two objectives. One is to deepen our understanding of how legal discourse contributes to the maintenance of a liberal political order. It is a common theme of contemporary legal and political theory that liberalism depends on forms of "public reason" that mute moral contention.[13] Deterrence theory, I will show, performs exactly this

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[11] *See, e.g.*, Ray Long & Fran Spielman, *Some See Politics in Clemency Order*, CHI. SUN-TIMES, May 15, 1994, at 5 (reporting on controversial commutations granted by a Republican governor facing a female Democratic candidate in his reelection bid).

[12] *See, e.g.*, ROBERT JUSTIN GOLDSTEIN, BURNING THE FLAG: THE GREAT 1989–1990 AMERICAN FLAG DESECRATION CONTROVERSY (1996).

[13] JOHN RAWLS, *The Idea of Public Reason*, *in* POLITICAL LIBERALISM 212, 212 (1993); *see also* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 8–12 (1980) (arguing for constraints on "power talk" that are grounded in the idea that nobody can claim a privileged insight into the moral universe); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 52–53 (1996) (concluding that deliberative democracy requires participants to seek "fair terms of cooperation for their own sake"); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35–48 (1996) (arguing that agreements that are "incompletely theorized" promote liberal goals); David A. Strauss, Legal Argument and the Overlapping Consensus 4–5 (July 12, 1998) (unpublished manuscript, on file with the Harvard Law School Library) (proposing that legal institutions that command widespread allegiance enable liberal societies to function in the face of deep moral divisions).

function in a critical domain of American law. The contribution that deterrence makes to taming public discourse, moreover, complicates the prevailing accounts of what liberal "public reason" should be expected to look like.

My second objective is to expose the unappreciated complexity of the normative status of deterrence. The role that deterrence theory plays in staunching expressive conflict acquits it of the standard arguments against it, all of which ignore its contribution to sustaining liberal politics. Indeed, the conceptual and evaluative poverty of deterrence, along with its false empirical confidence, is exactly what gives this theory its liberal bracketing power. The impertinent debunking of deterrence always risks unleashing divisive public moralizing, a lesson that liberal critics of deterrence theory have largely failed to perceive.

At the same time, the role of deterrence in muting expressive conflict should feed a distinctive *antiliberal* anxiety. The aspirations of liberal public reason notwithstanding, contestable social meanings pervade our politics and law.[14] Not talking about these meanings in a public way doesn't render them inert; if anything, norms that discourage divisive public discourse extend the life of these meanings by making it harder for their critics to expose them and easier for their beneficiaries to disclaim their significance in the law. Deterrence is vulnerable to exactly that objection: by leaching the meaning out of criminal law, deterrence rhetoric extinguishes a powerful resource for reshaping the social norms that construct unjust systems of status and privilege.

My argument unfolds in three parts. In Part I, I discuss the dual function of theories of punishment as normative guides for action and as strategies for managing public discourse. Deterrence theory, I argue, is demonstrably inferior to expressive condemnation along the former dimension but a serious competitor of it along the latter.

Part II examines the influence of deterrence rhetoric on public debate over three important issues: capital punishment, gun control, and hate crimes. Although prominent on both sides of these disputes, deterrence arguments don't genuinely explain why most citizens hold the positions they do on any of them. What does are citizens' understandings of how these issues cohere with the more general moral commitments of the social groups that they favor and despise, and what particular resolutions of such issues would express about the status of these groups in American society. Citizens resort to deterrence rhetoric in response to norms, principles, and strategic interests that enjoin them to minimize conflict and expressions of disrespect in

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[14] *See generally* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) (describing the role of social meaning in reinforcing existing social arrangements).

their face-to-face interactions with those who harbor cultural commitments that differ from their own. None of these forces is especially stable, however, which is why deterrence détentes are prone to break down.

Finally, in Part III, I evaluate the secret ambition of deterrence. The power of deterrence to mute expressive conflict, I will try to show, supplies both the strongest argument *for* and the strongest argument *against* deterrence theorizing. There simply is no right answer — at least in the abstract — to the question whether deterrence theory furnishes a morally appropriate idiom for public discussion of criminal law.

I. THEORIES OF PUNISHMENT AND POLITICAL CONFLICT

Normative legal theories do more than justify particular legal doctrines. They also furnish vocabularies and concepts that determine *how* we talk to each other about what the law should be. The manner in which citizens routinely talk about contentious matters — whether they speak softly or raise their voices, use terms that connote respect or express contempt — influences how likely they are to reach agreement, and how easily they'll be able to get along with each other if they don't. Indeed, the vocabulary the law uses to frame an issue can determine whether citizens of diverse commitments even see anything to disagree about.[15]

We can thus evaluate theories of punishment both as normative guides for action and as strategies for managing the tone of public discourse. In this Part, I assess two prominent theories of punishment — expressive condemnation and deterrence — along both of these dimensions.

A. Expressive Condemnation

1. As Normative Theory. — The expressive theory of punishment is part of a more general expressive account of rationality.[16] According

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[15] *See* SUNSTEIN, *supra* note 13, at 35–44 (identifying and praising people's tendency to agree on the basic contours of principles while refusing to fill in the details); Strauss, *supra* note 13, at 21–22 (arguing that the legal culture's emphasis on technical forms of argumentation helps to shift the focus away from underlying moral disagreements, thereby promoting tolerance).

[16] For general accounts of expressive rationality, see ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 17–43 (1993) and Lessig, cited in note 14 above. *See also* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990) (arguing that rational choice theory must take greater account of the inseparability of rationality and social practices, institutions, and norms); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936 (1991) (criticizing modern public law thinking for focusing exclusively on the instrumental outcomes of policies while ignoring cultural consequences). For expressive theories of punishment, see JOEL FEINBERG, DOING & DESERVING:

to this account, we can't make sense of individual and group behavior without considering its social meaning. Social norms define how persons (or communities) who value particular goods — whether the welfare of other persons, their own honor or dignity, or the beauty of the natural environment — should behave. Against the background of these norms, actions and laws express attitudes toward these goods. Individuals take these social meanings into account when deciding what actions to take, as do communities when deciding what laws to enact.

The expressive theory of punishment says we can't identify criminal wrongdoing and punishment independently of *their* social meanings. Economic competition may impoverish a merchant every bit as much as theft. The reason that theft but not competition is viewed as *wrongful*, on this account,[17] is that against the background of social norms theft expresses disrespect for the injured party's moral worth whereas competition (at least ordinarily) does not. Military service and imprisonment may be equally destructive of a person's liberty; the reason that imprisonment but not conscription is regarded as *punishment* is that against the background of norms only imprisonment expresses society's moral condemnation.[18] The meanings of wrongdoing and punishment, moreover, are related: the condemning retort of punishment signals society's commitment to the values that the wrongdoer's act denies.

This account supplies a powerful tool for making sense of common intuitions about criminal law. The belief that wrongs are distinguished by their meanings, for example, helps to show why rape, which evinces profound contempt for a woman's agency, is seen as more reprehensible than an assault that imposes equivalent or greater physical injury.[19] The expectation that punishments should condemn, and not just regulate, explains why non-evocative sanctions such as fines are

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ESSAYS IN THE THEORY OF RESPONSIBILITY 95–118 (1970); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 370–76 (1981); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); and Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

[17] There are, of course, other accounts. *See, e.g.*, Posner, *supra* note 4, at 1195–96 (claiming that the law criminalizes behavior that bypasses an available market to effect a pure coercive transfer of wealth).

[18] *See* Hart, *supra* note 16, at 404–05 (identifying moral condemnation by the community as the sine qua non of criminal punishment).

[19] *Cf.* People v. Liberta, 474 N.E.2d 567, 574–75 (N.Y. 1984) (holding that the "marital rape exception" violates the Equal Protection Clause and rejecting the argument that ordinary assault prosecution is sufficient when a husband forces sex on his wife: "The fact that rape statutes exist . . . is a recognition that the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault . . . . 'Short of homicide, [rape] is the "ultimate violation of self."'" (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977))).

regarded as inappropriate substitutes for more evocative ones such as imprisonment.[20] The idea that punishment evidences societal values accounts for the complaint that the lenient treatment of certain offenses — such as domestic violence or hate crimes — reveals that certain persons just "don't count" in the eyes of the law.[21]

Moreover, the expressive theory gives us the power not only to explain but also to appraise criminal law. Voluntary manslaughter doctrine distinguishes among angry killers, mitigating the punishment of the cuckold, for example, but not that of the spurned suitor.[22] Such distinctions are intelligible insofar as we see a person's emotions as expressing valuations; they are normatively justified to the extent that we think that the law is accurately apportioning punishment based on the moral truth or falsity of the valuations that offenders' emotions express.[23] Sodomy laws, even when unenforced, express contempt for certain classes of citizens.[24] The injustice of this message supplies a much more urgent reason to oppose the persistence of these rarely enforced laws than does their supposed impingement on anyone's liberty to engage in particular sexual practices.

2. As Discourse Strategy. — So far, I've been assessing expressive condemnation as a normative theory of punishment; it's also possible to assess it as a strategy for managing public discourse. In this respect, the expressive theory is a recipe for contention. Punishment, the expressive theory tells us, conveys an authoritative schedule of moral values. Society, however, is marked by profound moral dissensus. Accordingly, to the extent that citizens see the positions that the law takes as adjudicating the claims of diverse moral views, we can expect the criminal law to be a site of conflict.

Indeed, we can expect such conflict to be intense by virtue of the connection between the expressive function of law and *status*. Individuals value status — in the form of approval, respect, and deference

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[20] *See* Kahan, *supra* note 16, at 617–24.

[21] *See, e.g.*, *Judge Draws Protests After Cutting Sentence of Gay Man's Killer*, N.Y. TIMES, Aug. 17, 1994, at A15 (quoting a gay activist's reaction to a sentence reduction for a man convicted of manslaughter for the intentional killing of a homosexual: it says "that it's O.K. to kill faggots"); Sheridan Lyons & Robert Guy Matthews, *Oust Judge Cahill, Protesters Urge*, BALTIMORE SUN, Oct. 22, 1994, at 1B (reporting the reaction of a female protester that an 18-month work-release sentence for a man who killed his wife after discovering her infidelity sends the message that "murder is no big deal — in fact, is a fitting punishment" for unfaithful wives).

[22] *See* Kahan & Nussbaum, *supra* note 8, at 308.

[23] *See id.* at 308–09.

[24] *See* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 233 (concluding that the rare enforcement of sodomy laws demonstrates that "our society exhibits little interest in implementing direct control over sexual activity in private bedrooms. . . . Rather, the purpose of sodomy statutes is to proclaim the message that society hates homosexuals, whoever that category happens to encompass and whatever those people happen to do in bed.").

— both as a means to an end and as an end itself. As a result, they are motivated to master the norms that signify that they merit such esteem. These norms, however, are always specific to particular subcommunities — whether religious sects, ethnic groups, geographic regions, or more loosely defined cultural styles — and are contested in society at large. Inevitably, then, the pursuit of status impels individuals to defend *their* subcommunities' norms, as well as the claims to esteem that these norms construct, against rival subcommunities' norms and claims.[25]

The expressive function of law is an important resource in this struggle. Because criminal law is widely understood to signify a society's authoritative moral values, culturally embattled groups can use it to demonstrate — to themselves and to others — that *their* norms are worthy and ascendant and their cultural adversaries' bankrupt and deviant.[26] "The courtroom decision or the legislative act often glorifies the values of one group and demeans those of another."[27] "The public support of one conception of morality at the expense of another enhances the prestige and self-esteem of the victors and degrades the culture of the losers."[28]

Expressive conflict of this sort becomes especially pronounced when traditional norms are contested. For it is in that circumstance that traditionally ascendant groups are most likely to value official confirmation of their status and traditionally dominated ones are most likely to see opportunities for establishing their claims to respect.[29] Law is thus an instrument for the redistribution of status as well as material wealth. "The struggle to control the symbolic actions of government is often as bitter and fateful as the struggle to control its tangible effects."[30]

Many of America's most fiercely contested criminal law issues have involved battles to control the law's expressive capital. Well into the middle of the nineteenth century, the nation was consumed by disputes over corporal punishment, which was perceived by its opponents and

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[25] *See* JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 13–24, 62–65, 172–75 (2d ed. 1986); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2326–31 (1997).

[26] *See generally* Balkin, *supra* note 25, at 2326 (discussing groups' struggle for prestige through minor, symbolic changes to statutes).

[27] Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54, 57 (1968).

[28] GUSFIELD, *supra* note 25, at 5.

[29] *See id.* at 17–18, 20, 177, 205–06; Balkin, *supra* note 25, at 2334–35. *See generally* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 402–03 (1997) (depicting legislation as a way of signaling consensus in the formation of norms).

[30] GUSFIELD, *supra* note 25, at 167; *see also* MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 5 (1964) (declaring that "[p]olitics is for most of us a passing parade of abstract symbols," a "series of pictures in the mind" that we "fear or cheer").

proponents alike as emblematic of contested forms of social hierarchy, including slavery.[31] Contentious votes in Congress on the use of corporal punishment in the navy were thus regarded as tests of the status and power of these competing sectional factions.[32]

No sooner had the corporal punishment controversy abated than the nation was fractured by the temperance debate, which was similarly expressive in nature. Temperance supporters tended to be nativist, rural, and overwhelmingly Protestant; for them, abstinence from drink connoted the virtues of self-reliance and discipline.[33] Temperance opponents were largely immigrant, urban, and Catholic; they celebrated commerce and leisure and chafed at the perceived regimentation and asceticism of agrarian norms.[34] Prohibition marked an attempt to shore up the norms that had underwritten the cultural preeminence of America's traditional rural elite.[35] Repeal marked a decisive defeat for the norms of that subcommunity,[36] although only on that particular battlefront.[37]

Expressive disagreements continue to be central to many contemporary criminal law disputes. The centuries-old rule affording mitigation to cuckolds who kill their unfaithful wives is now an object of intense controversy. The reason is not that the number of such killings is on the rise, but rather that the patriarchal norms that such rules express are on the decline.[38] Overthrowing the old rule is a way for those committed to contemporary feminist norms to display their strength.

Flag desecration is another example. Few individuals burn flags.[39] Legislation to punish such behavior generates intense controversy nonetheless because votes on such legislation are understood to be tests

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[31] *See generally* MYRA C. GLENN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA 55–57 (1984) (observing that condemnation of corporal punishment reflected shifting attitudes toward a variety of hierarchical relationships); HERBERT ARNOLD FALK, CORPORAL PUNISHMENT: A SOCIAL INTERPRETATION OF ITS THEORY AND PRACTICE IN THE SCHOOLS OF THE UNITED STATES 15, 108–09 (1941) (recognizing corporal punishment as distinctive of hierarchical societies).

[32] *See* GLENN, *supra* note 31, at 129–31 (detailing the political disagreements between northern and southern congressmen on naval flogging).

[33] *See* GUSFIELD, *supra* note 25, at 4.

[34] *See id.* at 4, 6–8.

[35] *See id.* at 8.

[36] *See id.*

[37] *See id.* at 11 (identifying success on issues including fluoridation, domestic communism, and school curricula in the struggle between the traditional rural cultural style and the modern urban style).

[38] *See* Kahan & Nussbaum, *supra* note 8, at 346–50.

[39] *See* GOLDSTEIN, *supra* note 12, at 381 (noting the "paucity of recent flag burnings").

of the national commitment to patriotism and of the status of those for whom patriotism is an unproblematic virtue.[40]

Of course, criminal law does not monopolize expressive conflict. According to Kristin Luker, abortion laws (both civil and criminal) spark controversy because they confer esteem on women who occupy traditional domestic roles and express contempt for those who inhabit modern professional ones.[41] Robert Ellickson traces the dispute over range-closure laws to the desire of western ranchers to erect a symbolic barrier to the erosion of their status.[42] Disputes over public monuments, Sanford Levinson has shown, reflect the rivalries spawned by multiculturalism.[43] Jack Balkin demonstrates how such rivalries affect interpretation of the Constitution.[44] But because criminal law is viewed as distinctively charged with vindication of moral norms, it is not surprising that it draws a disproportionate share of expressive controversy.

This relationship between the expressive theory and political conflict is not immutable, at least in theory. In a society unmarked by fundamental moral dissensus, the expressive function of criminal law might simply reinforce solidarity.[45] Moreover, even in a morally pluralistic society, it is possible to imagine the law expressing only those values on which there is "overlapping consensus,"[46] and thereby reinforcing liberal accommodation.

There's little reason to suppose, however, that such expressive harmony is realistically attainable in our society. Whether we choose to celebrate or lament it, pluralism is a permanent social fact.[47] Nor should we expect groups that hold discordant moral and cultural visions to renounce their aspirations to see their distinctive values confirmed by law. Indeed, if even a small minority of cultural zealots remain committed to using the law to project the ascendancy of their

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[40] *See id.* at 190–91, 369–70, 381–84, 407–10 (documenting the influence of veterans groups in flag desecration debates and the importance of flag-burning laws as a symbolic affirmation of patriotic values).

[41] *See* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 193–94 (1984).

[42] *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 116–18 (1991).

[43] *See, e.g.*, SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 23–25 (1998) (surveying some modern disputes over the names of public places).

[44] *See* Balkin, *supra* note 25, at 2316–20.

[45] This apparently was Durkheim's view, for example. *See* EMILE DURKHEIM, DIVISION OF LABOR IN SOCIETY 87–89, 103–06 (George Simpson trans., The MacMillan Co. 1933).

[46] RAWLS, *supra* note 13, at 133.

[47] *See id.* at 37 (describing moral pluralism as the "inevitable outcome of free human reason"); *see also* GUTMANN & THOMPSON, *supra* note 13, at 18–26 (canvassing sources of persistent moral disagreement, including interest, scarcity of resources, and incomplete understanding, as well as ultimate plurality of values).

norms, the less culturally ambitious majority will be goaded into expressive competition by way of self-defense. Thus, criminal law will furnish an irresistible target for public moralizing so long as citizens see criminal law issues in expressive terms.

B. Deterrence

1. As Normative Theory. — Whereas expressive theory focuses on meanings, deterrence theory focuses on consequences. According to deterrence theory, society should punish if, and to the extent that, doing so maximizes social welfare.[48] This directive generates a series of practical axioms: that the expected penalty must exceed the expected gain from the offense in order to deter it; that society should invest in punishment up to the point where the marginal cost of additional punishment equals the marginal benefit in averted crimes; that society should allocate punishment across crimes so as to discourage the substitution of more serious for less serious ones — and so forth.[49] Deterrence theorists typically assess the efficiency of a punishment for its contribution both to "general deterrence," which refers to the effect that punishing a particular offender has on the behavior of the population generally, and to "specific deterrence," which refers to the impact of a punishment on the offender's own behavior, a usage that brings the aim of incapacitation within the ambit of deterrence broadly understood.[50] The optimal punishment so derived might correspond to our perception of the form and degree of punishment necessary to counter the message expressed by a wrongful act and the emotional motivations that inspired it. But if it doesn't, then it is our naïve expressive sensibilities, not the prescription generated by deterrence theory, that must yield.[51]

The aspiration to be normative for expressive sensibilities, however, is one that deterrence theory can never genuinely realize. The reason is that deterrence theory presupposes an external theory of value, which we are always free to derive from our expressive sensibilities.[52]

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[48] *See* BENTHAM, *supra* note 4, at 170.

[49] *See generally id.*, at 170–73, 179–84 (presenting Bentham's principles for shaping the criminal law); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 223–231 (4th ed. 1992) (using an economic model to evaluate criminal punishment); Becker, *supra* note 4, at 183–84 (same).

[50] *See* Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 949–54 (1966).

[51] *See, e.g.*, BENTHAM, *supra* note 4, at 126–35 (asserting that whether good or bad, the moral quality of an individual's motivations or character dispositions should not affect punishment independently of the individual's propensity to frustrate the maximization of social welfare).

[52] *See generally* ANDERSON, *supra* note 16, at 29–30 (making this point about consequentialist theories generally).

Imagine two intentional killers: a woman who, in anger, kills the sexual abuser of her young child;[53] and a man who, out of humiliation, kills his wife for seeking a divorce.[54] One thing that deterrence theory tells us is that to deter a crime of a particular sort the expected penalty — that is, the severity of the punishment discounted by the probability that it will be imposed — must exceed the gain to the offender.[55] Assume that the angry mother (and others in her situation) and the dishonored husband (and others in his) get roughly the same psychic returns from their killings, and that they are equally likely to be convicted when society commits comparable resources to detecting and prosecuting their offenses. Does deterrence theory imply under those circumstances that the two killers should receive the same punishment?

The answer is, "Not necessarily." To identify the optimal punishments, we must also determine what value society gets from deterring these types of killings.[56] Society might attach relatively little value to the lives of child molesters: private acts of retaliation against them might make members of society happy and help to deter further child molestation. If so, then the social benefit of deterring deadly violence against child molesters might be small or even negative. The social benefit of deterring deadly attacks on women who want divorces, in contrast, might be great: members of society might attach a relatively high value to the innocent victims of such killings and experience intense indignation in response to the killers' patriarchal motivations; they might worry, too, that such killings will intimidate women seeking to escape abusive marriages. If so, then it might make sense, from a consequentialist or economic standpoint, for society to devote more of its limited punishment resources to punishing the dishonored husband, because the social benefit of deterring his type of killing would be greater than the benefit of deterring the angry mother's type.

Of course, matters could be otherwise. Maybe members of society are even less disturbed by the killing of disobedient wives than they are by the killing of child molesters, in which case the deterrence theory might justify punishing the angry mother more severely. Or

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[53] *See, e.g.*, People v. Shields, 575 N.E.2d 538, 546 (Ill. 1991) (finding victim's admission that he had raped defendant's daughter and statement that he would do so again to be one of several factors that constituted sufficient provocation to mitigate murder to manslaughter).

[54] *See, e.g.*, State v. Klimas, 288 N.W.2d 157, 165–67 (Wis. Ct. App. 1979) (holding that the defendant's mental state during a period of marital breakdown in which his wife had an affair and sought a divorce was not grounds for mitigating intentional homicide from murder to manslaughter).

[55] *See* BENTHAM, *supra* note 4, at 179, 184; Becker, *supra* note 4, at 183–84.

[56] *See generally* BENTHAM, *supra* note 4, at 172 (Punishment is unjustified "[w]here it is *unprofitable*, or too *expensive*: where the mischief it would produce would be greater than what it prevented.").

maybe they disvalue these killings equally, in which case the punishments should in fact be equal.

The point, however, is that from a deterrence point of view, the optimal level of punishment for these, and for all other offenses, depends critically on how bad we perceive them to be. Unless we know whether and how much we disvalue a particular species of conduct, we can't determine whether the cost of deterring any particular amount of it is worth paying. Nor can we make a rational judgment about how to allocate punishment resources between crimes that impose different levels of harm.[57]

Deterrence, in short, presupposes a consequentialist theory of value. Yet nothing intrinsic to the deterrence theory supplies one.

Our expressive sensibilities, in contrast, do. We can judge the relative culpability of the dishonored husband and the angry mother by considering our perception of whether the valuations their actions and motivations express (the importance of one's sovereignty in the household in the one case; the importance of the well-being of one's child in the other) are morally reasonable or not. If we decide to construct our consequentialist theory of value in this way, deterrence theory, at least, is powerless to object.[58]

This conclusion by itself, however, doesn't establish that deterrence theory lacks critical force relative to the expressive theory. A "pure" expressive approach would have us set punishments based solely and directly on our perceptions of what different species of wrongdoing mean. The deterrence theory, even if informed by an expressive theory of value, suggests that we should be prepared to qualify our expressive appraisals in light of factual considerations relating to the cost-effectiveness of punishment. Suppose we discover that it is in fact substantially harder to obtain convictions of angry mothers than dishonored husbands; or that angry mothers on average derive substantially more psychic pleasure from killing; or that the "demand" for deadly retaliation against independent wives is inelastic relative to the expected punishment for — or the "price" of — such killings. These considerations could imply that it would be cost-effective to punish the angry mother more severely than the dishonored husband even if we conclude, based on expressive considerations, that revenge killings of child molesters are less harmful to society than are honor-inspired killings of independent women.

But this is the point at which the empirically speculative nature of deterrence becomes unbearable. We will rarely have reliable informa-

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[57] *See generally id.* at 181 ("The greater the mischief of the offence, the greater is the expense, which it may be worth while to be at, in the way of punishment.").

[58] *See* Kahan & Nussbaum, *supra* note 8, at 354–55.

tion on the probability of conviction, average psychic gains, elasticity of demand, and like variables, the measurement of which depends on seemingly intractable empirical problems. Our confidence in the information we do have on these facts will nearly always be less than the confidence we have in the relative expressive reprehensibility of diverse wrongs, a matter that each of us is in a position to determine through personal introspection.[59] Cognitive psychology tells us that individuals tend to resolve uncertainty about disputed empirical matters — from the safety of nuclear power to the deterrent efficacy of the death penalty — consistently with their prior evaluative judgments.[60] Consequently, even if we commit ourselves to a deterrence framework, the raw expressive judgments that inform our consequentialist theory of value are much more likely to dominate the cost-benefit axioms of deterrence than vice versa.

Indeed, even if we could attain perfect confidence in the relevant empirical variables, deterrence theory wouldn't dictate that we put cost-effectiveness ahead of our raw expressive judgments. The reason is that, consequentially or economically speaking, the satisfaction of those judgments creates a species of social wealth. Within a consequentialist or economic framework, we are entitled to trade off this species of wealth against the species of wealth created by efficient behavioral incentives. If society decided for expressive reasons to devote a greater share of its limited punishment resources to dishonored husbands notwithstanding evidence that angry mothers are more responsive to threatened punishments, that decision would reflect the judgment that the utility of indulging its members' expressive sensibilities more than offsets the disutility associated with creating suboptimal behavioral incentives. To say that such a trade-off offends *deterrence theory* would reveal an arbitrary (or at least undefended) exclusion of expressive utility from the social welfare function.[61]

2. As Discourse Strategy. — I have been arguing that deterrence is inferior to expressive condemnation as a normative theory of punishment. But how does it rate as a strategy for managing public discourse? Through a particular example, I will demonstrate that the de-

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[59] This isn't to say that each of us will agree with everyone else on these issues, but only that each of us is likely to have better access to our own values than to reliable information on the empirical variables upon which the deterrence theory depends.

[60] *See* JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 239, 242–43 (1997) (death penalty); Paul Slovic, Baruch Fischhoff & Sarah Lichstenstein, *Facts Versus Fears: Understanding Perceived Risk*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463, 485 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (nuclear power).

[61] *See* Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 615–16 (1998); Kenworthey Bilz, Populist Wealth in Legal Economic Analysis (Oct. 12, 1998) (unpublished manuscript, on file with the Harvard Law School Library).

fects of deterrence as a normative theory don't detract at all from its function in guiding public discussion of criminal law issues, and may in fact *enhance* its power to discharge the potential for conflict associated with expressive theory.

Most American jurisdictions follow the rule that a person confronted with a deadly attack in public may repel it with deadly force even if she could have safely fled.[62] Consider two justifications for this doctrine, the first articulated by the Missouri Supreme Court in 1902,[63] and the second by Justice Oliver Wendell Holmes, writing for the U.S. Supreme Court, in the 1921 decision of *Brown v. United States*:[64]

> [1] It is true, human life is sacred, but so is human liberty. One is as dear in the eye of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist, supposing for a moment that such an anomaly to be possible. In other words, the wrongful and violent act of one man shall not abolish or even temporarily suspend the lawful and constitutional right of his neighbor. And this idea of the nonnecessity of retreating from any locality where one has the right to be is growing in favor, as all doctrines based upon sound reason inevitably will .... [No] man, because he is the physical inferior of another, from whatever cause such inferiority may arise, is, because of such inferiority, bound to submit to a public horsewhipping. We hold it a necessary self-defense to resist, resent, and prevent such humiliating indignity, — such a violation of the sacredness of one's person, — and that, if nature has not provided the means for such resistance, art may; in short, a weapon may be used to effect the unavoidable necessity.[65]
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> [2] The law has grown, and even if historical mistakes have contributed to its growth, it has tended in the direction of rules consistent with human nature .... Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore, in this court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety, or to disable his assailant rather than to kill him.[66]

Although they get to the same place, these two justifications for the "no retreat" rule travel along strikingly different normative paths. The position of the Missouri Supreme Court is unapologetically expressive. The man who stands his ground and fights has done nothing wrong because his "resent[ment]" reveals that he appropriately attaches more value to his "rights," "liberty," and "sacredness of . . . person" than he does to the life of a "wrongful" aggressor. Indeed, other courts of the day defended the same result on the ground that "a true man" — one

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[62] *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.7(f), at 460–61 (2d ed. 1986).

[63] *See* State v. Bartlett, 71 S.W. 148, 151–52 (Mo. 1902).

[64] 256 U.S. 335 (1921).

[65] *Bartlett*, 71 S.W. at 151–52.

[66] *Brown*, 256 U.S. at 343.

whose character and values are straight rather than warped — cannot be expected "to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."[67] Extending the privilege to use deadly force to repel such an attack is the appropriate way for the law to acknowledge the courage of the defender's decision to stand firm; indeed, punishing him for killing the aggressor would send the "anomal[ous]" message that the law values the sanctity of "human life" but not the goods — from "liberty" to "rights" to "dignity" to honor — that make life sacred.

Justice Holmes's argument, in contrast, is a concession to futility. A deadly attack triggers an unthinking impulse to fight; it disregards "human nature" to believe that the threat of subsequent criminal punishment will induce "detached reflection" on the prospects for safe retreat. Although there is certainly more than one way to interpret Holmes's argument, Holmes, who saw "[p]revention" as the "only universal purpose of punishment,"[68] can plausibly be read (and has plausibly been read) as making a deterrence argument. Because punishment cannot be expected to influence behavior in such circumstances, it would be a waste to punish a man for not taking flight in the face of deadly aggression.[69]

As an exercise in normative justification, Holmes's account is manifestly less satisfying than the Missouri Supreme Court's. For one thing, Holmes's defense of the "no retreat" doctrine displays the characteristic empirical speculativeness of deterrence arguments. Why so quickly assume that "human nature" makes it impossible for a person confronted with aggression to hear a legal directive to retreat? Physically threatened people run in fear all the time; adding the prospect of being killed down the road by the state to the prospect of being killed instantly by the attacker should only make running in fear all the more likely.

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67 Erwin v. State, 29 Ohio St. 186, 199–200 (1876).

68 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 46 (Dover 1991) (1881).

69 *See* Richard Singer, *The Resurgence of Mens Rea: II — Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 501 (1987); *see also* Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 498 n.98 (1997) (reading Holmes as arguing that punishing a reasonable defender will overdeter legitimate self-defense because of a defender's inability to assess the probability of a safe retreat). Another reading of the argument would be that because the threatened individual is incapable of detached reflection, he cannot be said to be acting "freely" when he chooses to kill rather than run and thus cannot be blamed. This voluntarist reading, however, would be inconsistent with Holmes's philosophical skepticism about "free will" and his related opposition to treating subjective blameworthiness as relevant to liability in criminal law and elsewhere. *See* HOLMES, *supra* note 68, at 49–51; G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 143–44, 161–62, 165 (1993).

Even assuming that certain people won't run no matter what, it still might make sense to punish *all* non-retreaters for the sake of general deterrence. The prospect of a defense for the person who stands his ground and fights might induce some premeditating killers to stage deadly attacks or to provoke them; steadfastly denying a defense would discourage this form of strategic behavior and in fact encourage individuals to steer clear of situations in which they might be confronted with a deadly attack that triggers their supposedly unreasoning fighting impulses. Of course, denying a defense to the person who stands his ground might encourage aggressors to initiate more deadly confrontations. But if our goal is to maximize lives, it's just not clear which of these empirical effects we should expect to dominate.[70]

These empirical issues are much less of a problem for the Missouri Supreme Court, because it doesn't see maximizing lives per se as the goal. Life has sacred value only because liberty, dignity, and honor do; legally obliging a person either to "retreat[] from [a] locality where [he] has the right to be"[71] or "to submit to a public horsewhipping"[72] when he could effectively repel the attack would express contempt for these values. If we accept this account, then it doesn't much matter whether the "true man" doctrine leads to the unnecessary taking of aggressors' lives, for the virtue of the "true men" would be worth much more than the lives of wrongful aggressors.

We needn't, of course, accept the Missouri Supreme Court's account of what's valuable. Less than a year after the Missouri Supreme Court issued its decision, Joseph Beale argued that the norms that the "true man" doctrine expresses ought to be condemned, not endorsed:

> The ideal of [the] courts [that have propounded the "true man" doctrine] is found in the ethics of the duelist, the German officer, and the buccaneer. . . . The feeling at the bottom of the [rule] is one beyond all law; it is the feeling which is responsible for the duel, for war, for lynching; the feeling which leads a jury to acquit the slayer of his wife's paramour; the feeling which would compel a true man to kill the ravisher of his daughter. We have outlived dueling, and we deprecate war and lynching; but it is only because the advance of civilization and culture has led us to control our feelings by our will.[73]

For Beale, it is the man who endures the embarrassment of retreat to avoid the shedding of blood whose values are true:

> A *really* honorable man, a man of *truly* refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he

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[70] *See* Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1217–19 (1994).

[71] State v. Bartlett, 71 S.W. 148, 151 (Mo. 1902).

[72] *Id.* at 154.

[73] Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 577, 581 (1903).

> would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten times more distasteful to kill.[74]

If we accept Beale's account, then the duty to retreat is appropriate because it tells us what good persons really care about. If we attach as much value to having the law get that message across as Beale does, then we have a reason to impose a duty to retreat even if Holmes is right in his wobbly empirical guess that doing so won't change the behavior of individuals who are attacked in the public square.

Beale and the Missouri Supreme Court have thus clearly joined issue on the question of what state of affairs the law should be trying to promote, whereas Holmes, displaying another characteristic vice of deterrence theorists, has begged that question. It also won't do to assert that, from an optimal deterrence perspective, the proper rule on retreat just *is* the one that maximizes lives saved regardless of what that rule expresses about norms and character.[75] For that would amount to an indefensible exclusion of something people value — social meaning — from the social welfare calculus.

In sum, Holmes's defense of the "no retreat" rule fails in all the ways typical of deterrence arguments relative to their expressive alternatives. Nevertheless, this assessment of Holmes's position is incomplete. Just as the antiliberal critique of "self-interest" misunderstands the ambition of the classic liberals to displace the contentious moral idiom of glory, so the expressive critique of Holmes overlooks how his use of the deterrence idiom predictably calmed illiberal jockeying over the content of America's public morality.

From the end of the Civil War well into the early part of this century, the duty to retreat was an unsettled and fiercely contested issue in American criminal law. Like the disputes over corporal punishment and temperance, the battle over the "true man" doctrine was one for the control of the law's expressive capital. The judicial proponents of the "true man" doctrine — which constituted a sharp break with English common law — were located in the South and West.[76] By virtue of the slave culture in the former and the frontier culture in the latter, both of these regions had inherited rich systems of honor that put a premium on physical displays of courage and on violent reactions to

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[74] *Id.* at 581 (emphasis added).

[75] Indeed, it is unrealistic to assess a legal doctrine's behavioral incentives apart from its expressive content, because the norms that the law expresses are likely to be internalized by members of society generally and thus to affect their behavior. *See* Kahan & Nussbaum, *supra* note 8, at 355–57.

[76] *See, e.g.*, La Rue v. State, 41 S.W. 53, 54 (Ark. 1897); People v. Lewis, 48 P. 1088, 1089–90 (Cal. 1897); Ragland v. State, 36 S.E. 682, 684–85 (Ga. 1900); McCall v. State, 29 So. 1003 (Miss. 1901).

slights.[77] Opponents of the "true man" doctrine, such as Beale, tended to come from the East, which viewed traditional honor norms with alarm and contempt in part because of their historical association with slavery.[78] Western judges derided the English common law requirement that a man "retreat to the wall" before using deadly force as contrary to "the tendency of the American mind";[79] in fact, the dispute over the "true man" doctrine was about *whose* minds — those of the aristocratic South and the ruggedly individualistic West, on the one hand, or those of the more egalitarian and cosmopolitan East, on the other — would be proclaimed *genuinely* "American" by the law.

Against this background, Holmes's use of the deterrence idiom can be understood as a gesture of expressive neutrality. Reformulated in Holmes's language, the "no retreat" rule is transformed from a story about the righteous "resent[ment]" of the "true man" into one about the paralyzing fear of the terrified man. Its adoption marks not the "inevitable" triumph of "sound reason" in the law, but a mature concession to the unreasoning necessity of "human nature." Without expressly mentioning the southern and western decisions that had initiated the rift with the English common law, Holmes implies that *their* morally aggressive defenses of honor and freedom can be seen as "historical mistakes" that happily "contributed to [the law's] growth" nevertheless.[80] Having gotten what they wanted, the southern and western proponents of the "no retreat" rule were in no position to complain. But having been spared an official endorsement of the honor norms they abhorred, the eastern opponents had little to complain about either.

If Holmes's goal was to short-circuit the no-retreat conflict, then the empirically speculative and morally question-begging nature of deterrence made that theory singularly appropriate. Stated at a high level of abstraction, the idea that the law should promote security but avoid futility is unlikely to offend any group's deeply held values. To be sure, the empirical premise of Holmes's futility argument is open to dispute — but if that narrow empirical issue is *all* the "no retreat" dispute is really about, why become agitated about it? Precisely because deterrence fails to address the most important value-laden issues that surround the "no retreat" rule, Holmes's authoritative reconceptualiza-

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[77] *See generally* RICHARD E. NISBETT & DOV COHEN, CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH (1996) (discussing systems of honor in the South).

[78] *See, e.g.*, State v. Brown, 53 A. 354, 356 (Del. 1902); People v. Constantino, 47 N.E. 37, 39 (N.Y. 1897); Commonwealth v. Drum, 58 Pa. 9, 20–22 (1868); State v. Roberts, 21 A. 424, 425 (Vt. 1891); RICHARD MAXWELL BROWN, NO DUTY TO RETREAT 24–28 (1991).

[79] Runyan v. State, 57 Ind. 80, 84 (1877).

[80] Brown v. United States, 256 U.S. 335, 343 (1921).

tion of the rule strips it of the evocative vitality that it needs to underwrite expressive conflict.

This account of Holmes's objectives can be supported by extrinsic evidence. In a letter to his long-time confidant Harold Laski, Holmes disclosed more candidly his motives for upholding the "no retreat" rule. Invoking a conception of "human nature" more cognizant of socialization and less steeped in mechanistic necessity than the one in his *Brown* opinion, Holmes wrote: "[L]aw must consider human nature and make some allowances for the fighting instinct at critical moments. In Texas where this thing happened, . . . it is well settled, as you can imagine, that a man is not born to run away . . . ."[81]

This approving nod in the direction of southern and western honor norms resonated with Holmes's own pride in having been part of a Civil War regiment that "never ran."[82] In his famous 1884 Memorial Day Address, Holmes spoke not of the thoughtless impulses of those who survived hand-to-hand combat, but rather of the "swift and cunning thinking on which once hung life or freedom."[83] Acknowledging how much less passionately he defended the "no retreat" rule in *Brown*, Holmes tells Laski, "I don't say all I think in the opinion."[84]

Holmes's decision *not* to say all that he thought about the "true man" doctrine stemmed from his more basic jurisprudential commitments. Holmes entertained a hard-edged belief in the permanence of social and moral conflict.[85] Nevertheless, he viewed the judicial system as a decidedly less desirable location for such conflict than the legislative arena, where unrestrained and cacophonous interaction of competing interests was far more likely to yield stable compromise. Holmes's aspiration to channel conflict away from the judicial process accounts for his famous project to demoralize the language of common law tort standards.[86] Deterrence theory, which is more important for

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81 Holmes, *supra* note 1, at 262.

82 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841–70, at 126 (1957) (quoting Holmes); *see* WHITE, *supra* note 69, at 477 ("Holmes emerged from the Civil War with what became, in the course of his life, an anachronistic, tribalist perspective, glorifying war and its codes, such as duty, honor, chivalry, self-abnegation."); *see also* Albert W. Alschuler, *The Descending Trail: Holmes'* Path of the Law *One Hundred Years Later*, 49 FLA. L. REV. 353, 358 (1997) (describing Holmes as a "Nietzschean" who "venerated power, conflict, violence, death, and survival" (emphasis omitted)).

83 Oliver Wendell Holmes, Memorial Day, Address Before John Sedgwick Post No. 4, Grand Army of the Republic (May 30, 1884), *in* THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 11 (Max Lerner ed., 1946).

84 Holmes, *supra* note 1, at 262.

85 *See generally* Grant Gilmore, *Some Reflections on Oliver Wendell Holmes, Jr.*, 2 GREEN BAG 2d 379, 385 (1999) ("Holmes had arrived at a tragic view of the human condition. In the life of an individual as in the life of a society there is nothing but force, violence, and a never-ending struggle for bare survival.").

86 *See* Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES, at xi (Richard A. Posner ed., 1992) (identifying the "severance of law from morals" as a "basic element" of Holmes's

what it does *not* say than for what it does, carries this philosophy forward into the world of criminal law.

Since Holmes recast the "true man" doctrine, public controversy over the duty to retreat has largely disappeared. It's difficult to say, of course, whether and to what extent the abatement of the "true man" controversy is due to Holmes's reconceptualization of the rule. Nevertheless, it should be clear that this is one of the questions that we ought to ask if we are trying to evaluate Holmes's argument.

Because deterrence theory can be seen as a strategy for managing public discourse, it misses the point to evaluate arguments such as Holmes's solely as normative justifications. We should consider, in addition, what function such arguments play in moderating expressive conflict, how effective they are in performing this function, and whether their aspiration to denude criminal law of its social meaning is itself a worthy objective. These are the issues that guide the remainder of this Article.

II. THE SECRET AMBITION REVEALED

Just as deterrence theory enabled Justice Holmes not to say all that he thought about the "true man" doctrine, so deterrence enables the rest of us not to say all we think about a host of controversial issues in criminal law. Deterrence arguments play a large role in public debate. The prominence deterrence enjoys, however, is misleading. Even if they honestly believe the deterrence arguments they are making, the vast majority of citizens and officials don't believe such arguments are essential to their positions on highly charged issues. They emphasize deterrence arguments nevertheless only to satisfy a social norm against the open expression of contentious moral judgments or to avoid exciting expressively motivated opposition to their own policy positions. This rhetorical self-restraint can and often does break down, but so long as it persists it functions to dissipate expressive conflict. I will support this argument by analyzing public opinion on three disputed issues: capital punishment, gun control, and hate crimes.[87]

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jurisprudence). *See generally* WHITE, *supra* note 69, at 290–91, 324, 328, 391–92 (discussing Holmes's views and his use of political economy principles rather than rights in his opinions).

[87] As should be clear, I do *not* mean to claim that deterrence arguments never influence *anyone* on *any* issue. There may be some forms of behavior — perhaps speeding or tax evasion — on which moral and cultural disagreement is minimal (if not nonexistent) and on which instrumental issues loom much larger. Even with respect to some culturally charged issues, some individuals may honestly believe that the deterrent impact of a particular law or policy is all that matters — although even when they honestly believe that, it is likely that their perceptions of what is instrumentally effective are being decisively if imperceptibly shaped by their expressive values. *See*

A. Capital Punishment

Following two decades of intense political contention, New York in 1995 became the latest state to restore the death penalty in the (receding) wake of *Furman v. Georgia*.[88] Only days before the legislature passed the death penalty bill, a *New York Times* poll had shown that New Yorkers believed, by a margin of fifty-seven percent to forty percent, that capital punishment would deter murders.[89] In signing the new law, Governor George Pataki, who had emerged from obscurity to dethrone prominent incumbent Mario Cuomo by attacking Cuomo's opposition to capital punishment, stated:

> The citizens of New York State have spoken loudly and clearly in their call for justice for those who commit the most serious of crimes by depriving other citizens of their very lives. *The citizens of New York State are convinced the death penalty will deter these vicious crimes and I, as their Governor, agree.* The legislation I approve today will be the most effective of its kind in the nation. It is balanced to safeguard defendants' rights while ensuring that our state has a fully credible and enforceable death penalty statute. *This law significantly buttresses the twin pillars of an effective criminal justice system — deterrence and true justice for those convicted of violent crimes.*[90]

New Yorkers and their Governor are not the only ones who purport to give primary consideration to deterrence when evaluating the death penalty. Polls have consistently shown that most Americans are likely to put deterrent efficacy or inefficacy first when asked to rank their motives for supporting or opposing the death penalty.[91]

To anyone who has reflected on the death penalty debate, however, this feature of public opinion ought to seem puzzling. No issue of criminal justice has been subjected to greater empirical study than whether the death penalty is an effective deterrent, and on none is the evidence more ambiguous and conflicting.[92] It is genuinely astonish-

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supra p. 425. But as I will try to show, there is ample evidence that deterrence has little impact on what most individuals believe about highly charged issues.

[88] 408 U.S. 238 (1972). The state legislature had enacted a death penalty bill every year for 18 years, but every bill had been vetoed by Democratic Governors Hugh Carey and Mario Cuomo. *See What's News — World-Wide*, WALL ST. J., Mar. 8, 1995, at A1.

[89] *See* Tom Kuntz, *Killings, Legal and Otherwise, Around the U.S.*, N.Y. TIMES, Dec. 4, 1994, § 4, at 3.

[90] William C. Donnino, Practice Commentary, N.Y. PENAL LAW § 125.27 (McKinney 1998) (quoting memorandum of New York Governor George Pataki on the death penalty) (emphasis added).

[91] *See, e.g.*, Dov Cohen, *Law, Social Policy, and Violence: The Impact of Regional Cultures*, 70 J. PERSONALITY & SOC. PSYCHOL. 961, 970 (1996); Ellsworth & Ross, *supra* note 5, at 145–49; *see also* Tom R. Tyler & Renee Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 LAW & SOC'Y REV. 21, 24–25 (1982).

[92] *See generally* DAVID LESTER, THE DEATH PENALTY: ISSUES AND ANSWERS 83–109 (2d ed. 1998); Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for*

ing, then, that *only three percent* of the respondents in a poll such as the one conducted in New York claim to be uncertain when asked whether the death penalty deters.

What's more, only someone who is morally obtuse could fail to perceive how charged the issue of capital punishment is with fundamental questions of value. Is there any satisfactory public gesture *other than* the death penalty for reaffirming the sanctity of the life of a murder victim? But doesn't taking the life of the murderer itself demean the sanctity of life? Even if the death penalty is just in the abstract, doesn't the racially disparate administration of it in practice — an empirical issue on which there is relatively little doubt[93] — make capital punishment unacceptable? Depending on one's view on these and many other issues, one could easily come out for or against the death penalty irrespective of its deterrent impact, which is bound to be small relative to life imprisonment without parole. So *why* do citizens put deterrence first when they are deciding whether they are for or against the death penalty?

The answer is, *they don't*. The story of what citizens believe about the death penalty and why is much more complicated than their simple profession of deterrence claims suggests.

1. Deterrence Doesn't Matter. — There is ample evidence that deterrence doesn't really have the decisive significance that individuals say that it has in shaping their opinions on the death penalty. For example, pollsters often ask whether respondents would change their view if they were shown conclusive evidence that the death penalty either does or does not deter. The vast majority of respondents, both for and against the death penalty, indicate that they would not.[94] In other words, even when individuals say that deterrence is the most important consideration, it turns out that what they believe about deterrence is neither necessary nor sufficient to explain their opinion about the appropriateness of the death penalty.

Less direct but equally compelling sources of evidence point in the same direction. The value that individuals attach to deterring crime presumably reflects how serious they take crime to be. There is no significant correlation, however, between support for the death penalty

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Murder? An Examination of Social Science Research, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 1998).

[93] *See, e.g.*, DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY (1990) (discussing the racially disparate impact of the death penalty).

[94] *See* Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 27, 32 (1994); Tyler & Weber, *supra* note 91, at 26.

and fear of crime.[95] To be sure, national support for the death penalty began to climb in the late 1960s — from a low of forty-two percent in 1966 to some seventy-five percent by the late 1980s — at the same time that homicide rates began to rise significantly.[96] But these high levels of support have persisted as homicide rates have declined.[97] Moreover, professed belief in the deterrent efficacy of the death penalty (while well over fifty percent) did not rise as steadily as support for the death penalty itself did throughout the 1970s.[98] In the main, individuals' assessments of the death penalty clearly do not derive from their beliefs about deterrence.

Indeed, it seems more likely that individuals' beliefs in deterrence derive from their independent evaluative assessments of the death penalty. To avoid dissonance, individuals tend to resolve factual uncertainty consistently with their existing convictions.[99] Experimental work shows that this is exactly what happens when individuals assess the deterrent effect of the death penalty. When asked to evaluate conflicting empirical studies, subjects credit those that confirm their prior beliefs and dismiss those that conflict with them.[100]

Finally, the reluctance of death penalty supporters to make one species of deterrence argument casts doubt on the strength of their commitment to the rest. In its conventional economic or utilitarian form, deterrence theory favors not the most effective punishment per se, but the most *cost*-effective one. It costs a lot less to pass a fatal surge of electricity through a person's body or to inject a lethal dose of poison into his veins than it does to house him for decades in a prison. Thus, even if death penalty abolitionists are correct that life imprisonment without parole is an equally severe disincentive to murder, deterrence theory could be used to justify capital punishment as the most *cost-effective* disincentive. Yet most proponents of deterrence refuse to make this cost-effectiveness argument.[101]

In truth, once the multiple layers of judicial review for death sentences are taken into account, it costs more to execute an offender than to imprison him for life.[102] But most members of the public don't re-

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95 *See* Dennis R. Longmire, *Americans' Attitudes About the Ultimate Weapon: Capital Punishment*, *in* AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 93, 95–96 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996).

96 *See* Ellsworth & Gross, *supra* note 94, at 40, 41 fig.4.

97 *See id.* at 42; Samuel R. Gross, *Update: American Public Opinion on the Death Penalty — It's Getting Personal*, 83 CORNELL L. REV. 1448, 1449 (1998).

98 *See* Ellsworth & Gross, *supra* note 94, at 27.

99 *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 271 (1957).

100 *See* ROBERTS & STALANS, *supra* note 60, at 239, 242.

101 *See* Ellsworth & Gross, *supra* note 94, at 29–30.

102 *See, e.g.*, PHILIP COOK & DONNA SLAWSON, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 98 (1993) (finding that the extra cost per execution of prosecuting a case capitally is over $2.16 million).

alize this.[103] Moreover, Congress has now drastically streamlined (that is, truncated) federal habeas corpus procedures.[104] In the years of contentious debate that led up to these reforms, supporters criticized the existing procedures as visiting unjustified burdens on the states, but *didn't* argue that reducing these costs would make execution a more "efficient" penalty.[105] Not only does public support of the death penalty depend on some value other than deterrence, but that value, it seems, would be demeaned were the death penalty to be defended in the naked cost-effectiveness terms that are distinctive of deterrence theory.[106]

2. Expressive Judgments Do Matter. — Deterrence judgments don't explain the death penalty debate; expressive ones do. The death penalty debate has all the trappings of a battle for the law's expressive capital. Individuals hold the positions that they do on the death penalty because of what those positions signify about the norms of competing subcommunities. Adopting one position or another is a way for individuals to sharpen their own senses of group allegiance and to signal those allegiances to others; thus, individuals "do not so much form opinions [on the death penalty] as choose sides."[107] The death penalty issue enjoys the prominence that it does in contemporary politics because its resolution signifies the relative social status of the groups whose norms are at stake. Whether or not they affect the behavior of criminals, death penalty laws "confer[] prestige on the law-abiding" population,[108] or at least on that segment of it that sees its status as bound up with the messages that the death penalty projects.

(a) Expressive Attitudes. — Individual opinions on the death penalty correlate with membership in various groups. All else equal, support for the death penalty is more prevalent among whites than blacks;[109] among men than women;[110] among rich than poor;[111] among

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103 *See* ROBERTS & STALANS, *supra* note 60, at 238.

104 *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217–26 (1996).

105 *See, e.g.*, H.R. REP. NO. 104-23, at 9–11 (1995); 32 WEEKLY COMP. PRES. DOC. 719 (April 24, 1996).

106 *See* LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 149 (1996) (stating that "cost-benefit" rhetoric "gut[s] the moral core of" the retentionist position).

107 Ellsworth & Gross, *supra* note 94, at 23; *see* Gross, *supra* note 97, at 1452 ("For most Americans, a position on capital punishment is an aspect of self-identification. We say, 'I'm for the death penalty,' the same way we say, 'I'm a Republican,' or 'I'm a Red Sox fan.'").

108 Barbara Ann Stolz, *Congress and Capital Punishment: An Exercise in Symbolic Politics*, 5 LAW & POL'Y Q. 157, 167 (1983).

109 *See* ROBERTS & STALANS, *supra* note 60, at 228; Longmire, *supra* note 95, at 98.

110 *See* Longmire, *supra* note 95, at 98.

111 *See id.* at 100.

country dwellers than city dwellers;[112] and among adherents of fundamentalist and evangelical religious denominations than adherents of other sects.[113] Generally speaking, individuals tend to adopt the views of the persons with whom they associate or identify as a means of earning approval and signaling solidarity and belonging.[114] The demographic patterns that characterize death penalty views suggest that the same expressive dynamics help to determine those attitudes.[115]

Even stronger evidence of the expressive underpinnings of death penalty attitudes comes from the clustering of positions on the death penalty with positions on other issues. Death penalty proponents are more likely to oppose abortion, for example, and to take relatively conservative stances on civil rights and civil liberties.[116] There is no necessary *philosophical* link between the death penalty and these latter positions; one could (and some persons do) oppose both the death penalty *and* abortion on the ground that the state should never condone the taking of life,[117] or favor the death penalty for civil rights violations. The relative infrequency of these pairings, however, suggests again that death penalty positions are largely symbolic or expressive: in order to understand themselves and to be understood by others as the sorts of persons who belong to particular ideological communities, individuals adopt the position on the death penalty that is *conventionally* associated with those allegiances.[118]

Finally and most compellingly, positions on the death penalty correlate with a range of other more abstract evaluative dispositions. Death penalty proponents are more likely to value obedience to authority, to believe more fervently in the power of individual will, and to accept the permanence of warfare.[119] They are more likely to see morality as absolute, whereas death penalty opponents are more likely to see it as contextual and relative to persons or communities.[120]

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112 *See id.* at 99.

113 *See id.* at 94.

114 *See generally* ELLIOT ARONSON, THE SOCIAL ANIMAL (7th ed. 1994).

115 *See* SEIDMAN & TUSHNET, *supra* note 106, at 162–63 ("[E]xpression of opinion about capital punishment is a way of defining oneself and signaling to others which side one is on.").

116 *See* Tyler & Weber, *supra* note 91, at 29, 37.

117 This, of course, is the position of the Catholic Church. Most American Catholics, however, disagree with the Church's stance on capital punishment. *See* Michele Dillon, *Rome and American Catholics*, 558 ANNALS AM. ACAD. POL. & SOC. SCI. 122, 123 (1998).

118 *See* Ellsworth & Gross, *supra* note 94, at 23–24 (interpreting data as suggesting that positions on the death penalty are part of an individual's "self-identification"); Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 AM. POL. SCI. REV. 4, 17 (1987) (suggesting that social relationships help form political opinions).

119 *See* Tyler & Weber, *supra* note 91, at 29–30, 37.

120 *See* O.J. Harvey, *Belief Systems and Attitudes Toward the Death Penalty and Other Punishments*, 54 J. PERSONALITY 659, 661–62, 668–69 (1986).

Death penalty proponents are less tolerant of social deviance.[121] They trust their fellow citizens less.[122] Death penalty opponents are more likely to care about racial equality.[123] These attitudinal variables furnish the most powerful predictors of death penalty opinion.[124]

Again, there is no intrinsic connection between these abstract evaluative dispositions and the death penalty. In the abstract, there is nothing incongruous in saying that one opposes the death penalty because one is a moral absolutist, or that one is for it because, morality being contextual, one cannot identify any compelling moral reason to oppose the majority who want it. There is nothing conceptually inconsistent about being against the death penalty because one is so universally distrustful of others that one doesn't believe that anyone should be afforded the power to impose it, or about favoring it because one is so universally trusting that one thinks that the state would invariably impose the death penalty only in appropriate circumstances. It's idiosyncratic, but not senseless, to say that one favors the death penalty to promote equality for African Americans because they are victimized more often by homicide than are whites.[125]

If these positions *do* seem discordant or even unreal, that's only because the death penalty bears connotations that make it fit better with certain evaluative stances than others. By virtue of its history, the death penalty is imbued with social meanings. Those meanings make it signify something attractive for those who understand themselves, and who want to be understood by others, as strong believers in moral truth and as respecters of authority; they make it signify something repulsive for those who see themselves, and want others to perceive them, as nonjudgmental and egalitarian.

Based on the social science data that I've been reviewing, it's possible to sketch out rough expressive profiles of the proponents and opponents of the death penalty. The proponent believes that there is a single moral truth that others in his society should adopt and should be judged by. He thinks that individuals are responsible for their circumstances, resents being obliged to contribute to the well-being of unrelated others, and is himself wary of relying on others overmuch. He is likely to be politically conservative on a range of issues and most

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[121] *See id.*; Paul M. Valliant & Carrie L. Oliver, *Attitudes Toward Capital Punishment: A Function of Leadership Style, Gender, and Personality*, 25 SOC. BEHAV. & PERSONALITY 161, 165 (1997).

[122] *See* Longmire, *supra* note 95, at 95.

[123] *See* ROBERTS & STALANS, *supra* note 60, at 228–29.

[124] Tyler and Weber, for example, found that social and political attitudes explain 11 times more of the variance in death penalty opinions than does individuals' fear of crime. *See* Tyler & Weber, *supra* note 91, at 37.

[125] *Cf.* Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391 (1988).

likely believes that individuals are duty-bound to respect society's rules and institutions. He may well belong to a social group — ethnic, regional, or religious — many of whose members share these outlooks. To him, the death penalty embodies and expresses these values and commitments.

The opponent is different from the proponent along all of these dimensions. She may hold strong moral beliefs herself, but recognizes that others, who were raised in different circumstances, have different views that are worthy of her respect. She believes that individuals' circumstances are often determined by forces outside their control and that as a result society is responsible for the well-being of all citizens, whom she generally views as good and worthy of trust. She is likely to be a political liberal, and in any event is skeptical of official authority. She, too, is likely to belong to a social group — ethnic, regional, or religious — many of whose members share these outlooks. To her, being against the death penalty embodies and expresses these values and commitments.

The communities made up of persons of these sorts are more diffuse and loosely defined than are religious, ethnic, or professional allegiances. It makes more sense to think of them as "cultural styles" than as cultural groups.

These collective orientations, however, can still furnish a ready ground for status conflict. They correspond to what Gusfield calls "status collectivities," groups that "have no church, no political unit, and no associational units," but that nonetheless furnish coherent norms for granting and withholding esteem. "Examples of these are cultural generations, such as the traditional and the modern; characterological types, such as 'inner-directed and other-directed'; and reference orientations, such as 'cosmopolitans and locals.'"[126]

Many of the most charged social and political issues of the past century can be understood as conflicts between individuals who identify with competing cultural styles and who see their status as bound up with the currency of those styles in society at large.[127] The death penalty is one of these issues.

(b) Expressive Politics. — If the death penalty is assessed apart from its social meaning, its political significance seems mysterious. The federal government, for example, has jurisdiction over an exceedingly tiny fraction of the homicides that can result in a sentence of death. Yet the issue of the death penalty looms large in national elec-

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[126] GUSFIELD, *supra* note 25, at 21.

[127] *See id.* at 21–23, 140–47 (linking a variety of issues to these polarities, including civil rights, temperance, and populist economic regulation).

tions and consumes a large number of lawmaking hours in Congress.[128]

Even the significance of the issue in state politics seems odd from a consequentialist perspective. Pataki defeated Cuomo in an election that centered on the death penalty, yet the Pataki-supported law that the New York legislature enacted is so narrow that it may never be applied.[129] California rarely executes offenders.[130] Nevertheless, the issue embroils state politics and in fact resulted in the nonretention of Chief Justice Bird in 1986.[131]

Considered expressively, however, the pivotal nature of the death penalty debate is perfectly understandable. Positions on the death penalty reflect deeper, community-defining commitments on a range of contentious values. What's at stake, then, when Congress or a state legislature considers death penalty legislation is whose basic commitments will be affirmed and whose repudiated by the law. Moreover, to the extent that positions on the death penalty do cluster with positions on other ideologically charged issues, citizens can use a political candidate's positions on the death penalty to gauge whether that candidate is likely to vote consistently with their desires (expressive and otherwise) on various other matters, many of which might not even be foreseeable at the time of the election.[132] None of these expressive consequences depends necessarily on the death penalty being imposed in any significant number of cases. Thus, "[c]apital punishment is an issue of largely symbolic importance, but symbols count."[133]

The one study of federal legislators' attitudes toward the death penalty confirms this interpretation. Political scientist Barbara Ann Stolz extensively surveyed and interviewed the members of Congress

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[128] *See, e.g.*, HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972–1994, at 112 (1996).

[129] *See* Andrea E. Girolamo, Note, *Punishment or Politics? New York State's Death Penalty*, 7 B.U. PUB. INT. L.J. 117, 117 (1998) (observing that safeguards meant to insulate law "from constitutional challenge . . . may realistically and ironically prevent an execution from ever taking place in New York").

[130] California has imposed only seven of the 584 executions carried out by American states since 1977. *See U.S.A. Executions by Year and State* (visited Nov. 12, 1999) <http://www.smu.edu/~deathpen/execyrst1.html>.

[131] *See* Mark I. Pinsky, *Times Poll: Law and Order, Spending, Bird Top the Issues*, L.A. TIMES, Nov. 5, 1986, at 2-I ("[One of the] dominant issues in the minds of Orange County voters Tuesday" was "Chief Justice Rose Elizabeth Bird's death penalty rulings. . . . [In an exit poll] more than 80% of voters . . . said they support the death penalty. Not surprisingly, they voted against confirming Bird . . . .").

[132] *See generally* SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS 51–52, 213 (2d ed. 1994) (describing "information shortcut[s]" that voters use "to estimate [a candidate's] future positions," including "past political positions" and ideological stances).

[133] FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA, at xiv (1986).

who were most active on the capital punishment issue between 1972 and 1982, a period during which Congress dealt repeatedly with the question of what federal offenses should be subject to the death penalty.[134] Deterrence arguments, she found, figured prominently both in congressional debates and in the self-reported motivations of both proponents and opponents of federal death penalty legislation. Nevertheless, in personal interviews members indicated that "their answers were not rooted in the academic literature," which many characterized as "just a statistical game."[135]

The survey and interview data suggested that members had a much more vivid sense, in contrast, of the symbolism of the death penalty. Proponents, Stolz found, depicted the "enactment of federal capital punishment legislation [as] a means of communicating society's moral indignation toward a type of behavior"; "capital punishment," they stressed, "more clearly emphasizes the outrage at these crimes than other sanctions would."[136] Sometimes proponents depicted this expressive upshot as itself reinforcing deterrence by instilling aversions to killing in potential wrongdoers.[137]

But even more significant, according to Stolz, were the messages that the death penalty conveyed to, and about, committed law-abiders. Proponents expected the enactment of a federal death penalty, even if infrequently imposed, to reassure law-abiders that their representatives are resolutely opposed to crime.[138] They also saw it as a means of affirming the virtue of the "upright" — those citizens who stake their claim to respect on their successful adherence to society's norms.[139] "Such legislation indicates that government has taken sides" in a battle for social esteem.[140] "[S]upport for capital punishment *and criticism of opponents*," Stolz writes, "may be interpreted as a desire to grant status" to those who see their standing as expressively linked to emphatic moral condemnation of law-breakers.[141]

Congressional opponents of the death penalty, according to Stolz, see the issue in equally expressive terms. They worry that the death penalty will "brutal[ize]" society.[142] It sends the message that society bears no responsibility for the wrongdoer's situation and hence no obligation to improve it.[143] Just as proponents see the death penalty as a

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134 *See* Stolz, *supra* note 108.
135 *Id.* at 172.
136 *Id.* at 166.
137 *See id.*
138 *See id.* at 161, 165.
139 *See id.* at 166–67.
140 *Id.* at 167.
141 *Id.* (emphasis added).
142 *See id.* at 168–69.
143 *See id.*

means of siding with the upright, so opponents see repeal as a means of siding with those who are emotionally invested in equality and collective attention to social welfare and whose status is threatened by the harsh repudiation of the worth of offenders.[144]

Thus, expressive considerations energize both sides in the political debate over capital punishment. For opponents and proponents alike, the issue is whose defining commitments and allegiances will be symbolically credited, and whose repudiated, by the law.

3. Deterrence Talk and Public Discourse Norms. — But if the capital punishment debate is really expressive, why don't people say so? Why does deterrence rhetoric dominate public discourse?

The answer does not seem to be that opponents and proponents are themselves deluded about the moral foundations of their positions. Although they may be likely to cite deterrence or lack thereof *first*, they never cite it as the *only* reason that they support or oppose the death penalty. Rather, those on both sides of the issue cite a variety of moral and emotional bases for their positions: that executing a convicted murderer is just/is itself murder; that the death penalty comports with/defies religious teachings; that the death penalty affirms/demeans the sanctity of life.[145] Indeed, opinion polls show that citizens invariably signify their agreement with *all* the conventional rationales that point in the direction of their preferred position on the death penalty.[146] Deterrence occupies a central place in public debate only because those on both sides consciously choose to emphasize it to the near exclusion of other arguments.

The most convincing account of why they make this choice is that talking openly of the expressive foundations of their positions would violate a social norm against public moralizing. Liberal political culture stigmatizes public appeals to contested moral values.[147] This taboo applies most forcefully to religious convictions,[148] but extends as well to secular evaluative judgments, which are also likely to be dismissed as "mere opinions" that cannot legitimately support imposing obligations on those who disagree. Politics (or at least "comprehensive

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144 *See id.*

145 *See* Ellsworth & Ross, *supra* note 5, at 150.

146 *See* Ellsworth & Gross, *supra* note 94, at 26.

147 *See generally* Stephen Holmes, *Gag Rules or the Politics of Omission*, *in* HOLMES, PASSIONS AND CONSTRAINT, *supra* note 2, at 203 (describing the "range and variety of self-censorship common in liberal democratic societies"); Strauss, *supra* note 13, at 39 ("It is not true that in politics, anything goes. There is general agreement on an elaborate set of both procedural and substantive limits on the acceptable ways of resolving political disputes. . . . [W]e underestimate the extent to which political decisionmaking is the product of constrained disputation.").

148 *See generally* STEPHEN CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 1–6 (1993).

views" of politics) and religion are unfit topics of conversation — not only at the dinner table, but also in the public square.[149]

The idiom of deterrence avoids triggering the injunction against contentious public moralizing. As open as they are to dispute, arguments about the empirical consequences of deterrence have an "objective" or "scientific" veneer; those who rely on such arguments need not be seen as relying solely on their "subjective opinions."

But even better, deterrence rhetoric elides the major points of expressive contention that separate proponents and opponents of the death penalty. The conventional expressive arguments on the death penalty are pregnant with accusation: if *I favor* the death penalty because it's essential to vindicating the worth of the victim, then *you* must be *against* it because you don't sufficiently appreciate her worth and overvalue the worth of the wrongdoer; if *I oppose* the death penalty because it is administered in a way that devalues the lives of African Americans, then *you* must be *for* it because you are a racist. In contrast, if I claim to be for/against the death penalty because it is/is not the penalty most likely to protect lives — a claim that is abstract enough to fit within essentially all recognizable cultural and ideological commitments — then I can be seen as saying only that you are factually misinformed, rather than morally obtuse, for feeling otherwise. In much the way that Justice Holmes resorted to deterrence rhetoric because he resented being implicated in fundamental moral conflict as a judge, we resort to it because we resent being implicated in such conflict as citizens.

The social science evidence, although relatively thin in this respect, again supports this interpretation. Those who have analyzed survey responses, for example, posit that "the belief in deterrence is seen as more 'scientific' or more socially desirable than other reasons; people mention it first because its importance is obvious, not because its importance is real."[150] Stolz, too, finds that the emphasis on deterrence by members of Congress reflects their belief that "'statistical/scientific' explanation is perceived as more 'rational,' hence more 'legitimate,'" than unadorned appeals to values.[151] Given the ideologically charged nature of the debate, moreover, proponents perceive that it is more "acceptable" to cite the deterrent benefits of executing a killer than it

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149 *See generally* MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 8 (1964) ("[Individuals] are likely to talk politics with those who agree with them, avoid the subject with those who do not, and sometimes shade or change their opinions to create agreement."); JON ELSTER, ALCHEMICS OF THE MIND: RATIONALITY AND THE EMOTIONS 157 (1999) (discussing the role of social norms in suppressing expression of condemnatory emotions); Holmes, *supra* note 147, at 234 ("[S]trategic self-censorship seems to be an almost universally employed technique of self-management and self-rule.").

150 Ellsworth & Ross, *supra* note 5, at 149.

151 Stolz, *supra* note 108, at 174.

"would be to say 'the bastard deserved it.'"[152] Private citizens are similarly loath to be perceived as vindictive; proponents of the death penalty will thus much more readily acknowledge experiencing "outrage" when a murderer escapes the death penalty than taking "satisfaction" when one is executed, although the two emotional sensibilities are obviously conjoined.[153]

Of course, participants in the death penalty debate might also be making deterrence arguments because they think that those are the ones most likely to change their opponents' minds. Indeed, that would be an understandable conclusion, given how adamantly their adversaries purport to be relying on deterrence. In this way, arguments that disclaim judgmental valuations invite counterarguments that do the same, creating a feedback effect that likely reinforces the norm against public moralizing.

But if they choose to employ deterrence claims in order to persuade, then participants in the public debate *are* deluding themselves. Again, experiments suggest that empirical studies carry little weight with those on either side of the death penalty issue. Proponents and opponents alike conform their assessments of the quality of such studies to their preexisting expressive evaluations.[154]

What does make people change their minds are shocking spectacles that create evaluative dissonance. Thus, a state is most likely to repeal the death penalty in the aftermath of a "botched" execution, particularly one in which a sympathetic person who is perceived to be innocent gets put to death.[155] This is not surprising: proponents of the death penalty see it as a singularly apt gesture for remarking viciousness and depravity; such miscarriages cloud the death penalty's symbolic import. There is also evidence that death penalty abolitionists can change their minds when they confront gruesome, racially inspired murders: the fitness of the death penalty for remarking an emphatic

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[152] *Id.* at 176.

[153] *See* Ellsworth & Ross, *supra* note 5, at 155.

[154] *See supra* p. 438.

[155] *See* Herb Haines, *Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment*, 39 SOC. PROBS. 125, 131–35 (1992). The prospect of innocent individuals being sentenced to death was instrumental in the recent defeat of a death penalty bill in Massachusetts. *See* Gross, *supra* note 97, at 1475. The release of an innocent offender from death row in Illinois moved the Illinois House of Representatives to enact a nonbinding resolution in favor of a moratorium on executions in the state and led the Nebraska state legislature to enact a binding one. *See* Robynn Tysver, *Pause in Deaths to Get Debate this Week*, OMAHA (NEB.) WORLD-HERALD, April 11, 1999, at 1B (discussing the influence of Illinois developments on the Nebraska debate). Had the Nebraska measure not been vetoed by the state's Governor, *see* Robynn Tysver, *Moratorium Vetoed*, OMAHA (NEB.) WORLD-HERALD, May 26, 1999, at 1, *available in* 1999 WL 4501362, then Nebraska would have become the first state since *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), to suspend the death penalty after reinstituting it.

opposition to racism starts to erode in opponents' minds the penalty's conventional signification of racial domination.[156]

This evidence suggests that deterrence arguments not only fail to persuade. By masking the effective expressive motivations behind death penalty positions, they also obscure from participants on both sides of the debate their best rhetorical opportunities to change their opponents' minds.

4. The Cooling Effect of Deterrence. — I suggested earlier that Justice Holmes invoked the idiom of deterrence not only to avoid saying all he thought about honor and deadly violence, but also to defuse a contentious expressive controversy in the law. It might seem doubtful that the deterrence idiom similarly dissipates controversy on the death penalty issue. The death penalty is one of the most divisive issues in criminal law even though it is dominated by deterrence rhetoric.

But the relevant question, of course, is not how divisive the death penalty debate *is* when it focuses on deterrence, but how divisive it *would be* if it did not. We have been treated to glimpses of this in American history. The last time that it happened was in 1988, when the simmering death penalty debate boiled over with George Bush's victory over Michael Dukakis in the race for President. What raised the temperature was the social meaning of Willie Horton.

Willie Horton was a Massachusetts inmate serving a life term for murdering a teenage gas station attendant. Under a program strongly supported by Governor Dukakis, Horton received regular weekend furloughs to visit his young daughter. During one furlough, Horton fled to Maryland, where he terrorized an innocent couple, torturing the man and repeatedly raping the woman while holding them hostage in their home for hours. The Bush campaign seized on this episode to depict Dukakis as soft on crime. It occupied pride of place in campaign manager Lee Atwater's plan to focus voter attention on "social fabric" issues such as crime and patriotism, a strategy that is credited with erasing Dukakis's seemingly insurmountable lead in the polls as he emerged from the Democratic National Convention.[157]

The Bush campaign invariably coupled Willie Horton with the death penalty. Thus, campaign ads introduced the furlough issue by underscoring that Bush was for the death penalty and Dukakis against

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156 *Cf.* Greg Hernandez, *O.C. Jury Votes Death for Hate Crime Murder*, L.A. TIMES (ORANGE COUNTY EDITION), Oct. 10, 1997, at A1, *available in* 1997 WL 13988485 ("[Human Relations] Commission Chairman Rusty Kennedy said that although he is personally opposed to the death penalty, 'the fact that this man was convicted of this heinous crime and given the maximum penalty is good. I do think it's going to send a message to other purveyors of hate in our community and across the nation that we take this very seriously.'").

157 *See* DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE 214 (1995).

it.[158] The unmistakable implication was that Dukakis deserved censure not only for letting Horton out on weekends but also for having opposed a regime in which Horton would have been executed for his commission of the earlier murder. Indeed, Willie Horton and the death penalty became so closely identified that when Bush criticized Dukakis's position on the death penalty in the first debate, Dukakis — to the horror of his campaign handlers — answered by defending his support for the Massachusetts furlough program. Bush's answer affirmed the Horton/death penalty link: "When a narcotics wrapped-up guy goes in and murders a police officer, I think they ought to pay with their life . . . . So I am not going to furlough men like Willie Horton . . . ."[159]

The Bush operatives also invariably coupled the Horton issue with all the excruciatingly judgmental expressive themes that motivate death penalty support. Televised advertisements featured the enraged husband and the humiliated wife and trumpeted Dukakis's refusal to reexamine his position on prison furloughs and the death penalty;[160] the message was that death-penalty opponent Dukakis did not care about the worth of innocent crime victims and the indignity that they suffer at the hands of brutal criminals. Bush operatives televised Horton's sullen and hostile-looking mug shot, which they viewed as making Horton "look[] like an animal";[161] Bush depicted Horton as drug-crazed and implied (falsely) that he had killed a cop.[162] The implication was that Dukakis, like other death penalty opponents, could not be counted on to employ the brute force necessary to repel the threat posed by the dangerous, unreasoning, and beastly foes of lawful authority. A Republican party fundraising letter juxtaposed photos of Dukakis and Horton, asking, "Is this your pro-family team for 1988?"[163] Death-penalty opponent Dukakis, we were being told, did not care about family values and other timeless and absolute elements of morality. Even the continual reminder that Horton had escaped from Massachusetts, a New England state that does not have the death penalty, to Maryland, a southern state that does, was calculated to enflame the regional schisms that lurk in the background of the death penalty controversy.

Predictably, Democrats answered expressive arguments with expressive arguments. For them, the Horton/death-penalty issue reflected pure and simple racism. Horton was a *black man*; he raped a

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158 *See id.* at 215, 228, 231.
159 *Id.* at 241–42 (quoting George Bush).
160 *See id.* at 228–29.
161 *Id.* at 233.
162 *See id.* at 242.
163 *Id.* at 236–37.

white woman. There can be no more potent historical symbol of white America's racial anxieties, resentments, and fears, Dukakis campaign officials pointed out.[164] Bush campaign officials later expressed indignation at the charge that they framed the Horton/death-penalty issue to appeal to racial animosity.[165] But even assuming that they were telling the truth, their *inability to see* how the Horton/death-penalty issue would be interpreted by African Americans and by citizens who cared passionately about civil rights only confirmed to death penalty opponents the deficiency of their adversaries' commitment to equality.

The social meaning of Willie Horton and the death penalty constructed a conflict between two fundamentally opposed cultural styles. Authoritarianism clashed with egalitarianism, righteousness with tolerance, southernness and westernness with easternness, compassion for victims of crime with compassion for victims of social deprivation. As divisive as the death penalty debate can be when it focuses on deterrence, it rarely achieves this level of polarization.

At the same time, the dynamics that generated the Willie Horton dispute suggest that the heat of the death penalty debate is bound to reach this temperature periodically, notwithstanding the cooling potential of deterrence. *Most* of us don't want to talk in the way that Americans talked to each other during the 1988 presidential campaign. But *some* of us do want to talk this way, at least when there's some obvious political gain to be had in doing so. Once these expressive zealots succeed in framing the death penalty issue in their terms, even those who prefer the milder idiom of deterrence must fight expressive fire with expressive fire or else face the risk of rhetorical immolation.

This, too, is one of the lessons of the 1988 campaign. Michael Dukakis's prospects for winning the election died with his answer to the first question of the final presidential debate. "Governor," asked CNN anchorman Bernard Shaw, "if [your wife] were raped and murdered, would you favor an irrevocable death penalty for the killer?"[166] As distasteful as the question was, it offered Dukakis a chance to dig himself out of the expressive hole that the Willie Horton issue had put him in. Obviously, Dukakis couldn't have changed his position on the death penalty at that point. But he could have shown how enraged and anguished contemplating such a crime could make him, and how severely he thought that the perpetrators of such an abomination should be punished short of execution. An answer like that could have

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164 *See, e.g.*, Stephen Chapman, *Would It Matter If Willie Horton Were White?*, CHI. TRIB., Oct. 27, 1988, at C23 ("Susan Estrich, Dukakis'[s] campaign manager, sees nothing accidental about these facts: 'There is no stronger metaphor for racial hatred in our country than the black man raping the white woman.'").

165 *See* ANDERSON, *supra* note 157, at 216–17.

166 *Id.* at 243.

gone a long way toward dispelling the negative meanings associated with his opposition to the death penalty — that he lacked compassion for victims, was ambivalent toward government authority, was only weakly committed to traditional moral values, and the like. Instead he said: "No, I don't, Bernard. And I think you know that I've opposed the death penalty during all of my life. *I don't see any evidence that it's a deterrent . . . .*"[167]

It was understandable, and maybe even honorable, that Dukakis would seek to discharge the moral tension by drawing attention to the instrumental effect of the death penalty. But by that point in the debate, deterrence talk was clearly not up to the task of returning the expressive genie to its bottle.

B. Gun Control

The gun control debate has a profile similar to that of the death penalty debate. Again, both sides tend to frame their arguments in deterrence terms: supporters of gun control say that banning firearms, particularly handguns, will discourage violent criminals from arming themselves and preying on innocent victims;[168] opponents say that permitting potential *victims* to arm *themselves* will deter violent criminals from preying on them.[169]

But again, citizens generally don't say all they think when they are justifying their positions on gun control. Deterrence considerations don't genuinely explain opinions on either side. Expressive considerations matter much more: for proponents and opponents alike, guns and gun control bear social meanings that go to the heart of their fundamental moral commitments and cultural identities. The protagonists in the gun control debate, like those in the death penalty debate, are fighting to control the expressive capital of the law. Deterrence rhetoric conceals, but barely contains, each side's illiberal ambition to proclaim its cultural and moral ascendancy through the law.

1. Deterrence and Public Opinion. — The perceived effect of gun control on crime does not have nearly as significant an impact on attitudes towards gun control as the rhetoric of proponents and opponents

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167 *Id.* at 243–44 (emphasis added).

168 *See, e.g.*, *83rd Congressional District: Election '94*, HARTFORD COURANT, Nov. 3, 1994, at G23 (quoting Democratic congressional candidate James Abrams) ("I support retention of the ban on assault weapons and other gun-control measures as a cost-effective method of fighting violent crime.").

169 *See, e.g.*, Nelson Lund, *Gunning Down Crime*, WKLY. STANDARD, June 1, 1998, at 35 ("Even taking account of evidence that some criminals substitute crimes of stealth (like burglary) for crimes of violence (like robbery) and that some criminals migrate to jurisdictions that forbid their citizens to carry guns, concealed-carry permits remain the most cost effective crime-control measure ever studied. Such laws are cheaper than increased law enforcement or incarceration, and they do not rely on tax dollars.").

might suggest. The majority of persons who say that they favor gun control to reduce crime nevertheless answer "no" when asked if they believe that crime would in fact go down if the government enacted stricter gun control laws.[170] Similarly, most Americans favor stricter gun control, yet only a small fraction list it when asked to specify the policies that they think the government should enact in order to reduce crime.[171] And although crime is perennially put at or near the top of citizens' biggest concerns, the vast majority of Americans rank gun control as less important to them than a host of non-crime policies and issues that bear on public welfare.[172]

Opponents argue that gun control interferes with the use of firearms for lawful self-defense. But whether one accepts or rejects this argument turns out not to predict one's position on gun control.[173]

If individuals did base their gun control positions on their beliefs about its effect on crime, then one would expect variation in the perceived pervasiveness of crime to influence individuals' opinions on gun control. But it doesn't. Survey data show no significant correlation between prior victimization or fear of victimization and positions on gun control. Nor can variation in opinions about gun control be fully explained by variations in violent crime rates across space or time or by variations in the perception of such crime rates.[174] Whatever they say in public, those involved in the gun control debate are not really motivated by beliefs about guns and crime.

2. The Social Meanings of Guns. — What *does* motivate them, a wealth of sociological and historical literature suggests, is their attachment to competing cultural styles that assign social meanings to guns. Indeed, the gun control debate is, in many important respects,

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[170] *See* GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 370 (1991); SPITZER, *supra* note 10, at 121; Don B. Kates, Jr., *Public Opinion: The Effects of Extremist Discourse on the Gun Debate*, *in* THE GREAT AMERICAN GUN DEBATE 93, 95 (Don B. Kates, Jr. & Gary Kleck eds., 1997); *see also* JAMES D. WRIGHT, PETER H. ROSSI & KATHLEEN DALY, UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 236 (1983) (noting that the number of persons who believe gun control would be effective in reducing crime is smaller than the number of persons who support gun control).

[171] *See* ROBERTS & STALANS, *supra* note 60, at 281.

[172] *See* WILBUR EDEL, GUN CONTROL: THREAT TO LIBERTY OR DEFENSE AGAINST ANARCHY? 72 (1995); ROBERTS & STALANS, *supra* note 60, at 281; Kates, *supra* note 170, at 94.

[173] *See* Tom W. Smith, 1996 National Gun Policy Survey of the National Opinion Research Center: Research Findings 8, 33 tbl.6 (Mar. 1998) (unpublished report, on file with the Harvard Law School Library).

[174] *See* ARTHUR L. STINCHCOMBE, REBECCA ADAMS, CAROL A. HEIMER, KIM LANE SCHEPPELE, TOM W. SMITH & D. GARTH TAYLOR, CRIME AND PUNISHMENT — CHANGING ATTITUDES IN AMERICA 103–04, 121 (1980); Kenneth Adams, *Guns and Gun Control*, *in* AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 109, 123 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996); Gary Kleck, *Crime, Culture Conflict, and the Sources of Support for Gun Control: A Multilevel Application of the General Social Surveys*, 39 AM. BEHAV. SCI. 387, 394–99 (1996).

the successor of the "true man"[175] and temperance[176] debates. As in those controversies, one side is disproportionately rural, southern or western, and Protestant, as well as male and white; the other is disproportionately urban, eastern, Catholic or Jewish, as well as female and black.[177] The two sides also subscribe to competing cultural ethics reminiscent of those at stake in the earlier controversies. For the former, the "model is that of the independent frontiersman who takes care of himself and his family with no interference from the state."[178] To them, "the . . . gun symbolizes much that is right in [American] culture," including "manliness, self-sufficiency, and independence."[179] The latter "take bourgeois Europe as a model of a civilized society [—] . . . just, equitable, and democratic[,] but well ordered, with the lines of responsibility and authority clearly drawn, and with decisions made rationally and correctly by intelligent men for the entire nation."[180] To them, "the gun is symbolic of much that is wrong in American culture," including "violence, aggression, . . . male dominance,"[181] individualism, and racism.

Obviously, it would be a mistake to speak as if there were only two cultural styles in America that attach social meaning to guns. The inner-city gang member who carries a gun to signify defiance of authority and indifference to deadly risk,[182] for example, has little in common with either the western NRA member who prizes his gun as an emblem of his frontier heritage or the liberal Urban Leaguer who despises the gun as a badge of anachronistic honor norms and individualism. No doubt there are still other coherent styles and systems of meanings that differ from all three of these.

At the same time, I don't think it's a mistake to speak of two *dominant* cultural styles in this setting. These are the ones that belong to the middle and upper classes in American society, whose members exercise disproportionate influence in the political conflict over gun control, particularly at the federal level. Because that is the conflict that I am trying to explain, I will focus on what guns mean to them and why.

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175 *See supra* pp. 432–35.

176 *See supra* p. 423.

177 *See* Kleck, *supra* note 174, at 390, 398; Smith, *supra* note 173, at 6.

178 B. Bruce-Briggs, *The Great American Gun War*, PUB. INTEREST, Fall 1976, at 37, 61.

179 James D. Wright, *Ten Essential Observations on Guns in America*, SOC'Y, Mar.–Apr. 1995, at 63, 68.

180 Bruce-Briggs, *supra* note 178, at 61.

181 Wright, *supra* note 179, at 68.

182 *See* Deanna L. Wilkinson & Jeffrey Fagan, *The Role of Firearms in Violence "Scripts": The Dynamics of Gun Events Among Adolescent Males*, 59 LAW & CONTEMP. PROBS. 55, 81–84 (1996); Mary E. Pattillo & Reuben A.B. May, Gun Talk: Culture & Social Control in an African-American Community 19–21 (1996) (unpublished manuscript, on file with the Harvard Law School Library).

The positive meanings that fuel opposition to gun control derive from two historical sources. The first is America's militia heritage.[183] Through their use in revolutionary-era militias, guns came to symbolize the "civic virtue and military prowess of the yeoman" as well as the "degeneration of England and . . . the sharp decline of the 'liberties of Englishmen' on their original home soil."[184] These connotations became institutionalized in the Second Amendment.[185]

The second historical source is the frontier heritage of the American West.[186] Frontiersmen depended on guns for many practical purposes, including hunting and security. But in the course of performing these missions, guns became suffused with meaning. "[C]arried openly on the person, firearms serve[d] as badges that enable[d] those individuals displaying them to mark themselves off as being worthy of special attention without even firing a shot."[187] One could draw inferences about another's social competence, economic class, profession, and even desirability as a suitor from whether he carried a "Kentucky rifle," an "English shotgun," or a dueling pistol.[188] To prevent the appropriation of status — and to repel subversive threats to authority — norms and laws regulated who could possess such weapons.[189] Thus, "[w]ell into the nineteenth century the gun was a more widely held badge of membership in the body politic than the ballot."[190]

Through "cultural momentum," remnants of these meanings have outlived the utilitarian role that guns played in arming militias and settling the frontier.[191] A number of institutions and practices contribute to this dynamic. One is the use of guns for recreation, including target shooting and hunting. In the South and West, proficiency in

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183 *See* Richard Hofstadter, *America as a Gun Culture*, 21 AM. HERITAGE, Oct. 1970, at 4, 82 (connecting the persistence of gun culture to "the anti-militaristic traditions of radical English Whiggery").

184 *Id.*

185 *See id.* at 83; Don B. Kates Jr., *The Second Amendment and the Ideology of Self-Protection: Essays on Firearms & Violence*, *in* THE GREAT AMERICAN GUN DEBATE, *supra* note 170, at 271, 278–82.

186 *See* SPITZER, *supra* note 10, at 8–12; Hofstadter, *supra* note 183, at 7.

187 WILLIAM R. TONSO, GUN AND SOCIETY: THE SOCIAL AND EXISTENTIAL ROOTS OF THE AMERICAN ATTACHMENT TO FIREARMS 318 (1982).

188 *Id.* at 247–50, 281–82, 317–19.

189 *See* Hofstadter, *supra* note 183, at 84 ("[I]n the historic system of the South, having a gun was a white prerogative."); *see also* LEE KENNETT & JAMES LA VERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 167 (1975) (noting that early regulation was inspired by concerns about aliens and political radicals); TONSO, *supra* note 187, at 256–57 (noting that the earliest regulations against the possession of firearms were aimed at disarming immigrants, labor agitators, poor whites, and blacks).

190 KENNETT & ANDERSON, *supra* note 189, at 250.

191 Pauline Gasdow Brennan, Alan J. Lizotte & David McDowall, *Guns, Southernness, and Gun Control*, 9 J. QUANTITATIVE CRIMINOLOGY 289, 292, 305 (1993); *see* TONSO, *supra* note 187, at 30–35, 39.

these activities continues to signal a man's social competence, whereas the refusal to participate in them risks making him into a social outcast.[192] Collecting likewise sustains the positive connotations of guns: "Just to hold [a Colt Model 'P'] in your hand produces a feeling of kinship with our western heritage — an appreciation of things like courage and honor and chivalry and the sanctity of a man's word."[193]

Finally and most importantly, the positive social meaning of guns is sustained by the market, which simultaneously exploits and creates the appetite to share in the culture of martial virtue and frontier independence that the gun connotes. Since the 1950s, the entertainment industry has ceaselessly glamorized the frontier gunslinger.[194] So has the firearms industry:

> An advertisement for the old Colt, for example, shows a photograph of one of these revolvers with a 7 1/2-inch cavalry-length barrel under a color drawing of the lower extremities of galloping horses and the legs of their uniformed riders flashing past a feathered Indian spear imbedded in the ground. Printed on the drawing is: "A COLT says: distant drums, hoof beats, pursuit, confidence."[195]

These connotations are reflected in a host of regional attitudes and practices. The firearm's signification of responsibility, masculinity, and (male) status is reflected in the custom of awarding an adolescent boy his "first gun" — "the *bar mitzvah* of the rural WASP."[196] Its connotation of suspicion of government is reflected in the positive correlation between opposition to gun control and distrust of the police (a correlation that cannot be explained by greater fear of crime).[197] Its affiliation with individualism is reflected in the correlation of opposition to gun control with opposition to social welfare policies and support of punitive measures such as capital punishment.[198] Its resonance with martial virtues is reflected in the greater propensity of gun own-

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192 *See* TONSO, *supra* note 187, at 329–30.

193 *Id.* at 287–88 (quoting a gun collector) (internal quotation marks omitted).

194 *See* KENNETT & ANDERSON, *supra* note 189, at 218; *cf.* SPITZER, *supra* note 10, at 12, 22 n.46 (noting the power of frontier mythology about the gun and concluding that "the admittedly ambivalent relationship between movies and guns has nevertheless helped cultivate America's gun tradition"). Indeed, as early as 1870, live entertainment and novels were trading on the evocative connections between guns and the frontier. *See* TONSO, *supra* note 187, at 248.

195 TONSO, *supra* note 187, at 293.

196 Bruce-Briggs, *supra* note 178, at 41; *see* Hofstadter, *supra* note 183, at 82 (describing first guns as "milestones of life, veritable rites of passage" that signify "arrival at manhood"); *see also* TONSO, *supra* note 187, at 285 (noting that in some communities the gift of a gun marks the coming of age for males).

197 *See* Adams, *supra* note 174, at 122–24.

198 *See* WRIGHT, ROSSI & DALY, *supra* note 170, at 104, 112.

ers to join the military.[199] In all these ways, commitment to the gun remains deeply enmeshed in a coherent cultural style.

Hostility toward guns is enmeshed in a coherent cultural style as well. Indeed, gun control supporters attach many of the same meanings to guns that opponents do, but invert the relevant valuations of these meanings.

Thus, gun control proponents resent guns because they find frontier ethics abhorrent. Residents of the urban North and East have historically been, and continue to be, leery of rural honor norms.[200] Whereas the typically southern or western collector celebrates the gun as redolent of "chivalry" and "courage,"[201] the northern control proponent derides it as "uncivilized" and "atavistic," and exhorts America to follow the lead of other "modern nations" in banning private weapons possession.[202] Gun owners are not men of honor; they are "rednecks."[203] Their belief that guns are symbols of "manliness" (it is said) displays their subconscious anxiety about sexual potency.[204]

The relationship between gun control and the repudiation of traditional honor norms has two important components. One is aversion to violence. Whereas gun-related journals promote guns as a way to introduce young boys to the tradition of the West, more mainstream journals such as *Parents' Magazine* warn readers not to buy toy guns for their children lest they develop an appetite for aggression and war.[205] Gun control supporters are also ambivalent about the use of weapons even in self-defense.[206]

Another component of the anti-gun/anti-honor style is resistance to gender hierarchy, or at least certain conventional forms of it. The vir-

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[199] *See id.* at 118. According to Wright, Rossi, and Daly, military service does not predict opposition to gun control when other demographic and attitudinal variables are controlled for; in other words, the same cluster of attributes that incline individuals to be pro-gun also incline them to military service. *See id.*

[200] *Cf.* NISBETT & COHEN, *supra* note 77, at 25–38, 62–63, 72–78 (describing the differences between the South and other regions of the country in attitudes towards the use of violence in various circumstances).

[201] TONSO, *supra* note 187, at 287.

[202] Bruce-Briggs, *supra* note 178, at 61 ("To [gun control proponents], hunting is atavistic, personal violence is shameful, and uncontrolled gun ownership is a blot upon civilization."); Hofstadter, *supra* note 183, at 4 (asserting that America is the "only nation so attached to the supposed 'right' to bear arms that its laws abet assassins, professional criminals, berserk murderers, and political terrorists at the expense of the orderly population" and that "[in other countries in which] rights are rather better protected than in ours . . . our arms control policies would be considered laughable").

[203] *See* Raymond G. Kessler, *Ideology and Gun Control*, 12 Q.J. IDEOLOGY, No. 2, at 1, 4–5 (1988).

[204] *See* EDEL, *supra* note 172, at 97–98; Kates, *supra* note 170, at 97–98.

[205] *See* KENNETT & ANDERSON, *supra* note 189, at 215.

[206] *See* Kates, *supra* note 170, at 106–10; *see also* Smith, *supra* note 173, at 8, 33 tbl.6 (finding belief that gun control impedes self-defense does not predict position on gun control).

tues that honor norms construct — "courage," "self-reliance," "chivalry" — are traditionally *male* virtues; guns function as symbols of these virtues in rural communities for *men*; the practices that forge this symbolic link — from hunting, to target shooting, to the custom of presenting guns to adolescent boys — are predominantly *male* practices. Indeed, women who possess guns are likely to be perceived (unflatteringly) as possessing male traits.[207]

It is not surprising, then, that guns became an issue early on for women's groups, whose advocacy of gun control in between the First and Second World Wars reflected their distinctive ambition to infuse politics with "maternal" values.[208] Gun control opponents of that time depicted control as inspired by women, who, they said, "instinctively fear and mistrust guns."[209] These resonances persist: women continue disproportionately to favor gun control,[210] which is therefore seen as a position geared to appeal to female voters.[211]

Men who resent the gender-specific expectations and dispositions constructed by honor norms are also more likely to favor gun control. Thus, one study found that support for gun control correlated with tolerance for homosexuality, disdain for "macho" behavior, opposition to pornography, and other attitudes opposed to traditional, hierarchical gender roles.[212] The proponents of gun control are also repulsed by the individualism that guns connote. Proponents believe that society is responsible for the well-being of individuals: they tend to support social welfare policies and to oppose punitive measures, including capital punishment, that signify a belief that individuals are solely to blame when they transgress society's rules.[213]

Thus, for the same reasons that control proponents see guns as proclaiming "individual self-reliance," control supporters see them as denying civic solidarity. "Every handgun owned in America is an implicit declaration of war against one's neighbor."[214] The gun owner is an "anti-citizen[]," an "enem[y] of [his] own *patriae*."[215]

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207 *See* H. Taylor Buckner, Sex and Guns: Is Gun Control Male Control? 3 (Aug. 5, 1994) (unpublished manuscript, on file with the Harvard Law School Library).

208 *See* KENNETT & ANDERSON, *supra* note 189, at 214.

209 *Id.* at 215 (quoting a pro-gun magazine) (internal quotation marks omitted).

210 *See, e.g.*, Smith, *supra* note 173, at 18, 36 tbl.14.

211 *See, e.g.*, Alison Mitchell & Frank Bruni, *Suburban Districts Seen as a Key In the Debate Over Gun Control*, N.Y. TIMES, June 16, 1999, at A1 ("In a pointed appeal to suburban women, Mr. Clinton cast gun control as a women's issue, saying, 'Women who belong to both parties in America, all over this country, have been in the forefront of this fight.'").

212 *See* Buckner, *supra* note 207, at 22–24.

213 *See* STINCHCOMBE, ADAMS, HEIMER, SCHEPPELE, SMITH & TAYLOR, *supra* note 174, at 104, 111–13.

214 Kates, *supra* note 170, at 109 (quoting Gary Wills) (internal quotation marks omitted).

215 *Id.* at 97 (quoting Gary Wills) (internal quotation marks omitted).

> Give up your gun the gun nut says, and you give up your freedom. . . . *Trust no one but yourself to vindicate your cause. Not the law. Not your representatives. Not your fellow citizens.* . . . When the chips are down, [the gun] owner says, he will not trust any other arbiter but force personally wielded.[216]

The idea that arming private citizens is the way to deter crime "ought to disgust rather than cheer the civilized observer."[217] To accept it is "to embrace a society based on an internal . . . balance of terror,"[218] "a jungle where each relies on himself for survival."[219] There is "[n]o reason . . . why anyone in a *democracy* should own a weapon."[220]

Finally, for control proponents the gun means racism. Historically, at least, the status conferred by gun ownership was not only an important symbol of *male* status, but also "an important symbol of *white* male status": the earliest forms of gun control were aimed at keeping weapons out of the hands of African Americans.[221] The gun's connotations of white supremacy were no doubt renewed and intensified by the assassinations of Martin Luther King, Jr. and Medgar Evers and by the generally violent reaction to the civil rights movement in the South,[222] which experienced soaring weapons purchases during that period.[223] These meanings persist: African Americans continue disproportionately to favor gun control, as do whites who favor civil rights policies.[224] Commitment to racial equality, moreover, reinforces the social meaning of the gun as a denial of solidarity: because poverty and criminality are both racially concentrated, the expressive equation of guns with opposition to assisting strangers and with punitiveness makes every handgun a declaration of war against one's *black* neighbors in particular.[225]

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216 *Id.* at 109 (quoting various articles by Gary Wills) (internal quotation marks omitted).

217 H. Laurence Ross, Book Review, 98 AM. J. SOC. 661, 662 (1992).

218 *Id.*

219 RAMSEY CLARK, CRIME IN AMERICA 107 (1970).

220 William R. Tonso, *Social Science and Sagecraft in the Debate over Gun Control*, 5 LAW & POL'Y. Q. 325, 333 (1983) (emphasis added) (quoting sociologist Morris Janowitz) (internal quotation marks omitted).

221 Hofstadter, *supra* note 183, at 84 (emphasis added); *see* TONSO, *supra* note 187, at 256–57; Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353, 370 (1994).

222 *See* TONSO, *supra* note 187, at 236.

223 *See* KENNETT & ANDERSON, *supra* note 189, at 224–25.

224 *See* Smith, *supra* note 173, at 5; *cf.* STINCHCOMBE, ADAMS, HEIMER, SCHEPPELE, SMITH & TAYLOR, *supra* note 174, at 106, 110–113 (finding that African Americans, as well as whites who supported busing, were less likely than others to own guns, and finding that gun ownership is correlated with decreased support for gun control).

225 Gun control opponents fuel this association when they attribute the demand for gun control to inner-city crime problems that do not affect rural areas, an argument that could be taken to imply that the right of virtuous white citizens to own guns should not be compromised by the vi-

Thus, much more is at stake in the gun control debate than crime control. At bottom, the disagreement embodies "two alternative views of what America is and ought to be."[226]

3. Illiberalism and Expressive Zealotry. — As in the death penalty debate, overtly expressive arguments figure in the gun control debate only intermittently. They emerged, for example, in the late 1960s: primed by a decade of political assassinations, gun control proponents aggressively flooded the market with expressive currency, unapologetically invoking the themes of race, solidarity, and civilized nonaggression.[227] They emerged again in the 1980s: using the issue to frame politics as a conflict between the virtuous and the vicious, NRA member Ronald Reagan heralded his opposition to gun control to show that "our side" supports "law-abiding people who want to protect their home and family," and his adversaries' pro-control stance to show that "the liberals" are "indifferent to the safety and welfare of the average American."[228] And they are surfacing once more in the wake of a series of school ground massacres, which have provoked waves of contempt for "hicksville cowboy[s]" with "oversized belt buckles"[229] who need guns to overcome their "macho, Freudian hang-ups."[230] Most of the time, however, politicians and ordinary citizens alike blunt the sharp edges of their expressive commitments with the softer idiom of deterrence, the logic of which doesn't assault either sides' fundamental commitments, at least not frontally.

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cious behavior of African-American citizens. *See, e.g.*, 145 CONG. REC. H4371 (daily ed. June 16, 1999) (statement of Rep. Cunningham of San Diego) ("I went to Mr. Schumer's district, and I understand why he hates guns. They have all the projects, and they shoot each other, and they do drugs, and they kill each other, and that is bad. But the answer is not just to be negative, but to look and see what is reasonable.").

226 Bruce-Briggs, *supra* note 178, at 61.

227 *See* KENNETT & ANDERSON, *supra* note 189, at 234–36.

228 EDEL, *supra* note 172, at 112, 121 (quoting Ronald Reagan) (internal quotation marks omitted).

229 Margery Eagan, *Rally Proves Gun Lovers are Still Out There*, BOSTON HERALD, May 18, 1999, at 4, *available in* 1999 WL 3398695; *see also* Richard Cohen, *The Tame West*, WASH. POST, July 15, 1999, at A25 ("[Republican gun control opponents] all pretend to be upholding American tradition and rights, citing in some cases an old West of their fervid imagination and suggesting remedies that can only be considered inane."); Ted Flickinger, Letter to the Editor, *Dodge City, USA*, PITTSBURGH POST-GAZETTE, June 1, 1999, at A10 ("The widespread availability of guns in a society in which many so-called adult males still embrace the frontier mentality makes it a certainty these periodic adolescent outbursts will be tragically repeated. It's still Dodge City out there, boys. Wahoo."); Perry Young, *We Are All to Blame*, CHAPEL HILL HERALD, April 24, 1999, at 4, *available in* LEXIS, News Group File ("[W]e seem crippled by a mythological 'tradition' (a frontier gun world that ceased to exist 100 years ago and was wrong even then) and bullied into submission by a ridiculous minority of airheads like B-movie actor Charlton Heston and the National Rifle Association.").

230 Norman W. Nielsen, Letter to the Editor, L.A. TIMES, Apr. 30, 1999, at B6; *see also In Shadow of Littleton, NRA Refuses Scapegoat Role*, MILWAUKEE J. SENTINEL, May 2, 1999, at 1 (describing a sign displayed at a gun control rally that read: "Gun owners have penis envy").

What deterrence rhetoric helps each side to avoid disclosing, moreover, are their culturally imperialistic ambitions. Neither side can point to conclusive empirical evidence on whether handguns increase or decrease crime,[231] and in the end neither side is decisively motivated by beliefs about guns and crime control anyway. The dispositive point is what the enactment or defeat of gun control legislation *says*, not what it *does*. Both sides see the law as an instrument for affirming the moral commitments associated with the cultural style they admire and condemning those of the style they despise.

This is as true for the politically liberal proponents of gun control as it is for the conservative opponents of it. Liberals normally think that law should be confined to the regulation of other-regarding conduct and should not be used to promote a moral orthodoxy.[232] The commitments that gun control signifies to its supporters — including opposition to violence, support for gender and race equality, and concern with common welfare — are all proper objects of coercive law under the liberal standard (or at least under plausible conceptions of it). But gun control advocates don't support that policy because they believe that it will *itself* stop violent crime (most think it won't),[233] block racism and sexism, or remedy social deprivation; they support it because they think that it *expresses* the value of these objectives. Even more to the point, they support gun control because they see it as officially condemning a cultural style that prizes aggression, traditionally white male forms of status, and uncompassionate and punitive individualism. By taking private citizens' guns away, the law visits a decisive *symbolic* defeat on "macho men," "anti-citizens," and "uncivilized rednecks" who are obsessed with their sexual inadequacies. In effect, gun control is to the party of equality and solidarity what flag-desecration laws are to the party of patriotism.

Ironically, gun owners and their allies have repelled all but the most trivial forms of federal gun control in large measure because the ambitions of the gun controllers are perceived as expressive in nature. National polls have shown for decades that Americans prefer stricter gun control.[234] Why does Congress consistently side with the anti-

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[231] *Compare* LOTT, *supra* note 5, at 94 (presenting empirical evidence that states with permissive concealed handgun possession laws enjoy lower rates of violent crime), *with* Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 INT'L REV. L. & ECON. 239, 241–43 (1998) (finding flaws in the Lott study).

[232] *See, e.g.*, West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."); ACKERMAN, *supra* note 13, at 8–11; John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765–66, 773 (1997).

[233] *See supra* p. 452 & note 170.

[234] *Cf.* EDEL, *supra* note 172, at 70–73 (chronicling public support for gun registration).

control minority? The answer is that gun control opponents care much more intensely about the issue than do proponents and are much more willing to participate in gun control politics, either by voting against candidates who support control, by voicing their opinions to their representatives, or (most importantly) by giving money to anti-gun control interest groups such as the NRA.[235] And the reason that members of the anti-control minority care so intensely is that they know the aim of gun legislation is to disparage their cultural identities. Gun registration might be no more onerous than auto registration, but the social meaning of the former makes it impossible for gun owners to bear: "car regulation is not premised on the basis that cars are evils from which any decent person would recoil in horror — that anyone wanting to possess such an excrescence is atavistic and warped sexually, intellectually, educationally, and ethically."[236]

Expressive zealotry is inevitably answered in kind. Thus, the NRA became the force that it is today thanks to a huge influx of members and cash in the late 1960s when gun control rhetoric had reached its feverish expressive peak.[237] The organization continues to thrive on, and hence to fuel, its members' perception that control proponents are motivated by animus toward frontier and militia values.[238] Indeed, when gun control proponents tried to leverage national anguish over recent school yard shootings into stricter gun control laws, control opponents in the House of Representatives countered with a *Kulturkampf Blitzkrieg*, linking gun control to abortion, promiscuity, irreligiosity, and myriad other practices and policies perceived to be threatening to their constituents' cultural identities.[239] This tactic not only succeeded in stalling serious gun legislation but also secured the passage of measures condemning the low ethical standards of the entertainment indus-

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[235] *See* KENNETT & ANDERSON, *supra* note 189, at 238; Adams, *supra* note 174, at 119–20; *cf.* SPITZER, *supra* note 10, at 14 (detailing the success of the NRA).

[236] Kates, *supra* note 170, at 96. This is a familiar dynamic in expressive politics. *Cf.* Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54, 73 (1968) (noting that "redefining moral crusades tend to generate strong counter movements [sic]": "The threat to the legitimacy of the norm is a spur to the need for symbolic restatement in legal terms. . . . [I]t is when consensus is least attainable that the need for legal expression appears to be greatest.").

[237] *See* KENNETT & ANDERSON, *supra* note 189, at 240–42.

[238] *See* Kates, *supra* note 170, at 100 ("Indispensable to gun lobby success is an anti-gun discourse that convinces gun owners that 'gun control' is not a criminological imperative but a matter of culturally or ethically based hatred of them."); *cf.* SPITZER, *supra* note 10, at 9–12 (discussing the militia and frontier ethos of gun culture).

[239] *See* Francis X. Clines, *In a Bitter Cultural War, An Ardent Call to Arms*, N.Y. TIMES, June 17, 1999, at A26.

try and recognizing the authority of state officials to post the Ten Commandments in public schools.[240]

This "action-reaction" dynamic makes expressive arguments for gun control inexpedient as well as illiberal. To dampen the intensity of opposition, it is essential to assure gun owners that control is *not* motivated by disgust for their cultural identities. Indeed, moderate advocates of control implore their allies to disavow strident, ideologically charged rhetoric.[241] This strategic motivation, along with the norm against public moralizing, helps to explain the prevalence of deterrence arguments in the gun control debate.[242]

But such expressive détentes are inherently unstable. Like anti-control interest groups, pro-control interest groups have a stake in fomenting expressive controversy in order to generate financial support from their membership. Even more fundamentally, to the extent that the gun control controversy aims to capture the expressive capital of the law, the battle can't be decisively won unless the social meaning of gun control is made express; control premised on deterrence grounds won't authoritatively repudiate martial and frontier virtues. Ultimately, then, the gun control movement is constrained by a social meaning paradox: the proponents of control can win only if they give up expressive talk, but if they give up expressive talk they can't win anything they really value.

C. Hate Crimes

What to do about "hate crimes" — violent offenses motivated by animus toward victims' group identities — is now a matter of intense national debate. At this point, the majority of states have hate crime laws, which typically impose enhanced penalties (including death, in

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[240] *See* Alison Mitchell & Frank Bruni, *House Vote Deals a Stinging Defeat to Gun Controls*, N.Y. TIMES, June 18, 1999, at A1.

[241] *See, e.g.*, SPITZER, *supra* note 10, at 97 (arguing that the "white-hot rhetoric" of debate makes rational discussion impossible and urging proponents to stop screaming obscenities at the other side); Bruce-Briggs, *supra* note 178, at 61–62 (noting that the perception of cultural siege makes gun owners "a dangerous group to cross," and suggesting that "some of the mindless passion, on both sides, could be drained out of the gun-control issue"); Kates, *supra* note 170, at 100–02 (attributing the resistance to gun control to extremist pro-control rhetoric); Susan Tyrey-Jefferson, *Gun Control: Understanding the Policy Battle*, 20 CRIM. JUST. REV. 191, 198 (1995) (book review) ("Perhaps the most confounding question raised by the gun control debate, however, is that of why there is even a debate going on. . . . Until we stop fighting simply for the sake of a fight, no meaningful legislation can be enacted or implemented.").

[242] Borrowing from successful campaigns to regulate smoking, control advocates have recently begun to frame gun control as an element of public health policy. *See* William J. Vizzard, *The Impact of Agenda Conflict on Policy Formulation and Implementation: The Case of Gun Control*, *in* GUNS IN AMERICA 131, 139 (Jan E. Dizard, Robert Merrill Muth & Stephen P. Andrews, Jr. eds., 1999). Like the use of deterrence language, this tactic "avoids the need for demonization by moving to . . . cost-benefit language." *Id.*

the case of homicide, in some jurisdictions) for offenses based on race, religion, or national origin.[243] But many citizens criticize such laws as creating "special rights," and oppose extending them to additional categories, including offenses based on animus toward gays, a motivation specified in less than half of the existing statutes.[244] Indeed, in some jurisdictions, intense disgust or loathing toward homosexuality is treated as a ground for *mitigating* the punishment for homicide under either the voluntary manslaughter, self-defense, or "diminished capacity" doctrines.[245]

Like the debates over capital punishment and gun control, the political fight over hate crimes is aimed at capturing the expressive capital of the law. Those who support hate crime laws see enhanced punishments as countering the message of group inferiority that such crimes convey, as symbolically affirming the political community's dedication to a particular conception of equality, and as recognizing the status of citizens whose social standing is insecure. Those who oppose hate crime laws intensely see those laws as condemning the conceptions of virtue that underwrite their own claim to status and recognition.[246]

The hate crimes debate, however, is a much younger expressive controversy than is either the capital punishment or gun control debate. Consequently, the rhetorical structure of the debate has not fully matured. Both sides continue to speak in an unselfconscious expressive idiom that makes their true motivations transparent. But deterrence arguments are also familiar and show up often in the pronouncements of judges and legislators. These arguments, which invariably lack cogency, *conceal* their proponents' true motivations. Nevertheless, deterrence arguments can be expected to become increasingly common as participants in the hate crime debate recoil from the cultural tension that expressive claims reveal.

1. Expressive Claims. — The expressive theory holds that both wrongdoing and punishment are defined in significant part by their social meanings.[247] The participants in the hate crime debate disagree about what bias-motivated crimes mean and what the law should say in response.

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[243] *See* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 29 (1998).

[244] *See id.* at 30.

[245] *See* Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 L. & SEXUALITY 81, 81–82 (1992).

[246] *See* Dan M. Kahan, The Anatomy of Disgust *in Criminal Law*, 96 MICH. L. REV. 1621, 1635–39 (1998) (book review).

[247] *See supra* Part I.A.1.

Proponents of hate crime laws argue that crimes motivated by homophobia, racism, religious bigotry, and like emotions have a distinctive social meaning.[248] Such crimes, the proponents argue, "send a message" that the victim and those who share his identity are not full members of society. Hate crimes say, in effect, "Fags" — or Blacks or Jews — "are not wanted here."[249] Indeed, hate crime offenders often select — or just as significantly are understood to select — modes of killing that convey that message in express terms: by tying African-American James Byrd to the bumper of their car and dragging his body for miles, his white supremacist killers traded on the evocative connotations of lynching;[250] by leaving the severely beaten and unconscious body of gay man Matthew Shepard dangling from a fence post, his killers were said to be patterning their behavior on "the Old West practice of nailing a dead coyote to a ranch fence as a warning to future intruders."[251]

These meanings, hate crime proponents argue, make such offenses worthy of special condemnation.[252] In American society, many individuals see their group commitments — from their ethnicity to their religious affiliation to their sexual orientation — as essential compo-

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[248] *See* Kahan & Nussbaum, *supra* note 8, at 350–53 (dealing with the role of emotion in criminal law).

[249] Sam Fulwood III, *Dissent Blocks Tougher Hate Crime Laws*, L.A. TIMES, Oct. 14, 1998, at A14 (quoting the executive director of the National Coalition of Anti-Violence Programs) (internal quotation marks omitted); *see* Richard Lacayo, *The New Gay Struggle*, TIME, Oct. 26, 1998, at 32 ("What people mean when they say Matthew Shepard's murder was a lynching is that he was killed to make a point. When he was 21 years old, the world's arguments reached him with deadly force and printed their worst conclusions across him. So he was stretched along a Wyoming fence not just as a dying young man but as a signpost. 'When push comes to shove,' it says, 'this is what we have in mind for gays.'").

[250] *See* Les Payne, *Exploitation and Dismissal of a Victim*, NEWSDAY (New York), June 21, 1998, at B6 ("It was a lynching so heinous that the Ku Klux Klan was moved to deny any involvement. . . . Byrd was chained to a pickup truck and dragged so roughly that his head, neck and arms were torn off along a mile of bad Texas road in Jasper. The three men charged with raising their white hands against Byrd bore a gallery of tattoos, some reportedly suggesting links to the Klan and the prison-bred Aryan Brotherhood."); *see also* Editorial, *Race, Memory and Justice*, N.Y. TIMES, June 14, 1998, § 4, at 14 ("In Jasper, [Texas,] the community has rallied around a sheriff bent on color-blind prosecution of this lynching by pickup truck.").

[251] James Brooke, *Gay Man Dies from Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, at A1.

[252] *See, e.g.*, 144 CONG. REC. E2291 (Oct. 15, 1998) (statement of Rep. Kucinich) ("The message that Mr. Shepard's attackers intended to send is clear. Their message was that lesbian and gay people should not feel welcome anywhere, a message that lesbian and gay Americans everywhere should fear for their safety. This message is the wrong message in a democratic society."); Gary Norman, *Time Texas Has a Gay-Inclusive Hate-Crime Law*, HOUSTON CHRON., Oct. 20, 1998, at A19 ("Hate-crime laws increase punishment and send a message that crimes motivated by hate are different from other crimes and will not be tolerated."); Ed Vogel, *Nevada Gays Protected by '95 Hate Crime Law*, LAS VEGAS REV.-J., Oct. 18, 1998, at 2B ("We are not tolerant of [hate crimes] and we are willing to extract more punishment.") (quoting Nevada assemblywoman Jan Evans, author of hate crimes legislation) (internal quotation marks omitted).

nents of their identities.[253] Accordingly, as much as rape conveys a more profound denial of a woman's worth than does an ordinary assault, so a hate crime connotes a more profound denial of worth than does another type of crime. This indignity, moreover, is visited not just upon the individual victim, but upon all those who share his defining commitments.[254]

Proponents defend enhanced punishment for such crimes in expressive terms as well. Hate crime laws "send the message" that the offender was *wrong* to see the victim as lower in worth by virtue of his group commitments.[255] In this way, they assure the victim and those who share his commitments that they *are* full members of society.[256]

Hate crime laws also affirm the larger community's commitment to the value of equality. They make it clear that "[t]here is nothing more important to the future of this country than our standing together against intolerance, prejudice, and violent bigotry."[257] Indeed, by denouncing the values of the hate criminals, such laws convey that those who refuse to stand *with* us in support of equality so conceived are not

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253 *See, e.g.*, Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 690 (1988).

254 *See, e.g.*, 144 CONG. REC. H4535 (June 11, 1998) (statement of Rep. Northup) ("I think it is important that we remember that when one black man is brutalized, every other person of race feels a greater sense of unease, and rightfully so. The effects of what happened in Texas will live long beyond one person. It would be impossible to measure the sense of dis-ease, dis-ease, that black Americans all across this country feel as a result of this act. Because of that, it is important that we register our outrage and our agony."); Norman, *supra* note 252, at A19 ("Unlike other crimes, hate crimes terrorize entire communities and instill fear into our society's already marginalized populations of people."); Janet Saidi, *Why Hate-Crime Laws Make Sense*, SAN DIEGO UNION-TRIB., Oct. 21, 1998, at B11 ("The difference between hitting someone to take their money and hitting someone because of their sexual orientation is that the latter affects not just an individual, but sends a message to an entire group of people.").

255 *See, e.g.*, George R. Nock, *Attack on Hate-Crimes Legislation Lacks Reason*, NEWS TRIB. (Tacoma, Wash.), Oct. 22, 1998, at A8 ("Hate-crime laws send a message: It is terribly wrong to act against people who are members of groups for no other reason than their membership."); *Reno Urges Expansion of Hate-Crime Laws*, N.Y. TIMES, Oct. 19, 1998, at A12 ("[Attorney General Janet Reno] said a bill introduced nearly a year ago — but not passed by the current Congress — would send 'a clear message from the Federal Government, if we can get it passed, that hate crimes will not be tolerated.'").

256 *See, e.g.*, John Anthony Melson, Letter to the Editor, *Hate-Crime Myths*, CHI. TRIB., Oct. 19, 1998, at 18 ("Hate-crime laws send back an important message of hope and support to the victim, and a strong message to potential perpetrators that hate-mongering will not be tolerated.").

257 President William J. Clinton, Statement on the Attack of Matthew Shepard (Oct. 10, 1998), *in* 34 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS, 1998, at 2029; *see also* 144 CONG. REC. S12729 (Oct. 20, 1998) (statement of Sen. Kerry) ("The Declaration of Independence [gives us] certain inalienable rights; life, liberty, and the pursuit of happiness. Mr. President, those two young high school dropouts threaten [sic] each and every one of us when they stole Matthew's rights and life itself. That kind of hate is the real enemy of our civilization — and we come here to call on all people of good conscience to pass the laws that help us protect every citizen and we ask all Americans to make the personal commitment to live their lives each day in a way that brings us together.").

genuinely *of* us; *they* are the ones who "are not wanted here," who are "not part of [our] culture," "not part of [our] vision."[258] Projecting this meaning might be defended in instrumental terms as contributing to the inculcation of values such as toleration and respect. But the authoritative affirmation of equality also has inherent value as "a message about how the people of the state feel."[259]

Hate crime opponents respond in similarly expressive terms. They say that punishing bias-motivated crimes more severely "sends the message" that victims of other, non-hate-related crimes matter less in the eyes of the law than do hate crime victims.[260] This interpretation necessarily assumes that the proponents are wrong — perhaps descriptively, but more likely normatively — to see a person's group commitments as more central to her identity and worth than other facts about her.

Indeed, many critics of hate crime laws don't just assume but expressly argue that the law *shouldn't* convey respect for those who hold certain group commitments. Enhanced punishment for crimes motivated by animus toward homosexuality "would criminalize pro-family beliefs," argues an official of a prominent Christian advocacy group; such a law "basically sends a message that you can't disagree with the political message of homosexual activists."[261] "The reason they bring the Feds into this debate," adds another, "is that it's a way of legitimizing homosexual activity. They can't force the culture to accept their life but they are trying to do it legislatively."[262]

Expressive claims of this nature can even be used to justify *mitigating* the punishment of homophobic killers. Various doctrines of substantive criminal law, including voluntary manslaughter, reduce the punishment of impassioned offenders whose emotions express morally

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258 James Brooke, *Crowd in Denver Rallies Against Skinhead Violence*, N.Y. TIMES, Nov. 26, 1997, at A20 (reporting speech of Denver mayor); *cf. ABC This Week* (ABC television broadcast, June 14, 1998) ("[The killing of James Byrd was] a contemptuous act — a heinous, subhuman crime.") (quoting Reverend Jesse Jackson) (internal quotation marks omitted).

259 Vogel, *supra* note 252, at 2B (reporting the opinion of a state legislator who authored a hate crime law).

260 *See, e.g.*, Steve Chapman, *A Dubious Case for Hate-Crimes Laws*, LAS VEGAS REV.-J., Oct. 21, 1998, at 11B ("It is a mistake, though, for the president to suggest that certain types of violence and intimidation are more tolerable than others."); Fulwood, *supra* note 249, at A14 ("'All crime is hate crime,' said Andrea Sheldon, executive director of the Traditional Values Coalition, an umbrella group of conservative religious organizations. 'Is that poor boy any more dead because he was homosexual? We shouldn't label some crimes more hateful than other crimes to advance a political agenda.'"); Debra Saunders, *Let Debate Begin on Hate Crimes*, IDAHO STATESMAN, Oct. 20, 1998, at 7B (stating that non-hate-crime victims "believe that disparate laws send a message that some lives are worth more than others").

261 Brooke, *supra* note 251, at A1 (quoting Steven A. Schwalm of the Family Research Council) (internal quotation marks omitted).

262 Fulwood, *supra* note 249, at A14 (quoting Andrea Sheldon, executive director of the Traditional Values Coalition) (internal quotation marks omitted).

reasonable valuations.[263] Thus, if the homophobic killer is right to attach a low value to his victim, if his anger or disgust reflects appropriate "pro-family beliefs," then he is entitled, so the argument goes, to the benefit of one of these doctrines.

This is exactly what one judge in Texas concluded. Justifying a lenient sentence for a defendant convicted of killing two homosexuals for allegedly propositioning him, the judge reasoned, "I put prostitutes and gays at about the same level, . . . and I'd be hard put to give somebody life for killing a prostitute."[264] "I don't care much for queers cruising the streets," the judge continued, "I've got a teen-age boy."[265] A reduced sentence was thus the appropriate way to affirm the low valuation of homosexuals expressed by the defendant's disgust. Gay rights activists predictably attacked the sentence as "send[ing] messages to the community that it's still open season on gay and lesbian citizens."[266]

2. Deterrence as Normative Theory. — Neither side in the hate crimes debate, however, limits itself to expressive arguments. Both also make deterrence arguments, which are no more cogent in this setting than they are in others in which deterrence claims compete with expressive ones.

Proponents of hate crime legislation typically make two types of deterrence arguments. First, they argue that larger penalties are necessary to counteract the unusually strong impulses of criminals motivated by group animus, which is thought to emanate from historically rooted social norms.[267] Second, they argue that penalty enhancements are necessary because hate crimes harm society more than other types of crimes. "[B]ias-motivated crimes," the defenders of hate crime laws argued to the Supreme Court in *Wisconsin v. Mitchell*,[268] "are more likely to provoke retaliatory crimes, inflict distinct emotional harms on

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263 *See* Kahan & Nussbaum, *supra* note 8, at 306–21.

264 Lisa Belkin, *Texas Judge Eases Sentence for Killer of 2 Homosexuals*, N.Y. TIMES, Dec. 17, 1988, at 8.

265 *Id.*

266 *Id.*

267 *See, e.g.*, Robert T. Altman, Letter to the Editor, *Hate Crime Legislation*, L.A. TIMES, Oct. 21, 1998, at B6 (quoting a state court judge: "We punish wrongdoers in order to protect innocent people and to deter potential criminals. It is rather obvious that members of certain groups, for example, gays and African Americans, have long been abused simply because they are members of a group, and it seems similarly obvious that they should receive the additional protection that longer sentences hopefully afford."). *See generally* Gregory M. Herek, *Psychological Heterosexism and Anti-Gay Violence: The Social Psychology of Bigotry and Bashing*, *in* HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 149 (Gregory M. Herek & Kevin T. Berrill eds., 1992) [hereinafter Herek, *Psychological Heterosexism*] (discussing common motivations behind hate crimes).

268 508 U.S. 476 (1993).

their victims, and incite community unrest."[269] Given limited punishment resources, society should (all else equal) invest more in deterring more harmful crimes.[270] So assuming that hate crimes do in fact cause more harm than other types of crimes, society is justified in investing more to deter them even if hate criminals' violent propensities are no greater than those of other criminals. Turning aside the First Amendment challenge in *Mitchell*, the Supreme Court agreed that this "greater harm" argument "provides an adequate explanation for . . . penalty-enhancement provision[s] over and above mere disagreement with offenders' beliefs or biases."[271]

Opponents of hate crime legislation typically offer two sets of counterarguments. First, they challenge the empirical foundation of the claim that hate crimes cause greater harm.[272] Second, they suggest that enhanced penalties are wasteful. Offenders who lash out in racist or homophobic rage tend to act on impulse; consequently, they are unlikely to respond rationally to the threat of higher penalties.[273] After all, "[t]he conduct which hate crime laws aim at is already criminal."[274] If those who engage in such conduct are willing to "ignore existing criminal laws and punishment threats" — including, potentially, the death penalty in the case of homicide — there is no reason to think that "the additional threat promised by hate crime laws [will] add[] much, if any, marginal deterrence."[275]

In fact, the wasted-punishment argument can be used to justify punishing some hate criminals *less severely* rather than more. According to deterrence theory, the level of punishment should match the dangerousness of the offender. The mitigating consequence of the voluntary manslaughter doctrine can be justified on the ground that individuals who experience homicidal passion only in response to strong and unusual provocations are less dangerous than people who kill without provocation or when only mildly provoked.[276] Homosexual propositions seem fairly uncommon. Accordingly, a decisionmaker might well conclude that the impassioned killing of someone who makes such a proposition is a "one-time tragedy" committed by a per-

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269 *Id.* at 488 (internal quotation marks omitted).

270 *See, e.g.*, BENTHAM, *supra* note 4, at 181.

271 *Mitchell*, 508 U.S. at 488; *see* Saidi, *supra* note 254, at B11.

272 *See* JACOBS & POTTER, *supra* note 243, at 81–87.

273 *See* Richard A. Posner, *Emotion Versus Emotionalism in Law*, *in* THE PASSIONS OF LAW 309 (Susan A. Bandes ed., forthcoming 2000).

274 JACOBS & POTTER, *supra* note 243, at 130.

275 *Id.*; *see, e.g.*, Editorial, *The Hate Debate*, NEW REPUBLIC, Nov. 2, 1998, at 7 ("It's hard to see how Matthew Shepard's killers would have been deterred by the prospect of federally assisted prosecution and a tough federal penalty. Under Wyoming law, and that of most states, murder is already punishable by the ultimate penalty: death.").

276 *See, e.g.*, Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1280–82 (1937).

son who the decisionmaker can be "confident . . . [will] not kill again."[277]

The deterrence arguments both for and against hate crimes display all the shortcomings characteristic of this species of justification. To begin with, they are empirically speculative. The "impulsive" nature of hate crimes can cut either way. Perhaps additional punishment will have no effect and thus be wasted, as critics of hate crime laws (such as Richard Posner) suggest.[278] Or perhaps as deterrence theorists (including Richard Posner) have emphasized in other contexts, the prospect of extra punishment might be just what it takes to counteract the strength of these killers' impulses.[279] Alternatively, if these offenders are so consumed with unreasoning hate that no punishment of any size will *deter* them, then (as Richard Posner has stressed outside the hate crimes context) incarcerating them for longer periods of time or even executing them might be cost-justified for purposes of incapacitative *specific deterrence* because offenders of that sort clearly *are* very dangerous.[280] Or maybe not, because hate criminals are generally youthful (Richard Posner reminds us)[281] and can be expected to mellow with age.

Perhaps some homophobic killers are so unlikely to kill again that there is essentially no value in *incapacitating* them. But then again, perhaps mitigating punishment on that ground, as some jurisdictions do, will unacceptably detract from the *general deterrence* of individuals who find themselves faced with a homosexual proposition for the

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[277] *Judge Draws Protests After Cutting Sentence of Gay Man's Killer*, N.Y. TIMES, Aug. 17, 1994, at A15 (reporting a judge's explanation for the lenient sentence that he gave for a man who hunted down and killed a gay man who had fondled him); *see also* Posner, *supra* note 273 (arguing that a killing by a "'homophobe,' who, deeply concerned about his own sexual identity, kills a homosexual who propositions him" is a "category of hate crime [that] overlaps with the crime of passion and [thus] raises the issue whether provocation should not result in a lighter punishment for many hate crimes").

[278] *See, e.g.*, Posner, *supra* note 273 (speculating that "impulsive juveniles, who are in fact responsible for the majority of hate crimes," might be "less deterrable because of the emotionality of youth").

[279] *See generally* Posner, *supra* note 4, at 1223 ("There might seem to be another reason for punishing the impulsive crime less severely than the deliberated one: the impulsive crime is less deterrable; punishment is less efficacious, less worthwhile, and therefore society should buy less of it. But this analysis is incomplete. To begin with, the fact that a given increment of punishment will deter the impulsive criminal less than the deliberate one could actually point to heavier punishment for the former.").

[280] *See id.* ("And we must not forget the incapacitative effect of imprisonment. The fact that certain criminals may not be deterrable argues for greater emphasis on their incapacitation, which implies long prison terms.").

[281] *See* Posner, *supra* note 273 (emphasizing the youthfulness of most hate offenders).

first time. Furthermore, some premeditating killers might invite or stage homosexual propositions in order to escape severe punishment.[282]

Perhaps, as proponents of hate crime laws suggest, higher penalties are necessary to counteract the emotional and reputational pressure created by bigoted social norms. But it is also possible that higher penalties will *accentuate* rather than counteract those pressures. If skinheads and white supremacists already pride themselves on deviating from the norms of society at large, then penalty enhancements might actually magnify the status that homophobic and racist violence confers within those groups.

All of these effects are plausible. It is impossible to say, without the benefit of more solid empirical evidence than anyone in the hate crimes debate has marshaled so far, which of them predominates and under what circumstances.

The ineffectiveness of existing punishments is similarly inconclusive. Contrary to what critics of hate crime laws argue, the willingness of offenders to brave existing punishments does not imply that special hate crime penalties would be ineffective. For noncapital offenses, hate crime legislation supplies a penalty enhancement; for capital offenses, it supplies an additional aggravating factor for the death penalty, which isn't (and indeed can't be) mandatory under existing law.[283] Federal hate crime legislation permits *federal* prosecution, which might compensate for the reluctance of state officials to prosecute hate crimes aggressively.[284] By forcefully condemning bigotry, hate crime legislation could make factfinders more likely to convict and sentencers more likely to exercise their discretion to punish severely. Even if hate crime laws have no actual effect on the expected penalty, the information that they convey about society's attitudes might cause offenders to revise upward their *assessment* of the expected penalty, or induce them to revise downward the *value* that they attach to committing such crimes. Of course, similar arguments have been advanced in favor of severe punishments, including the death

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[282] Many cases in which a homosexual "provocation" is asserted seem to fit this pattern. *See* Comstock, *supra* note 245, at 96–97; Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 167–70 (1992).

[283] *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

[284] *See Reno Urges Expansion of Hate-Crime Laws*, *supra* note 255, at A12 ("[Attorney General] Reno . . . said such nationwide legislation was needed to address 'situations where the state cannot or will not take action.'").

penalty, in other settings[285] and have been empirically documented in none of them.[286]

The "greater harm" argument is also unsatisfying. As mentioned, critics of hate crime laws challenge the "greater harm" claim on empirical grounds. The real problem, however, is conceptual. The Supreme Court's conclusion in *Mitchell* notwithstanding, the "greater harm" argument *doesn't* genuinely avoid crediting societal aversions to the "offenders' beliefs or biases."[287] For if such crimes really do "inflict distinct emotional harms . . . and incite community unrest,"[288] what is traumatizing victims and enraging onlookers is what they understand these crimes to *mean*, which does in fact depend on their perception of the perpetrators' motivations. As is characteristic of deterrence claims, the "greater harm" argument obscures a contentious decision about what kinds of public sensibilities can be legitimately included in the social welfare function.

But so do the deterrence arguments *against* penalty enhancements for hate crimes. The justification for punishing, from a deterrence standpoint, is to maximize social welfare.[289] The satisfaction that citizens take in denouncing the motivations of hate criminals, in repairing the social status of historically despised groups, or in celebrating societal commitment to a particular conception of equality can be regarded as a species of social welfare. Securing it furnishes a justification for hate crime laws even if enhanced penalties fail to produce efficient behavioral incentives or are unnecessary for incapacitation. Those critics of hate crime laws who argue that the *only* pertinent consideration is the relative "dangerousness" of hate crime offenders[290] are using deterrence arguments to conceal the undefended *exclusion* of certain values from the social welfare function.

The only parties who are not concealing their motivations are the ones who criticize or defend hate crime laws in overtly expressive terms. However reprehensible his remarks, the Texas judge who miti-

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285 *See, e.g.*, Jack P. Gibbs, *Preventive Effects of Capital Punishment Other than Deterrence*, 14 CRIM. L. BULL. 34, 40–41 (1978) (referring to the argument that legal punishments serve the purpose of "normative validation" by helping maintain "the condemnation of a particular kind of act").

286 Empirical studies consistently find that increasing the certainty of punishment has a much more significant deterrent effect on all manner of crime than does increasing the severity of it. *See, e.g.*, JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 398 (1985) (drunk driving); Alfred Blumstein & Daniel Nagin, *The Deterrent Effect of Legal Sanctions on Draft Evasion*, 29 STAN. L. REV. 241, 269 (1977) (draft evasion); Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521, 544–47 (1973) (robbery).

287 Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993).

288 *Id.*

289 *See generally* BENTHAM, *supra* note 4; Posner, *supra* note 4.

290 *See, e.g.*, Posner, *supra* note 273.

gated the punishment of the homophobic killer presented an argument that was cogent. *If* prostitutes and gays aren't worth as much as other citizens, *then* punishing those who kill them less severely than those who kill others *does* express exactly that valuation. Maybe that sentence will "send [a] message[] . . . that it's still open season on gay and lesbian citizens,"[291] and thus invite even more violence against them, but that's not a problem for someone who, like the Texas judge, doesn't "care much for queers cruising the streets."[292]

Similarly, those who *support* hate crime laws on expressive grounds can be seen as saying that they value the messages of respect for minorities and condemnation of homophobes and other bigots that such laws convey, *regardless* of the behavioral consequences such laws produce. "I don't think an enhancement statute provides a deterrent effect," acknowledges the legislator who sponsored Nevada's hate crimes statute.[293] But even if the "law may not stop hate crimes," she explains, "it sends a message about how the people of the state feel."[294] "The criminal law is an expression of the nation's basic moral standards," observes a representative of the American Jewish Congress.[295] Consequently, "enactment of a [federal hate crimes] statute . . . serves a valuable purpose *even if no one is ever sentenced to an enhanced penalty* as a result of its enactment."[296] "[W]ill this stop violence against women . . . ?" asks the sponsor of the federal Violence Against Women Act. "The answer is no, [but] that is not my intention. My intention in making this a civil rights violation is to change the Nation's attitude."[297]

At this point, no rigorous public opinion testing has been done to determine whether deterrence arguments genuinely explain why those who make such arguments feel the way that they do about hate crime legislation. But given how absurdly weak those arguments are relative to the expressive claims made for and against such laws, it seems unlikely that deterrence is doing any more work in the hate crimes debate than it is in the gun control and death penalty debates.

3. Deterrence as Discourse Strategy. — The work that deterrence arguments *do* do in the gun control and death penalty debates, however, is substantial. Notwithstanding their empirically speculative and evaluatively question-begging nature — indeed, partly by virtue of

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291 Belkin, *supra* note 264, at 8 (internal quotation marks omitted).

292 *Id.*

293 Vogel, *supra* note 252, at 2B (internal quotation marks omitted).

294 *Id.*

295 JACOBS & POTTER, *supra* note 243, at 76.

296 *Id.* (emphasis added).

297 *Legislation to Reduce the Growing Problem of Violent Crime Against Women: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 2 (1990) (statement of Senator Joseph R. Biden) (internal quotation marks omitted).

that — deterrence arguments play a critical role in muting expressive controversy over those issues. This same discourse management function explains the emergence of deterrence arguments in the hate crimes debate.

The hate crimes debate is a struggle between opposing communities that pits competing cultural styles against each other. Work in social psychology, for example, suggests that individuals who hold homophobic views tend to belong to communities that assign status according to traditional hierarchical gender norms. These individuals express loathing toward homosexuality (sometimes violently) both to gain esteem within their subcommunities and to vindicate their communities' norms within society at large.[298] Individuals who belong to communities that prize egalitarian norms, in contrast, tend to have positive attitudes toward homosexuality and are likewise motivated to express those views publicly as a way to affirm their membership in those communities and to earn approval within them.[299]

The members of these groups care deeply about hate crime laws because they see those laws as adjudicating their competing claims to status and recognition.[300] Thus, gay advocacy groups lobbied intensely for the inclusion of homophobic crimes in the federal Hate Crime Statistics Act of 1990[301] and later celebrated it as "the first time in history that sexual orientation will be included in a federal civil rights law."[302] Right wing Christian groups opposed it just as passionately. To them, the law equated disapproval of homosexuality with racism and religious bigotry, a message that they found deeply insulting.[303] The legislation ultimately overcame the opposition of powerful conservative Senator Jesse Helms only after its sponsors consented to a preamble that proclaimed, "Nothing in this Act shall be construed . . . to promote or encourage homosexuality."[304] The same factions are

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298 *See* Karl M. Hamner, *Gay-Bashing: A Social Identity Analysis of Violence Against Lesbians and Gay Men*, *in* HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 267, at 179, 182–83; Gregory M. Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, *in* BASHERS, BAITERS & BIGOTS: HOMOPHOBIA IN AMERICAN SOCIETY 1, 12 (John P. De Cecco ed., 1985) [hereinafter Herek, *Beyond "Homophobia"*]; Herek, *Psychological Heterosexism*, *supra* note 267, at 153–54; *see also* Richard A. Berk, Elizabeth A. Boyd & Karl M. Hamner, *Thinking More Clearly About Hate-Motivated Crimes*, *in* HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 267, at 123, 127 (characterizing "hate-motivated violence" as "symbolic crimes" among competing groups).

299 *See* Herek, *Psychological Heterosexism*, *supra* note 267, at 153–54.

300 *See generally* JACOBS & POTTER, *supra* note 243, at 65 (arguing that the passage of hate crime laws can be "explained by the growing influence of identity politics").

301 Pub. L. No. 101-275, 104 Stat. 140 (codified as amended at 28 U.S.C. § 534 note (1994)).

302 JACOBS & POTTER, *supra* note 243, at 71 (quoting Tim McFeeley, executive director of the Human Rights Campaign Fund) (internal quotation marks omitted).

303 *See id.* at 70.

304 104 Stat. at 141.

girding for expressive battle over federal and state legislation in the aftermath of the grisly slaying of Matthew Shepard.[305]

Competition over the law's expressive capital can pit not only the Christian right against civil rights groups, but also civil rights groups against one another. For example, the groups that supported the Hate Crime Statistics Act successfully opposed feminist efforts to add rape to the Act out of concern that doing so would detract from their efforts to call attention to homophobic and racist assaults. Angered feminists thereafter turned their attention to securing their own hate crimes law, an effort that led to the Violence Against Women Act of 1994.[306] Feminists also squared off against African-American civil rights advocates over the *O.J. Simpson* case: whereas some feminists lobbied the prosecutor to seek the death penalty to "get[] society to take domestic violence and female victims seriously," African-American leaders lobbied against it on the ground that it could reinforce social disapproval of interracial marriages.[307] African-American and Jewish groups in New York City have clashed repeatedly over whether the "hate crime" label should be afforded to assaults committed by blacks against Jews and vice versa.[308]

Even if deterrence theory lacks the power to resolve these expressive conflicts as a matter of normative theory, it might still be rhetorically potent enough (that is, rhetorically inert enough) to discharge those conflicts in practice. On its face, at least, the cost-benefit logic of deterrence abstracts from the contentious social meanings that motivate the warring cultural factions in the hate crimes battle. Accordingly, those who speak in a deterrence idiom need not be seen (at least from a distance) as picking sides.

More specifically, we should expect deterrence arguments to appeal to three important constituencies. First are ordinary citizens who have a position on hate crime laws but do not hold it passionately. For them, the value of revealing their expressive allegiances in public is

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305 *See, e.g.*, Brooke, *supra* note 251, at A1 ("Gay leaders hope that Mr. Shepard's death will galvanize Congress and state legislatures to pass hate-crime legislation or broaden existing laws. Conservatives, particularly Christian conservatives, generally oppose such laws, saying they extend to minorities 'special rights.'").

306 *See* JACOBS & POTTER, *supra* note 243, at 72–76.

307 Scott Armstrong, *Case Against Simpson Intensifies Death-Penalty Debate in U.S.*, CHRISTIAN SCI. MONITOR, Sept. 6, 1994, at 2; *see also* Haya El Nasser & Richard Price, *"Race Factor Begins to Emerge"/L.A. Fear: Reopening Old Wounds*, USA TODAY, July 20, 1994, at 3A (noting concern of African-American civil rights activists that the Simpson case would "reinforce negative opinions about interracial marriages").

308 *See* JACOBS & POTTER, *supra* note 243, at 138. For a comic example of the conflict that hate crime legislation can provoke among civil rights advocacy groups, see Hayward, cited above in note 5, quoting a so-called "fathers' rights" activist opposed to domestic abuse legislation: "At every opportunity, this administration seeks to demonize fathers and destroy the institution of fatherhood."

smaller than the gains of complying with the liberal social norm against contentious public moralizing. So just as citizens do when forced to declare their position on the death penalty, these individuals will opt for the morally unambitious and culturally unaggressive idiom of deterrence.

Second, deterrence arguments should appeal to officials and opinion leaders who are committed to cleansing public debate of moralizing as a matter of principle. They will frame the hate crime issue in deterrence terms as a means of steering expressive controversy away from the hate crimes issue ex ante and blunting the expressive import of hate crime laws ex post. Motivations of this sort plausibly explain the Supreme Court's acceptance of the fallacious argument in *Mitchell* that penalty enhancements are warranted by the "greater harms" associated with hate crimes rather than by societal aversions to the messages that such crimes express.[309] They explain, too, why an economist as smart as Richard Posner would focus only on the "dangerousness" of criminal offenders in evaluating hate crime laws: Posner excludes expressive sensibilities from the social welfare calculus not because he is obtuse but because, like Justice Holmes, he sees the infusion of expressive sensibilities into the criminal law as productive of incessant illiberal conflict.[310]

Third, deterrence arguments will recommend themselves to strategically sophisticated (and emotionally disciplined) proponents of hate crime legislation. Like opposition to gun control, opposition to hate crime laws draws much of its force from the perceived cultural ambitions of those who support such laws; the Christian right sees hate crime legislation as equating disapproval of homosexuality with racist bigotry and therefore as "criminaliz[ing]" supposedly "pro-family beliefs."[311] Muting the expressive overtones of such laws should thus reduce the intensity of the opposition to them. A moderate legislator

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309 *See supra* pp. 467–68.

310 Posner writes:

> [My] objection [to hate crime laws], in short, is not to varying the punishment for crime according to the harm suffered by the victim or the deterrability of the criminal but to varying it in order to make a political or ideological statement, or (what is often the same thing) to accommodate the pressures of politically influential groups. Ideology and interest-group politics have no proper place in a criminal justice system. In rejecting this precept, the supporters of hate-crime laws, some of whom are deficient in historical memory, are playing with fire. It was not long ago that a political or ideological conception of the role of criminal law would have justified less, rather than more, protection of that law for blacks, homosexuals, and other minorities. Proponents of hate-crime law may respond that in those bad old days the enforcement of the criminal law on behalf of these groups was often unenthusiastic, and this is true. But there is a difference between failing to protect people adequately against private hostility and making that hostility a basis for punishment. The first practice is wrong; the second is wrong and dangerous.

Posner, *supra* note 273.

311 *See supra* p. 466.

who acquiesces in the enactment of a hate crime statute will get in less trouble with her most conservative constituents if the sponsors of hate crime legislation *say* their goal is only to "deter" violence than she will if the stated aim of the legislation is to "send the message" that gays deserve as much respect as heterosexuals, Jews as much as Christians, blacks as much as whites, etc. Of course, once such laws are on the books, their sponsors are free to celebrate them as symbolic acknowledgements of the status of the protected groups — just as gay rights advocates did after enactment of the Hate Crime Statistics Act, its absurd preamble notwithstanding.[312] These dynamics can explain why public officials who support hate crime laws gravitate toward the deterrence idiom.[313]

For all of these reasons, we should expect deterrence arguments, already prominent in the debate over hate crime laws, to become even more so as the debate progresses. Those who are content merely to debunk such arguments as normatively facile are, at a minimum, overlooking the role that these arguments play in discourse management.

Worse yet, the deterrence critics might also be making a grievous moral blunder. By loudly discrediting deterrence arguments — by demonstrating, in particular, that such arguments cannot really compel a position on hate crimes independent of contentious judgments of value — normative theorists risk impairing the cooling effect of deterrence as a strategy for discourse management. *If* the secret ambition of deterrence is a morally honorable one, then it is morally wrong to be (or at least to talk like) anything other than a Benthamite. *Whether* the secret ambition of deterrence is morally honorable is the question to which I now turn.

III. THE SECRET AMBITION APPRAISED

So far I have concerned myself with the positive question of why deterrence theory figures so prominently in public debate over criminal law. The answer, I have argued, is *not* that deterrence speaks authoritatively to the moral issues posed by capital punishment, gun control, hate crimes, and the like; on the contrary, the attraction of deterrence

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312 *See supra* pp. 473–74.

313 *See, e.g.*, Nock, *supra* note 255, at A8 ("When the Tacoma City Council voted, 8–1, to include sexual orientation as a protected category, one of the council members, an opponent of gay rights, noted he was voting for the provision because it was a safety issue."); *see also* Altman, *supra* note 267, at B6 (quoting a state court judge: "We punish wrongdoers in order to protect innocent people and to deter potential criminals. It is rather obvious that members of certain groups, for example, gays and African Americans, have long been abused simply because they are members of a group, and it seems similarly obvious that they should receive the additional protection that longer sentences hopefully afford.").

is precisely that it *doesn't* speak to the contested expressive values that make these matters so contentious. We resort to the culturally ecumenical idiom of deterrence to avoid a style of public moralizing that principle, interest, and etiquette all condemn. In this way, deterrence cools — with intermittent success — an engine of debate that is predisposed to run at a white hot temperature.

I now want to take up the normative question of whether the discourse management function of deterrence is itself good or bad. Does it cleanse public debate of expressive zealotry? Or contaminate it with hypocrisy? Does it facilitate convergence by citizens of diverse cultural identities? Or conceal the influence of dominant subcommunities? Does it promote the ultimate triumph of enlightened policies? Or prolong the influence of morally bankrupt social norms?

The unhappy truth is that there just are no final answers to questions such as these. The contribution that deterrence makes to discourse management is both the strongest argument for and the strongest argument against this theory of punishment. The best we can do is pragmatically adapt our style of talk to the nature of the issue at hand, although even this strategy tends to defeat itself when self-consciously pursued.

My argument in this Part proceeds dialectically. I begin with a liberal defense of deterrence theory as a form of discourse management. I then counter that position with an antiliberal critique. Finally, I attempt a pragmatic reconciliation of these positions, one that I regard as only partially successful.

A. Liberal Thesis

Expressive condemnation and optimal deterrence are not so much competing ways to *identify* morally justified laws (the latter never contradicts the former) as they are competing ways to *describe* what makes such laws morally justified. The expressive theory is excruciatingly judgmental. It endorses the behavior of the individual who opts to kill rather than to run because he is a "true man," whose "resent[ment]" of the "humiliating indignity" of flight appropriately values "liberty" and "rights" more than the life of a wrongful aggressor;[314] it withholds severe punishment for homophobic killers because it "do[es]n't care much for queers," whom it puts "at about the same level" as "prostitutes";[315] it supports gun control to condemn the "anti-citizen," whose vision of individual self-sufficiency "ought to disgust . . . the civilized observer."[316] Deterrence, by contrast at least, is

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[314] *See supra* pp. 429–430.
[315] *See supra* p. 467.
[316] *See supra* pp. 457–58.

soothingly detached: it talks of persons who can't behave rationally "in the presence of . . . uplifted kni[ves],"[317] of the disutility of incapacitating offenders who we can be "confident . . . [will] not kill again,"[318] and of the effect that banning handguns will have in reducing violent crime.[319]

To choose between expressive condemnation and optimal deterrence, then, we must consider which form of public discourse — judgmental or detached, face-breaking or face-saving[320] — is better. In particular, since we know that citizens by and large are motivated by expressive considerations even when they profess to be relying on instrumental ones, the deterrence theory can be defended only if we think that it is appropriate for citizens to hide their true moral feelings — to refrain from "saying all [they] think," in Justice Holmes's words — when they deliberate about criminal law. Is there any theory of public discourse that would justify rhetorical indirection of this sort?

There is: modern liberalism. Liberalism is famously opposed to public moralizing, or at least to certain robust forms of it. Rawls calls this the liberal principle of "public reason," which enjoins public officials and private citizens alike "not to appeal to comprehensive religious and philosophical doctrines — to what [they] as individuals or members of associations see as the whole truth —"[321] when engaging in political deliberation, but rather "to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality."[322] Rawls confines the directive of public reason to certain fundamental issues relating to the structure of government and the content of basic rights.[323] Other liberal theorists, however, see the obligation of citizens to disclaim reliance on "privileged insight into the moral universe,"[324] and instead to confine themselves "to reasons or principles that can be shared by fellow citizens" of diverse moral persuasions,[325] as coextensive with the domain of coercive state authority.

Liberal legal theorists put the same constraints on judicial discourse. Formalism, "minimalism," and related techniques of judicial

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317 *See supra* pp. 429–430.

318 *See supra* pp. 468–69.

319 *See supra* notes 168–169.

320 *Cf.* GUSFIELD, *supra* note 25, at 185 ("Since status conflicts involve opposition between styles of life, it is necessary to break the 'face' of the opponent by degrading his cultural content.").

321 RAWLS, *supra* note 13, at 224–25.

322 *Id.* at 218.

323 *See id.* at 214. He does allow, however, that "it is usually highly desirable" that even less fundamental political issues be resolved "by invoking the values of public reason." *Id.* at 215.

324 ACKERMAN, *supra* note 13, at 10.

325 GUTMANN & THOMPSON, *supra* note 13, at 55.

restraint, they argue, can be seen as strategies for grounding legal decisions in reasons acceptable to persons of diverse moral outlooks and commitments.[326]

The liberal commitment to public reason rests on two motivations. The first is a practical one. The avoidance of contentious public moralizing is thought to promote popular acceptance of law. Because fundamental moral dissensus is a permanent feature of the modern condition,[327] we can expect citizens to submit to a regime in which democratic majorities continually get their way only if citizens are "assured that 'ultimate values' — the things they care about most — will not be dragged through the mud of contestation."[328] Once "emotionally charged solidarities and commitments are displaced from the political realm," moreover, democratic politics become more cooperative.[329] Citizens of diverse persuasions are more likely to converge on solutions to their common problems if they agree not to treat politics as a site for adjudicating the fundamental issues of value that divide them and if accommodation and compromise are not taxed with connotations of moral collaboration or surrender.[330]

The second motivation behind the principle of public reason is liberalism's foundational commitment to individual autonomy. Abiding moral dissensus is the "inevitable outcome of free human reason."[331] Consequently, in order to respect each individual's capacity to choose her own ends, citizens and legislators must refrain from grounding their support for coercive policies in reasons that are compatible with only some comprehensive views and not with others.[332] By rooting legal conclusions in formally authoritative sources such as precedent or textualism, rather than in raw invocations of morality, participants in the legal culture likewise "convey mutual respect and a desire to maintain connections."[333] Because such decisions disclaim any grounding in contentious moral presuppositions, dissenting citizens can acquiesce in them without feeling that they are being forced to renounce their defining outlooks and commitments.[334]

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326 *See* SUNSTEIN, *supra* note 13, at 46–47 (comparing "incompletely theorized agreements" to "overlapping consensus"); Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 37–38 (1996) (defending "minimalism" as morally unambitious in the liberal sense); Strauss, *supra* note 13, at 17–20 (connecting "techniques of legal argument" to the Rawlsian notion of "overlapping consensus").

327 *See* GUTMANN & THOMPSON, *supra* note 13, at 18–26.

328 Holmes, *supra* note 147, at 217.

329 *Id.* at 207.

330 *See* SUNSTEIN, *supra* note 13, at 37–39; Strauss, *supra* note 13, at 20–21.

331 RAWLS, *supra* note 13, at 37.

332 *See id.* at 216–17.

333 Strauss, *supra* note 13, at 21; *see also* SUNSTEIN, *supra* note 13, at 39 (arguing that "incompletely theorized agreements" help citizens show each other mutual respect).

334 *See* SUNSTEIN, *supra* note 13, at 41.

The strongest defense of deterrence theory is that using it to justify contentious criminal law policies satisfies the basic demands of liberal public reason. Expressive arguments overtly appeal to values — from hierarchical conceptions of honor to contested conceptions of equality, from individualism to civic solidarity — that belong only to particular moral visions and cultural styles; indeed, when they take the form of battles over the law's expressive capital, disputes over the death penalty, gun control, hate crimes, and like issues all aim at the exaltation of one subcommunity's moral view and the disparagement of another's. But when citizens and officials frame their positions on these same issues in deterrence terms, they avoid directly challenging each other's fundamental commitments. None of the cultural styles in conflict denies, in the abstract, that the law should "reduce crime"; *all* of them can agree that the law should be used to promote desirable states of affairs — so long as they don't have to say anything about what those states of affairs are. It's true that deterrence arguments have a certain caginess about them, insofar as they invariably reflect unstated expressive theories of value. But this evaluative modesty (how thoughtless to deride it as "emptiness"!) is exactly what makes deterrence theory congenial to liberal public reason, which counsels us "*not* [to] appeal to the *whole* truth as we see it, even when it might be readily available."[335]

To the extent that it succeeds in displacing its contentious expressive rival, deterrence theorizing secures both of the general goals of liberal public reason. First, it makes the criminal law more acceptable to persons of diverse moral persuasions. Once the law gets out of the business of "sending messages" about whose values and commitments count and whose don't, it no longer serves as a lightning rod for expressive zealotry. Citizens can determine their positions on issues like the death penalty, gun control, and hate crimes based solely on whether they believe such policies contribute to their security as opposed to their relative social standing. Indeed, shielded from the distorting influences of symbolic politics, legislators and judges are more likely to resolve disputed issues in a rational fashion that genuinely *does* furnish cost-effective security to *all* citizens.

Deterrence arguments are also open to dispute, of course, but the empirical issues that they involve excite much less contention than do the moral ones posed by the expressive arguments. Consider how little emotional blood is spilled over the duty to retreat from a deadly encounter once dispensing with it is seen to reflect, not the virtue of the "true man," but the perceived imperviousness of a terrified person to

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335 RAWLS, *supra* note 13, at 218 (emphasis added).

legal incentives.[336] By leaching the meaning out of issues like the death penalty and gun control, deterrence similarly lowers the expressive stakes of these debates, whether or not it makes the proper resolution of them any clearer.

Second, as a substitute for overtly expressive arguments, deterrence claims show respect for individual autonomy. When citizens publicly defend or oppose a law based *not* on its perceived behavioral consequences but on their desire to see the law repudiate values that they abhor, they show contempt for the persons who see such values as central to their identities. This is clearly so, for example, when legislators voice their support for unenforced sodomy laws to express condemnation of homosexuality;[337] but it's just as true when citizens say that they support gun control to show that they are "disgusted" with the frontier ethic of individual self-sufficiency. Like the decision of a judge to invoke formal grounds rather than moral ones, the decision of a citizen to rely on deterrence rather than on expressive arguments shows respect for her cultural adversaries. When citizens and public officials debate controversial policies in deterrence terms, moreover, they spare the losers in those debates from having to see their cultural and moral identities as incompatible with their civic ones.

Although some might object that Rawls's conception of liberal public reason taints deliberation with an objectionable lack of candor, the liberal defense of deterrence does not imagine that citizens will engage in deceit. Because individuals tend to resolve empirical uncertainty consistently with their values,[338] most citizens will sincerely believe that deterrence is best promoted by the policies that they actually support for expressive reasons. Even if they perceive (as is likely) that deterrence is not the *only* reason that they support those policies, citizens who choose to use deterrence arguments to avoid "saying all they think" are not lying, but are merely restraining their advocacy in the interest of civility and respect.[339]

Similarly, the liberal defense doesn't necessarily imagine that deterrence exercises its cooling effect by "tricking" or "duping" anyone. We are perfectly aware that those who make deterrence arguments on behalf of policies such as the death penalty, hate crimes, and gun control likely hold culturally partisan expressive beliefs that point in the same direction. But for exactly that reason, the decision of an individual to frame her position in the bland idiom of deterrence, rather than in the

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336 *See supra* pp. 432–435.

337 *See* Kogan, *supra* note 24, at 233.

338 *See supra* p. 428, 438.

339 *Cf.* Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 19 (1989) (arguing that the liberal principle of "conversational restraint" does not "require people to say things they believe are false" but only "to repress their desire to say many things which they believe are true").

caustic and assaultive one of expressive condemnation, effectively conveys her desire to avoid moral confrontation. Resort to deterrence is the rhetorical equivalent of extending the hand — a ceremonial gesture of goodwill and accommodation that signals that one is not about to let another's competing cultural commitments stand in the way of mutually advantageous undertakings.

I have been using liberal theory to justify the role of deterrence theory in public deliberations over criminal law; the role of deterrence theory, however, can also be used to deepen our understanding of liberal theory. The function of deterrence as a strategy for managing public discourse furnishes an example of what something approaching liberal public reason looks like in practice. It looks different, moreover, from what either liberal political theorists or liberal legal theorists imagine.

Rawls understands liberal public reason to preclude arguments rooted in a "comprehensive view," which he defines as any "precisely articulated scheme of thought" — religious or philosophical — that "includes conceptions of what is of value in human life, as well as ideals of personal virtue and character, that are to inform much of our nonpolitical conduct (in the limit our life as a whole)."[340] For Rawls, "[u]tilitarianism is a familiar example" of a comprehensive view.[341] Other liberal theorists likewise assume that utilitarianism and related consequentialist systems of justification are too ambitious in defining the good to be an acceptable basis for policymaking in a liberal regime.[342]

The function of deterrence theory as a strategy for managing political conflict calls this suspicion of utilitarianism into question. Deterrence theory is utilitarian or consequentialist in nature, yet it succeeds in muting illiberal conflict in criminal law. That it is able to do so notwithstanding its "comprehensive" underpinnings is likely a consequence, in part, of a rhetorical framing effect: because deterrence arguments are so much *less* contentious than their familiar expressive counterparts, one's choice to speak in a deterrence idiom is an unambiguous gesture of ideological compromise and self-restraint. Deterrence is also able to mute expressive conflict because of the relative *looseness* of utilitarian or consequentialist arguments as they actually

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340 RAWLS, *supra* note 13, at 175.

341 *Id.* at 13.

342 *See, e.g.*, ACKERMAN, *supra* note 13, at 49 ("[T]he problem with utilitarianism is its teleological character, its effort to evaluate distribution rules by how much 'good' they produce. *Any* such effort requires a specification of the good that will be contested by *some* citizens who insist on measuring their good by a different yardstick . . . ."); GUTMANN & THOMPSON, *supra* note 13, at 184–96 (arguing that consequentialist forms of policymaking supply neither a theoretically cogent nor a practically feasible approach for aggregating the preferences of citizens of diverse moral persuasions).

appear in political debate. Consequentialist arguments are likely to strike citizens as imperialistic about conceptions of the good only when those arguments clearly specify the account of the good that they are trying to maximize; deterrence arguments in American criminal law nearly always elide that question, and thus appeal widely across groups that subscribe to antagonistic conceptions of what makes for a valuable life.

The lesson for liberal political theory is that those who want to implement public reason need fairly fine-grained and contextual understandings of how citizens perceive different styles of argument. What sounds comprehensive to the ear of a philosopher might not to the ear of the ordinary citizen.

The function of deterrence as a strategy for managing public discourse also challenges certain conclusions of liberal legal theory, which unlike liberal political theory does pay close attention to actual practice. Sunstein, for example, sees American judicial discourse as contributing to liberal political ends through the device of "incompletely theorized agreements," by which he means (primarily) consensus on "concrete outcomes"[343] in the absence of any commonly stated agreement on the "general theory that accounts for" them.[344] Sunstein points out that it's often easier for citizens, lawmakers, or judges to agree about *what* the law should do — protect endangered species, recognize labor unions, respect the right to abortion — than about *why* the law should do it, in which case deliberation over "abstractions" such as utilitarianism or Kantianism will produce needless illiberal conflict.[345]

Deterrence, however, is an example of one "abstraction" that *lessens* conflict over the content of the law. Indeed, it is precisely because deterrence arguments *abstract from* contentious social meanings that they are able to cool debates over issues like the duty to retreat, gun control, and the death penalty, the concrete outcomes of which polarize the body politic.

Although it is hazardous to generalize about the respective functions of "generality" and "concreteness" in managing political conflict

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[343] SUNSTEIN, *supra* note 13, at 4.

[344] *Id.* at 5.

[345] *See id.* at 4–8, 36–37. Sunstein states that "incompletely theorized agreements" characterize the decisionmaking culture of the judiciary and not that of the political branches. *Id.* at 45, 60. Many of his examples of the salutary role of such agreements in discharging conflict, however, deal with policies made by legislatures or administrative agencies. The benefits of "incompletely theorized agreements" in the courts would surely be minimal were politics treated as a moral free-fire zone. *See, e.g.*, Strauss, *supra* note 13, at 39 ("There is general agreement on an elaborate set of both procedural and substantive limits on the acceptable ways of resolving political disputes. . . . [W]e underestimate the extent to which political decisionmaking is the product of constrained disputation like that found much more obviously in legal discourse.").

in legal discourse, the lesson to be learned from deterrence theory seems to be that the relative clarity of an argument's *social meaning* matters more than its theoretical abstractness. Legal and political issues become the site of illiberal conflict when citizens perceive that the resolution of them will signify whose side the government is taking in disputes between contending social groups and related cultural and moral styles. At least outside of law school and political philosophy seminar rooms, citizens usually *don't* get agitated about abstractions such as utilitarianism and Kantianism. Accordingly, one way to defuse moral contestation in law, especially when we can anticipate that citizens are *not* disposed to agree on the outcome of a legal question, is to envelop that issue in the anesthetizing (indeed, downright narcotizing) idiom of abstract theory.

Of course, the theorists who are positioned to learn the most from the function of deterrence as a strategy for managing public discourse are the ones who favor liberal values in criminal law. The lesson for them, plainly enough, is that they ought to speak in the idiom of deterrence.

This directive is far from obvious. Commentators of a liberal bent are not invariably deterrence theorists. Indeed, the two most sophisticated contemporary accounts of the *expressive* theory were developed by liberal moral philosophers: Jean Hampton, who saw it as an appropriate vehicle for infusing the criminal law with a Kantian theory of individual dignity;[346] and Joel Feinberg, who is famous for his project to conform the criminal law to liberal principles.[347]

Indeed, liberal criminal law theorists are much more likely to reject deterrence than to embrace it.[348] Bentham's fanatic commitment to the "greatest good for the greatest number" makes no allowance for the contemporary liberal commitment to individual rights. The bureaucratic fascism of Justice Holmes, who not only conceived of "[p]revention" as the "only universal purpose of punishment" but who imputed to the criminal law the precept that "the individual [i]s a means to an end, . . . a tool to increase the general welfare,"[349] seems a singularly inapt vehicle for advancing liberalism's humanist project. Yet given the latent illiberality that deterrence rhetoric holds in check, the best course for criminal law liberals is to throw their lot in with the modern-day Benthamites and Holmesians.

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346 *See* Jean Hampton, *The Retributive Idea*, *in* MURPHY & HAMPTON, *supra* note 16, at 135.

347 *See* FEINBERG, *supra* note 16, at 95–251.

348 *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 40–49 (1968) (describing the concept of excuse in criminal law as evidence that law ranks respect for individual autonomy over societal utility).

349 HOLMES, *supra* note 68, at 46–47.

Certainly, one can imagine many other ways of talking about criminal law that would also be consistent with liberal ideals. The question, however, is whether these *theoretically* available liberal idioms are also *practically* available. No merely imagined liberal alternative to deterrence has its track record in staunching expressive zealotry.[350]

Under these circumstances, liberals who disparage deterrence are guilty of indefensible recklessness. Whatever its shortcomings as a normative theory, the power of deterrence as a strategy for managing public discourse makes it liberalism's best hope for containing divisive public moralizing.

B. Antiliberal Antithesis

Deterrence theorizing might be liberals' best hope for insulating criminal law from divisive public moralizing, but that only puts the question whether we should *be* criminal law liberals. The argument I want to advance now is addressed to those who are committed, as I am, to the progressive values of egalitarianism and civic solidarity, and who believe that the existing regime of criminal law systematically disserves those values. Those who hold these views ought to see the liberal defense of deterrence, precisely because it seeks to suppress moral controversy, as a strategy for entrenching the status quo and as an invitation to the critics of the existing regime unilaterally to disarm.

As the liberal defense of deterrence theory recognizes, deterrence theorizing never genuinely resolves contested issues of policy. Its operational axioms demand better empirics than policymakers could ever have. Even more fundamentally, reasoning within those axioms presupposes a contestable theory of value that tells us what states of affairs the law should be trying to maximize; without such a theory, we can't rationally decide what forms of conduct the law should be deterring, how much it should spend to deter them, and what the most efficient allocation of resources is across different forms of wrongdoing.

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350 One readily imagined liberal alternative — voluntarism — has never been able to contain it. Voluntarism holds punishment to be deserved if and to the extent that an individual self-consciously chooses to break the law. For the classic exposition, see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 140–45 (1968). But whether or not voluntarism successfully brackets contentious moral visions as a matter of theory, in practice it is deeply pervaded by them. Told that they can excuse a crime only if an offender suffered "impaired volition," for example, legal decisionmakers predictably perceive this invisible condition only in the offenders whose behavior expresses the decisionmakers' preferred social norms — whether the cuckold who executes his unfaithful wife, or the battered woman who assassinates her tyrannical husband. When defenses are conceived of in voluntarist terms, expressive warfare continues unabated, with cultural factions trading rival charges of "abuse excuse." *See, e.g.*, Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435, 1441–51 (1998) (exposing political presuppositions underlying the "abuse excuse" critique).

These issues always get resolved by recourse to unstated expressive valuations that citizens and their representatives use to construct a usable theory of value and to help them screen conflicting empirical data.[351]

Accordingly, the liberal defense of deterrence as a strategy for managing public discourse gives us a program not for *extricating* contentious expressive valuations from the law but only for *concealing* their influence. Justice Holmes indeed didn't *say* all that he thought — namely, that "in Texas . . . a man is not born to run away" and that the law should recognize the glory of the "swift and cunning" combatant — but that's the unstated expressive evaluation that *motivated* him to reject the duty to retreat.[352] The judge who mitigates the sentence of the homophobic killer on the ground that the event was a "one-time tragedy" committed by a person who the judge is "confident . . . [will] not kill again" doesn't tell us all he thinks either, but his decision to emphasize specific deterrence to the exclusion of general deterrence reveals that he harbors (consciously or otherwise) the same expressive valuations as the judge who candidly tells us that he doesn't "care much for queers cruising the streets."[353]

The implicit expressive valuations that underlie decisions such as these are not self-generating; they are constructed, as all expressive judgments are, by social norms. Thus, deterrence as a strategy for managing public discourse amounts to a plan for concealing the patterning of the law on the contestable social norms of the dominant social groups from whose ranks most judges, legislators, and politically influential citizens come.

If one believes that those norms are likely to be *bad*, then one should see nothing *good* in deterrence as a form of liberal "public reason." For by obscuring the influence of these norms, deterrence theorizing insulates them from the forces in both politics and law that have the best prospect for dislodging them.

Social norms are not static. Indeed, the transformation of norms is a familiar phenomenon in contemporary political and social life. The once pervasive and unquestioned norms that underwrote white supremacy have now been disavowed, if not extinguished, by the cultural mainstream. The same is true in the domains of gender and sexuality, where traditional, hierarchical norms are today highly contested and in some cases completely discredited.

These norm shifts can be intentionally triggered and, at least to an extent, accelerated. Individuals tend to conform to the behavior and

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351 *See supra* Part I.B.1.

352 *See supra* p. 434.

353 *See supra* pp. 467, 469.

expectations of those around them.[354] What others do and say reveals information from which individuals infer the social acceptance of different courses of action; they furnish cues about how individuals should conduct themselves to gain approval and to avoid the stigma of deviance; and they supply examples of appropriate conduct that individuals are likely to internalize.[355] Advertisers, fund raisers, political campaign managers, and other "influence professionals" exploit these dynamics by bombarding us with images of persons engaging in the behavior or expressing the opinions that the professionals wish to promote.[356] Political and social reformers frequently use this same strategy. By staging or publicizing dramatic events — from mass demonstrations to campaigns of civil disobedience to examples of individual heroism — they seek to create the self-reinforcing impression of a groundswell of opinion in favor of their causes.[357]

Law is an important source of the information that determines the vitality of a nascent norm. Because it is commonly understood to express community values, criminal law in particular is an important cue about what others believe.[358] This is one of the reasons that contending social groups battle so fiercely to control the law's expressive capital: if the law conveys that *others believe* that gays warrant respect, or that the ideal of individual self-sufficiency expressed by handguns warrants disgust, then individuals — reformers and their adversaries both believe — are more likely to adopt that assessment. Indeed, the value of law as a signal of common attitudes is greatest for those who are trying to establish (or defend) contested norms, for in that case private behavior is least likely to convey a self-reinforcing signal in favor of the norm spontaneously.[359] Thus, by seeking to drain the law of its expressive vitality, deterrence as liberal public reason threatens to strip progressives of a potent weapon in their project to overthrow hierarchical and individualistic social norms.

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[354] *See, e.g.*, ELLIOT ARONSON, THE SOCIAL ANIMAL 13–56 (7th ed. 1994); ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 1–16 (2d ed. 1993).

[355] *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352–61 (1997) (discussing social influence on individual behavior).

[356] *See generally* CIALDINI, *supra* note 354, at 95–133 (discussing how society influences personal behavior).

[357] *See* Gusfield, *supra* note 27, at 56 (describing "[m]oral entrepreneurs" who trigger crusades to change the norms of deviancy); Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623, 654–55 (1998) (stating same for "ethnification entrepreneurs"); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 912 (1996) (stating same for "norm entrepreneurs"); *cf.* MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 38–39, 50 (1987) (discussing strategies of the "connected critic").

[358] *See* Kahan, *supra* note 355, at 362–65.

[359] *See* GUSFIELD, *supra* note 25, at 17–18, 20, 177, 205–06; McAdams, *supra* note 29, at 400–03.

Of course, two (or more) can play the norm-manipulation game. Political reactionaries can exploit the expressive function of law to reinforce bad norms just as political progressives can use it to promote good ones. Indeed, some of the most dramatic examples of expressive politics, including Prohibition, have been aimed at shoring up norms essential to the status of embattled dominant groups.[360] There is no reason, a liberal might argue, for the progressives to assume that they are going to win the expressive game. Out of prudence, progressives too should advocate that criminal law speak in the idiom of deterrence lest expressive condemnation add self-reinforcing insult to material injury when judges mitigate the punishment for homophobes when citizens elect pro-death-penalty Presidents and Governors, and when legislatures refuse to enact gun control.

There are three basic flaws in this liberal defense of expressive détente. First, it embodies an unjustifiable bias in favor of the status quo. The law as it stands — from the widespread adoption of the death penalty to the absence of effective gun control on a national level to the persistence of mitigation for homophobic killers under the voluntary manslaughter doctrine — already reflects hierarchical and individualistic norms. The progressives who oppose these norms would thus be giving up much more than the reactionaries who support them were both sides to agree to a moratorium on expressive criminal law politics.

Indeed, because contested expressive valuations determine how citizens and officials feel about the law even when they *say* their positions reflect deterrence considerations, the defenders of the status quo don't need to engage in expressive politics to construct a legal regime that reflects their values. Sodomy laws just *do* demean gays even when those law are universally applicable on their face. The death penalty just *does* express authoritarianism and devaluation of African Americans, whether or not politicians make those meanings express. Consequently, a prohibition on expressive rhetoric imposes costs *only* on progressive critics of the status quo, because they are the only ones who need the norm-shifting power of overt social meanings.

Second, the expressive détente defended by liberals lacks credible mechanisms of enforcement. "Public reason" is a classic "public good": the benefits of public reason — stability, legitimacy, respect for dignity, and the like — are enjoyed by all members of society and not only by the individual who renounces public moralizing, except insofar as she is benefited by the like restraint of others. Like all other public goods,

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360 *See* GUSFIELD, *supra* note 25, at 7–8 (Prohibition); Gusfield, *supra* note 27, at 62 (describing anti-gambling laws in Boston in 1930 as symbolically protecting "Yankee social and political superiority").

then, public reason is vexed by a collective action problem. Individuals are being expected to confer benefits on others who aren't obliged to reciprocate. Why should a self-interested individual restrain herself from engaging in divisive public moralizing when she can get the benefit of her principled adversaries' restraint for nothing? Why should a *prudent* individual agree to restrain *herself* if she can anticipate that her self-interested rival will free-ride?

Absent formal sanctions for public moralizing — a system that we don't have and couldn't have under the First Amendment — this collective action problem can be solved only by social norms backed up by the informal sanctions of personal guilt and public scorn. There are in fact such norms in our political culture.[361] But they are weak. Expressive zealots — including the leaders of interest groups that thrive on ideological conflict and ambitious politicians who see opportunities for immediate electoral gains — invariably breach the expressive peace and force more moderate citizens to take up arms as well.[362]

Common experience, moreover, suggests that defections from the norm against public moralizing are not uniform across moral commitments and cultural styles. Citizens who support egalitarianism and civic solidarity are more likely to see appeal in liberal public reason, whether out of principle or pragmatic calculation; citizens who support hierarchy and individualism tend to put little value on liberal public reason and are in fact likely to be horrified by the suggestion that moralizing be banished from political discourse. If *we* give up on enhanced penalties for gay bashing, *they* will still insist on the Defense of Marriage Act.[363] In these circumstances, progressives who voluntarily assent to the constraints of public reason are fools. They've failed to learn from the experience of Michael Dukakis, whose attempt to use deterrence talk to extinguish the flames of expressivism ignited by the Willie Horton issue left his campaign a smoldering heap of ashes.[364]

Third and finally, the liberal defense of expressive détente grossly overstates the costs of public moralizing by reactionaries. Persuading reactionaries to justify bad laws in deterrence terms achieves little, since those arguments will continue to persuade so long as decisionmakers remain responsive to unjust social norms. Things aren't necessarily worse, however, when reactionaries justify their positions ex-

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361 *See supra* pp. 445–46.

362 *See supra* Parts II.A.4, II.B.3.

363 Pub. L. No. 104-199 § 2, 110 Stat. 2419 (1996) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

364 *See supra* pp. 450–51.

pressively. For once their underlying normative commitments are exposed, their defenders can no longer disclaim their influence, and their critics can more readily organize public opposition to them.

To illustrate, consider the story of Maryland Judge Robert Cahill. Cahill gave an eighteen-month work-release sentence to a truck driver who had shot and killed his wife (execution style, as she slept) after discovering that she had committed adultery. So far there is nothing remarkable about this story; the vengeful cuckold has been the beneficiary of the mitigating effect of the voluntary manslaughter doctrine for centuries. What *is* remarkable about this case was how Cahill justified the lenient sentence. Rather than resorting to bland deterrence rationales — the futility, say, of trying to influence the behavior of someone in the grip of unreasoning passion, or the relative lack of dangerousness of a man who kills only when seriously provoked — Cahill opted for an overtly expressive one. He expressed sympathy for the defendant, stating that he could imagine nothing that would enrage "a happily married man" more than "to be betrayed in your personal life, when you're out working to support the spouse."[365] "I seriously wonder how many men married five, four years," the Judge continued, "would have had the strength to walk away without inflicting some corporal punishment."[366] This language bore the unmistakable signature of hierarchical gender norms, against the background of which the defendant's anger expressed an appropriate valuation of male domestic sovereignty, and the victim's "betrayal" of her husband a wrongful disvaluation of the same.

Just as remarkably, Cahill's statement provoked an immense political reaction. Newspapers across the country ran critical editorials.[367] Protesters picketed the courthouse, calling for Cahill's removal. Members of the Maryland General Assembly introduced a resolution condemning him.[368] And the Maryland judiciary agreed to withhold new sentencing guidelines so that provisions relating to domestic vio-

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365 Sheridan Lyons, *Court Panel to Probe Judge in Sentencing*, BALTIMORE SUN, Oct. 20, 1994, at 1B (quoting Judge Cahill).

366 *She Strays, He Shoots, Judge Winks*, N.Y. TIMES, Oct. 22, 1994, at A22 (quoting Judge Cahill).

367 *See, e.g.*, *A Judge Who Dishonors the Bench*, HARTFORD COURANT, Oct. 21, 1994, at A16; *Justice Mocked in Maryland*, BOSTON HERALD, Oct. 24, 1994, at 26; *"Passion Killing" Sentence Absurd*, SUN-SENTINEL (Fort Lauderdale, Fla.), Oct. 22, 1994, at 18A; *She Strays, He Shoots, Judge Winks*, *supra* note 366, at A22; Ann G. Sjoerdsma, *Justice: 18 Months for a Wife's Life*, CHI. TRIB., Nov. 14, 1994, at 21; *Unequal Justice*, ST. LOUIS POST-DISPATCH, Nov. 1, 1994, at 12B.

368 *See* John W. Frece, *Ouster of Judge Sought*, BALTIMORE SUN, Dec. 8, 1994, at 1B; Sheridan Lyons & Robert G. Matthews, *Oust Judge Cahill, Protesters Urge*, BALTIMORE SUN, Oct. 22, 1994, at 1B.

lence could be reviewed and possibly strengthened.[369] Cahill's remarks, in short, became the focal point for exactly the kind of orchestrated publicity that signals widespread opposition to an unjust norm in the law.

Had Cahill spoken in the deterrence idiom, things would likely have turned out differently. The *result* in the case would have been the same; relying implicitly on expressive valuations, Cahill would still have seen leniency as justified in cost-benefit terms. But precisely because deterrence arguments hide the speaker's theory of value, it would have been much more difficult to make citizens *see* what really motivated Cahill's decision and to make them outraged about it. Indeed, notwithstanding the contested status of hierarchical gender norms in contemporary society, judges who talk deterrence continue to mitigate the punishment of vengeful cuckolds all the time without provoking controversy.[370] At the end of the day, then, Cahill's use of expressive rhetoric, far from making things worse than they otherwise would have been, at least arguably made them *better* by showing citizens the influence of bad norms in their law and by showing legislators, judges, and juries that many citizens do in fact view those norms as *bad*.

This conclusion generalizes. Expressive rhetoric makes the reliance on contestable valuations salient and thus enables effective organizing against bad norms. The Texas judge who told us that he "do[es]n't much care for queers," for example, was defeated in an election in which gays and women furnished critical support for his opponent;[371] in the aftermath of this and similar cases, Texas (home of the "true man"!) enacted a hate crimes law that expressly enhances the penalty for crimes motivated by bias against any group, including gays.[372] Deterrence rhetoric, in contrast, lowers the profile of potentially contentious laws. By transforming the evocative "true man" doctrine into the expressively inert "paralyzed man" doctrine, Justice Holmes discharged the controversy surrounding the rule excusing individuals from an obligation to retreat before using deadly violence.[373] It is tempting to

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369 *See* Janet Naylor, *Maryland Judges Delay Relaxation of Sentence Guidelines*, WASH. TIMES, Jan. 26, 1995, at A1.

370 *See, e.g.*, JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 72–127 (1992); Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 76–99 (1992) (discussing the historical and continuing use of the voluntary manslaughter doctrine for wife killers).

371 *See Gay Rights Groups Hail Defeat of Judge in Texas*, N.Y. TIMES, Dec. 4, 1992, at B20.

372 *See* TEX. PENAL CODE ANN. § 12.47 (West Supp. 1999); TEX. CODE CRIM. P. ANN. art. 42.014 (West Supp. 1999); *see also* Clay Robison, *Richards Signs Hate Crimes Bill into Law*, HOUSTON CHRON., June 20, 1993, at 3D (noting that the purpose of the legislation is to punish "criminal offenses motivated by the victims' race, religion, ethnicity, sexual orientation or national origin").

373 *See supra* pp. 432–35.

believe that that doctrine continues as the majority rule in the United States only because Holmes's formulation broke courts of the habit of talking about the rule in a way that would alert citizens today to the doctrine's grounding in contested honor norms. Thus, accepting the expressive détente urged by liberalism would make progressives complicit in extending the life of hierarchical and individualistic norms that are in fact ripe for annihilation.

However well-meaning, the liberal aversion to moral conflict is in reality a powerful instrument for entrenching the reactionary status quo. Precisely because deterrence theory seeks to exclude contentious public moralizing from criminal law, progressives should without qualification oppose deterrence theorizing.

C. Pragmatic Synthesis?

Yet in truth, unqualified opposition to deterrence is just as indefensible as unqualified support of it. The best stance is one that seeks to negotiate the extremes of the liberal and antiliberal positions, employing deterrence theory selectively in the manner best calculated to express respect for individual dignity *and* to promote progressive values. The problem, sadly, is that this strategy tends to defeat itself.

The antiliberal critique effectively dispatches the practical liberal defense of deterrence but does not give sufficient credit to the principled liberal defense of it as a means of respecting individual dignity. Respect for the freedom of individuals to pursue their own conception of the good in a manner that does not impose harm on others — the core ideal of liberalism[374] — is as much a progressive value as are egalitarianism and civic solidarity. Conventional liberalism tends to define harm to third parties too narrowly, overlooking how norms and laws can construct social meanings that coerce individuals or undermine their status.[375] But when the pursuit of particular moral visions and cultural styles does not cause this or any other form of harm, the law should not be used as an instrument for expressing contempt for these styles of life, no matter how noxious they might seem. The antiliberal critique overlooks the potential utility of deterrence as a form of public "soft-spokenness" that allows the law to avoid imposing "counterproductive humiliation."[376]

Equally important, the antiliberal critique reflects undue optimism about the dynamics of norm reform. Substitute "reactionary" for "pro-

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374 *See, e.g.*, JOHN STUART MILL, ON LIBERTY 13 (Stefan Collini ed., Cambridge Univ. Press 1989) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.").

375 *See generally* Lessig, *supra* note 14 (exploring the construction and regulation of social meaning).

376 Holmes, *supra* note 147, at 206.

gressive," "hierarchy" for "equality," "individualism" for "civic solidarity," and vice versa, and the argument in the last section becomes a defense of expressive zealotry on behalf of those who seek to conserve or restore the influence of morally bankrupt norms. Informational and reputational cascades have no politics. Contrast the successful orchestration of the cues of public sentiment by the Civil Rights Movement with the similarly successful orchestration of cues by contemporary conservatives, who have nurtured the campaign against "political correctness" into a bandwagon of political defeats for affirmative action.[377] If they enfeeble norms against public moralizing in criminal law, then expressive appeals by progressives could inadvertently enable counterappeals that strengthen reactionary norms.

These concerns do *not* rehabilitate deterrence as liberal public reason, a position that invites passivity in the face of expressive aggression. They merely highlight the necessity of formulating a more moderate strategy that uses deterrence with pragmatic discretion.

Such a strategy should distinguish between three categories of policy positions. The first includes positions motivated by commitment to good norms that already enjoy the backing of overwhelming consensus or by opposition to bad norms that are already so far outside the cultural mainstream as to be largely inert. Supporters of these positions should avail themselves of the deterrence idiom to avoid inflicting gratuitous humiliation on those who subscribe to the deviant but harmless norms. The second category includes policy positions motivated by opposition to hierarchical or individualistic norms that continue unjustly to constrain the flourishing of some group of citizens *and* that can be effectively renounced by adoption of the policies in question. In that case, proponents should overtly avail themselves of the expressive idiom to maximize the prospects for successful norm reform. The third category includes policy positions that express opposition to vital hierarchical or individualistic norms but that have only a remote likelihood of prevailing. Here, proponents should express their views in deterrence terms to obscure the meaning of defeat and should wait for a more opportune moment to strike expressively.

An example of a policy in the first category is the prohibition on "extreme fighting."[378] This is a spectator sport in which two contestants fight, bare-fisted and unconstrained by rules against head-butting, kicking, elbowing, and the like, until one surrenders in disgrace or is knocked unconscious.[379] By now the vast majority of states ban this

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377 *See* TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES 137–54 (1996).

378 This example is inspired by an exchange between Gerald Dworkin and Martha Nussbaum at a recent Quinnipiac Law School symposium on Nussbaum's works.

379 *See* David Ferrell, *A Brutal Sport Fights for Its Life*, L.A. TIMES, Nov. 1, 1997, at A1.

practice.[380] Extreme fighting obviously appeals to a minority of citizens who take pleasure in watching human beings inflict physical injury on each other. That taste is recognizable but clearly deviant in society at large, which is why there is overwhelming majority support for banning such contests. It would be far-fetched if not downright silly to defend the "right" to watch extreme fighting: the majority that is disgusted by this practice is no less entitled to have its sensibilities respected than is the minority that relishes this spectacle. Nevertheless, there is already a vital norm against the enjoyment of actual bloodshed, and the ban needn't be defended as expressing that norm in order to protect the norm from erosion. Consequently, to avoid expressing gratuitous disrespect for the deviant minority, the majority that supports the ban should premise its position on deterrence grounds — that, say, extreme fighting could lead to violent behavior in society generally — even though such arguments are completely speculative and don't really explain the motivation behind the law.[381]

Enhanced penalties for homophobic crimes are an example of a policy that falls into the second category. Homophobic norms retain vitality in many segments of society and underwrite an array of practices that harm gay and lesbian citizens. At the same time, it's clear that these norms are now contested: as they encounter more individuals in private and public life who identify themselves as gay or lesbian, some members of the public shed their biases; in response, other citizens, whose status is tied to conventional gender roles, feel impelled to resist this growing acceptance through dramatic expressive gestures, including homophobic violence and homophobic legislation such as the Defense of Marriage Act.

Because individuals tend to conform their attitudes to those of persons around them, it is essential that the opponents of homophobic norms forcefully engage their cultural adversaries in the battle to control the law's expressive capital. Hate crime laws, which legislatures are most likely to enact in the aftermath of gruesome instances of homophobic violence, do just that. Because the value of such laws depends on the clarity with which they express condemnation of homophobia, and because those who support traditional gender roles will oppose such laws intensely no matter how they are defended, the pro-

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380 *See id.*

381 In fact, opponents of extreme fighting do nothing to hide their revulsion. *See* James Dao, *Senate Chief in Albany, Reversing Himself, Says He Backs a Ban on Ultimate Fighting*, N.Y. TIMES, Feb. 11, 1997, at B7 (quoting the legislative sponsor of the ban, State Senator Roy M. Goodman: "This is the culmination of a yearlong campaign to end what I call human cockfighting, a disgraceful, animalistic and disgusting contest which can result in severe injuries to contestants and sets an abominable example for our youth.").

ponents of enhanced penalties for homophobic hate crimes should defend those laws in unambiguously expressive terms.

Federal gun control and the abolition of the death penalty, in contrast, are examples of policies that fit into the third category. These positions also take aim at norms that construct a host of objectionable policies and practices. Nevertheless, the immediate prospects for significant federal gun control or for death penalty abolition are bleak. Because it is clear that those who favor these policies can't win the expressive game (at least for now), their best strategy is *not to play it.*

Participants in public debate tend to address the specific arguments advanced by their adversaries. Accordingly, if death penalty abolitionists and proponents of federal gun control religiously confine themselves to deterrence talk, then their opponents are likely to answer them in the same idiom. Deterrence arguments are unlikely to change the mind of those who favor the death penalty or oppose gun control, because those positions are in fact grounded in expressive considerations. But to the extent that they succeed in framing the debate in deterrence rather than expressive terms, gun control supporters and death penalty abolitionists can obscure the social meaning of their own defeat. In a climate in which everyone is talking deterrence, less committed members of the public are less likely to infer from the retention of the death penalty or from defeat of gun control legislation that those around them subscribe to the contested norms that in truth motivate the more ardent and politically influential advocates of these outcomes.

Of course, the expressive restraint of federal gun control proponents and of death penalty abolitionists shouldn't be permanent. At the moment that they think that they *can* win the game, they should resume the expressive defense of their positions in order to realize the norm-shaping benefits of policies so defended. Such moments are most likely to arise in the aftermath of dramatic events — such as horrific acts of gun violence, or botched executions — that expose the latent tension between the norms that block gun control and entrench the death penalty and other norms that many members of the public accept.[382]

Indeed, the opportunity for decisive expressive strikes will arise sooner if the supporters of such positions strategically restrain themselves in the near term. The intensity of the opposition to gun control, for example, is largely an artifact of the perceived expressive ambitions of those who support this policy.[383] Thus, by muting their expressive

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[382] *See, e.g.*, Haines, *supra* note 155, at 131–35 (describing the backlash against the death penalty in the wake of flawed executions as an example of a "suddenly realized grievance").

[383] *See supra* pp. 460–62.

aims, gun control proponents deprive the organized leadership of the pro-gun lobby of a resource for maintaining the zeal of their own constituency. Patience in the short- to medium-term, then, will diminish the readiness of the defenders of frontier and militia virtues to repel an opportune expressive attack on behalf of gun control.

Or at least that is the theory. The reality of the pragmatic position is more complicated, for at least three reasons. First, the pragmatic strategy assumes an unrealistically sophisticated and complete understanding of the norm-shaping consequences of different styles of discourse. It is exceedingly difficult to know whether one's policy position falls into the third pragmatic category, in which the expressive idiom will accentuate the undesirable meaning of political defeat, or the second category, in which a resort to the expressive idiom will transmit desirable meanings to the public. Michael Dukakis, for example, played a category-three strategy when in hindsight it surely would have been better for him to have used a category-two strategy.

Likewise, it is difficult to know whether one's policy position really falls into the first category, in which the contribution of expressive arguments to good norms is too negligible to justify imposing a humiliating defeat on a cultural subcommunity. For example, I might be wrong to view the norms that inform the pleasure that some take in extreme fighting as clearly deviant. Indeed, they might be closely related to the norms that construct homophobia or the social meaning of guns. If that's the case, then highlighting the disgust that motivates the extreme-fighting ban might create an expressive surplus that could be profitably reinvested in the campaigns for hate crime laws and gun control.

Because it depends on contentious empirical premises, the pragmatic strategy will inevitably result in errors. Maybe the cost of these errors will be smaller than the costs of uniformly following either the liberal or antiliberal discourse strategies. But that's an empirically speculative conclusion. Anyone who purports to be confident that one strategy or another minimizes error costs is likely conforming her assessment of the evidence to unstated expressive valuations of her own.

Second, the pragmatic strategy assumes an unrealistic degree of coordination and control. The progressives have their own zealots, who either out of self-interest, extreme preferences, or simple lack of discipline advance expressive claims with reckless indifference to how such appeals affect the prospects of the causes that they believe in. Thus, even if they could acquire the empirical knowledge that the pragmatic strategy contemplates, the progressives would be unable to force their own zealots to hold their tongues. And their zealotry would predictably invite expressive retorts from the reactionaries, whose zeal would in turn force the hand of even more moderate progressives. The pragmatic strategy is no more stable than is the liberal defense of expressive détente.

Third and most importantly, the pragmatic strategy is likely to unravel in the face of a public-discourse effect equivalent to the economic axiom of rational expectations. Whereas the liberal defense of deterrence as public reason assumes that individuals believe what they say,[384] the pragmatic strategy contemplates that progressives will employ deterrence arguments only when they wish to hide their true expressive motivations. But if the progressives' best strategic move is to constrain their discourse in this way, then their adversaries will infer that that is exactly what the progressives are doing when they talk deterrence. As a result, deterrence arguments are likely in short order to acquire the very social meanings that they are meant to suppress.[385] (Indeed, many citizens no doubt think of deterrence arguments as "rationalizations" of this sort.)

The pragmatic strategy refuses to treat the secret ambition of deterrence as a *secret*. And once the secret is out, the ambition cannot be realized.

CONCLUSION

In this article, I have tried to answer two questions: *why* do citizens use deterrence rationales to justify their positions on controversial issues of criminal law, and *should* they?

The answer to the first question — why deterrence talk? — isn't that citizens are actually persuaded by deterrence claims. They probably are, but only because they are relying on unstated theories of value to identify what's worth deterring at what cost and to resolve disputed empirical issues. These theories of value supply sufficient grounds for the positions that individuals say they subscribe to based on deterrence. Sometimes, as in the hate crimes debate, individuals will readily admit that this is so. But even when they do not readily admit that deterrence is superfluous, deterrence-related considerations play little role in determining the positions citizens hold on contentious issues like capital punishment and gun control.

The real reason that deterrence is so prominent in public debate over criminal law is that citizens generally don't want to say all they think about such contentious issues. Their positions on gun control, the death penalty, hate crimes, and the like reflect their allegiances in the ceaseless battle for status between contending social groups or between looser cultural styles. The natural idiom for signaling such allegiances is expressive condemnation, which is bristling with indignation and disgust. The consequentialist idiom of deterrence is much less

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384 *See supra* p. 482.

385 *Cf.* ELSTER, *supra* note 149, at 328 (noting that disingenuous attempts to manipulate ideology "tend to fail for reasons well understood by social psychologists").

passionate and confrontational. Avoiding illiberal status conflict is the secret ambition of deterrence.

A series of interlocking incentives motivates citizens to favor the face-saving idiom of deterrence over the face-breaking one of expressive condemnation. Social norms discourage overt moralizing in our dealings with those who we know harbor cultural commitments that differ from our own. Moral partisans pay a steep reputational price, at least within the social mainstream. This dynamic seems especially prominent in debate over the death penalty.

Such restraint is often reinforced by strategic calculation. By strengthening the resistance of those with opposing commitments, the open profession of expressive motivations can sometimes make it harder to garner legislative support for contested symbolic legislation. This explains the appeal of deterrence rhetoric on issues like gun control and hate crimes.

Finally, some citizens are moved by principle to disavow the confrontational stance of expressivism. These citizens talk deterrence because they view the injection of overt moralizing into public discourse as imprudent and disrespectful. Such individuals engage in an heroic form of rhetorical self-sacrifice, speaking in mechanistic or economistic terms that make them appear morally obtuse when in fact they know full well that that way of talking is empty.

None of these incentives, however, is particularly robust. Expressive zealots, who are unmoved by the norm against moralizing, conspire with professional ideologues, who know that they can mobilize their constituencies by invoking the specter of cultural aggression. Their lack of restraint forces the hand of more moderate citizens, who are drawn into the fray either to protect the norms on which their status depends or to remove ambiguity as to their allegiances at a time when those around them seem to be demanding conspicuous displays of loyalty. Political actors, too, are moved to release the divisive energy of expressivism when they perceive the opportunity for immediate electoral gain. When these dynamics bring simmering expressive controversy to a boil, political actors who try to defuse the controversy with deterrence will look more like fools than heroes.

There is thus no stable discourse equilibrium as a positive matter. We are constrained to cycle back and forth between deterrence détentes and bursts of expressive zeal.

Should citizens talk deterrence in these circumstances? Unsurprisingly, there is no stable discourse equilibrium as a moral matter either.

The cooling effect of deterrence can be seen as the strongest argument in favor of this style of justification. By muting expressive controversy, deterrence arguments make it easier for citizens of diverse moral and cultural commitments to agree on policy outcomes. Just as important, by leaching the social meaning out of such outcomes, deter-

rence theory spares those who *disagree* with a policy from the indignity of having their most fundamental commitments authoritatively repudiated by the law. In this way, deterrence theory secures the goals of liberal public reason, which enjoins us to disclaim privileged moral insight when we engage in public deliberations.

This benefit of deterrence, moreover, does not depend on the cogency of deterrence as a normative theory. Indeed, deterrence is able to mute expressive controversy precisely *because* it has nothing to say about the contentious issues of expressive value that are really at stake in debates about the death penalty, gun control, and hate crimes. Those who criticize deterrence for being evaluatively empty are missing the point of deterrence as a strategy for managing public discourse.

That doesn't mean, however, that the role deterrence plays in managing public discourse is beyond criticism. In fact, its cooling effect can also be seen as the strongest argument *against* deterrence theorizing.

Many of the social meanings that motivate citizens to support particular criminal law policies are *bad*. They are constructed by hierarchical and individualistic social norms that unjustly deny status to certain groups of citizens and constrain their material well-being in numerous ways. Deterrence theorizing doesn't make those norms go away; it merely obscures them beneath narcotizing layers of abstraction. Such obscurity is itself bad, because it makes the influence of such norms less salient and thus deprives norm reformers of opportunities to expose and critique them.

Even worse, deterrence theory risks lulling the critics of bad norms into a posture of decided rhetorical disadvantage. As a species of liberal public reason, deterrence contemplates a condition of mutual rhetorical self-restraint. But such a condition is unstable; expressive zealots have incentives to defect. Indeed, we should anticipate that supporters of unjust norms will defect the most readily since they are, by hypothesis, the citizens least inclined to show respect to their fellow citizens. Consequently, if the critics of bad norms assent voluntarily to the public discourse constraints of deterrence, they will more often than not be restraining themselves unilaterally, thereby allowing their adversaries exclusive access to the expressive capital of the law.

Since the secret ambition of deterrence is both the strongest argument for and the strongest argument against deterrence theorizing, a mixed rhetorical strategy might seem like the most promising one. Such a strategy would use the idiom that's best for the circumstances, shifting back and forth between optimal deterrence and expressive condemnation based on the prospects for effective norm reform, the risk of reactionary backlash, the need to repel expressive aggression, and the imperative to respect harmless moral deviance.

But this pragmatic stance also collapses. For one thing, it presupposes an unrealizable degree of both foresight and central control.

There are lots of teams and players but no effective coaches in the expressive politics game. Even more fundamentally, it is too nakedly instrumental. If deployed in a self-consciously strategic fashion, deterrence arguments become too transparent as rationalizations and thus lose their power to signal a spirit of moral and cultural accommodation.

The secret ambition of deterrence is thus only a slice of an insoluble discourse dilemma. The liberal defense of deterrence as public reason respects individual dignity and mutes counterproductive political conflict, but also subsidizes bad social norms by shielding them from critical appraisal. The antiliberal critique of deterrence liberates the norm-reforming potential of expressive condemnation, but gratuitously stigmatizes harmless deviancy and risks provoking reactionary backlashes. A pragmatic strategy, which shifts between deterrence and expressive condemnation, promises to combine the best elements of both approaches and to avoid the worst, but is impossible to execute as a practical matter.

So what theory is the best for managing public discourse? There simply is no answer, at least when the question is posed this globally. All we can do is try to understand all that is at stake and make the best decisions we can about how to speak in particular contexts. What strikes us as best, moreover, will be as much a matter of personal style as a matter of high principle or prudent calculation. Those who criticize others for the way they choose to speak either are misguided about the consequences of any individual's choice about how to talk, or are themselves drawn to a style of discourse imperialism that insists everyone talk one way even though nothing of real consequence is at stake.