From Betrayal to Violence: Dante’s Inferno and the Social Construction of Crime

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This essay reflects on contemporary justifications for the grading of crimes, especially the conception that the gravity of crimes is rooted in “desert,” understood to depend particularly on the offender’s state of mind and to a lesser extent on the harm done or threatened to society.

Drawing on Dante’s Inferno, the essay shows how the gravity of crimes is socially constructed. For reasons rooted in the sociopolitical forces, as well as the philosophy and law of his day, Dante found the crimes most deserving of punishment to be those of betrayal of trust. He conceived such crimes to be the most deliberate and to do the most damage to the social fabric. Contemporary law has found that crimes of betrayal are generally less deserving of punishment than crimes of violence; the essay shows how social and historical forces, including even the traditions upon which Dante drew, have shaped this choice. In the course of grading crimes in this way, the law has altered its conceptions of “intent” as well as of harm to society so radically that the notion of “desert” has lost much of its coherence. The importance of trust in modern society, moreover, has been misunderstood in the contemporary grading of crimes.

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While injury may be done in two ways, either by force or fraud, fraud is like the sly little vixen, force like the lion; both are wholly foreign to man, but fraud is the more despicable. Of all injustice, none is more grave than that of the people who, when they are most false, conduct their affairs as if they were good men.

—Cicero, On Duties

INTRODUCTION: CRIME IN THE INFERNO AND IN THE CONTEMPORARY WORLD

In The Inferno, as he descends through the nine circles of Hell, Dante encounters increasingly serious sins, many if not most of them also crimes. Thus the levels of Hell may be seen to grade crimes, roughly speaking, in the way a criminal code grades them, with penalties in proportion to their relative gravity. Although the way Dante grades the crimes is remarkable enough, still more significant is the fact that he explains his reasons for the grading.

For Dante, the most serious crimes are those of betrayal. In canto 11 of The Inferno he pauses with his guide, the poet Virgil, at the sixth circle of Hell to survey where they have been and where they may be going. In the levels they have already passed through, the sins or crimes are mostly those of passion or weakness; in the second circle, for example, they encountered the adulterers Paolo and Francesca, who had been overcome by passion. Virgil tells Dante that the violent criminals will be found just below them, and still lower the traitors. Dante’s grading, of course, is in sharp contrast to a typical modern penal code (e.g., ALI 1985), in which crimes of violence such as serious assault and robbery are viewed as more grave than fraud. Dante’s relative grading of crimes of violence and betrayal would be easier to understand, in modern terms, if he included in betrayal only treason. But in fact Dante included fraud and theft, at least very large thefts (e.g., by the five noble thieves in canto 25) among the crimes beneath (i.e., at a lower level of Hell than) crimes of violence. As Dante conceived them, fraud and betrayal were the most serious crimes because they were the most deliberate, the most calculated.

Just because it emphasizes the guilty mind of the criminal, The Inferno bears an intriguing relation to contemporary criminal law jurisprudence. At a first approximation, which I shall make more precise in what follows, a principal source for Dante’s system of grading was medieval theology and philosophy about ethics; similarly, scholarly thinking about punishment in the last generation has drawn on latter-day ethics. To modern penal reformers dissatisfied with rehabilitation and deterrence as rationales for punishment, “the philosophers offered,” as Andrew von Hirsch put it, “the
notion of desert—of deserved punishments, proportionate to the blameworthiness of the criminal conduct” (Hirsch 1985, 9). Blameworthiness, in turn, depends in part on the harm done or attempted by the actor, but more significantly on his or her state of mind—whether the crime is “intentional” or something less. In the last generation the notion of desert has become an influential, if not a dominant, view of the rationale of punishment, at least in the United States; it has shaped state and federal legislation, being partly responsible for the widespread acceptance of determinate sentencing (Walker 1998, 217–21; Hirsch, Knapp, and Tonry 1986, ch. 1). Statutory criminal law policy, nevertheless, continues to be colored by hopes for deterrence and incapacitation, if increasingly less for rehabilitation. The Inferno, on the other hand, is a pure case of the delivery of just deserts. The damned have no need of incapacitation or hope of rehabilitation; there is equally little reason for specific deterrence of the lost souls. There probably is some general deterrence running to the living in the contemplation of the sufferings of the damned but no more than is inherent in any system of punishment by just deserts. So Dante may give us an idea of what a system rooted solely in desert should look like.

But are the differences and resemblances anything more than intriguing? Can a poem like The Inferno be compared with contemporary criminal jurisprudence? Although it is written, and succeeds, as poetry, The Inferno is also intended, and succeeds, as a philosophical analysis of culpability reflected in crimes, both past and present, that were well-known in Dante’s time. Dante was concerned with issues of justice; he was active in politics and served briefly as a magistrate in his native city of Florence.1 In a letter to a patron he wrote: “If the work [The Divine Comedy] is taken allegorically, the subject is man, as by meriting or not meriting through his freedom of choice he is subject to justice, which has the function of rewarding or punishing him” (Gilbert 1971, 67). To be sure, Dante’s opinions about crime were idiosyncratic, but they were not strange to his contemporaries. As a philosophical support for Dante’s views from the ancients, for example, Cicero’s On Duties was well-known in the late Middle Ages, and the passage that appears as the epigraph to this essay was familiar to readers. Moreover, The Inferno stands out as a medieval commentary on criminal culpability; medieval philosophers rarely showed such a detailed interest in crime (Bar [1919] 1968, 393ff).2 Dante thus gives a kind of religious-philosophical rationale for the law of crimes as he sees them, as it were a criminology for the fourteenth century. Crime as conceived in The Inferno offers a

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1. Dante was ultimately exiled from Florence, chiefly as a result of a decision he had made as magistrate (Barbi 1954), an episode that no doubt contributed to the concern for justice in The Inferno and to Dante's strong criticism of the “avarice,” as he called it, of the unjust.

suggestive and illuminating comparison with contemporary ideas about culpability. For examples in contemporary jurisprudence as well as criminal law, I shall draw largely on the United States.

One purpose of the comparison is to show how the grading of crimes is socially constructed. Dante’s views about crime have their roots in the ethical concerns, the social and political milieu, and the jurisprudence and law of crimes that surrounded him; the same three interrelated concerns—philosophical, sociopolitical, and legal-criminological—will help to explain contemporary doctrine about the relative gravity of crimes. The radical contrast between Dante’s ranking and that of contemporary doctrine, viewed in the light of these changing concerns, will reveal how little is fixed, much less deontological, about the relative gravity of crimes.

As I shall show in later sections in more detail, the force of the contrast lies in the fact that for Dante, crimes of betrayal were the most serious not only because they required the most deliberate exercise of free will, but also because they did the most damage to the ethical net of obligations in society; conversely, violence seemed neither much out of the ordinary nor extraordinarily to be condemned. Criminal intention—the abuse of reason—was bracketed with treason and fraud in a way that it no longer is in contemporary thinking. Over the intervening generations, on the other hand, as life has come to seem less dangerous, it has come to seem more precious. The risk of death has become a characteristic fear, with life-threatening crimes correspondingly terrifying and grave. Simultaneously, the Christian basis of political obligation has largely faded in the modern world; the source of obligation is instead largely rooted in the protection of the rights of individuals.

I do not suggest, however, that Dante’s world of crime is completely lost to us. On the contrary, it is important to the comparison that the past is at work in the present; one of the social influences on contemporary conceptions of crime is in turn the history of conceptions of crime, running back at least to the time of Dante. It is significant how much of the medieval Christian framework for culpability survives into modern criminal law theory and doctrine, if only in skeletal form. For example, the moral world of The Inferno seems distant because it emphasizes sin more than crime;³ for a thinker of Dante’s time, an act was criminal partly because it was a sin, an intentional violation of the law of God. Nevertheless the notion of divine

³. W. H. V. Reade argued some 90 years ago that the comparison between the sins and crimes in The Inferno and the temporal world was not apposite; for Dante, Reade said, human law differs from divine law because on earth we can know only overt acts and results, while in the spirit world of The Inferno, motives are fully known (Reade [1909] 1969, 23, 48). But this oversimplifies; in the contemporary world of criminal law, we do root blameworthiness in the culprit’s state of mind, even if we only infer it. Furthermore, the sins in the poem are frequently allegories for worldly crimes. The poem “seems to draw more from legal codes than from manuals on vice; several of the punishments, particularly in the eighth circle, are based on contemporary penal codes” (Ferrante 1984, 134–35).
condemnation shaped the definition of crime as we now understand it, that is, as a violation of law that calls for redress by society, rather than a mere matter for settlement between private persons; the emergence of crime as a public or social rather than a private wrong was a doctrinal principle of great importance to scholars just after Dante's time (Berman 1983, 181–94).

The Christian conception of free will, essential for sin as for crime, also continues to exert influence. It is still true that there can be no guilt, at least on the theory of desert, without a “choice” to break the law. Some contemporary scholars argue that if the rationale of punishment is truly rooted in desert, then the actual harm of the crime, as distinct from the harm intended, should not affect its gravity (Harm v. Culpability 1994); thus, attempts should be punished as severely as crimes in which the harm is complete (ALI 1985). This is strikingly like the opinion of philosophers of Dante's time that the gravity of crime, like that of sin, lay solely in the “intention” of the actor (Reade [1909] 1969, 48, 52). As a practical matter, however, the criminal law as it is written and administered in modern times has not been hospitable to such views; harm as well as state of mind drives the grading of contemporary crimes. The changing construction of crime, through the centuries in which the fear of violence has assumed such importance, has altered the understanding of the state of mind as well as of the threat of harm to society that is essential for serious crime. As a result the “choice” that is required for culpability has become so slight and so poorly articulated as to threaten the coherence of the contemporary notion of desert.

The comparison between contemporary theories of punishment, particularly those rooted in desert, and The Inferno seems appropriate, and even irresistible, finally, just because of Dante's emphasis on trust and betrayal. Trust has assumed new importance for contemporary social scientists as one of the binders in the political glue that is called “social capital” (Coleman 1990). It is making its way into the law but only slowly into the criminal law. In light of the social construction of crime, The Inferno raises the question why our law does not take betrayal of trust more seriously as a social harm.

CRIME IN DANTE'S WORLD

The World of Ethics

Dante draws upon Aristotle, as reflected through medieval philosophy, for the three states of mind that underlie serious sins and crimes: malice, the bestial, and akrasia—meaning weakness of will in the face of what reason tells us to be right (for which Dante uses the inadequate Latinate “incontinence”) (canto 11, lines 79–84; see Aristotle 2000). To have violated the
law through akrasia is by no means the worst crime for Dante. It is for this reason that crimes of passion such as the adultery of Paolo and Francesca are found in the higher levels of Hell, although even an act of violence, if committed in a moment of weakness, would not be a crime of malice. The scope of the bestial for Dante remains controversial; it seems to include at least acts under the influence of insanity, but it may include very forceful, irrational crimes as well (Ferrante 1984, 152–53). Malice, on the other hand, implies the full sense of "ill-will," that is, choosing evil against others and consciously intending it. Medieval philosophers had elaborated the states of mind essential for the exercise of free will, and thus of malicious intent; as they understood it, intention required the use of the faculty of reason through deliberation and reflection (Mazzotti 1993, 75–77; Reade [1909] 1969, 73–78; Gilbert 1971, 49–50). For Dante, then, the most serious crime was the most human, the one that most clearly showed the abuse of free will: the betrayal of trust. As Virgil tells Dante, "because fraud is a vice peculiar to man, it more displeases God; and therefore the fraudulent stand beneath, and more pain assails them" (canto 11, lines 25–27).

In a sense, all crimes are betrayals—of the social compact to respect others and not to attack or take advantage of them (Kleinig 1978). But many crimes are not calculated—malicious—in the sense that Dante understood the term; a betrayal of trust was malicious in a way that other crimes were not. A crime of violence, of course, could also be a crime of betrayal. Thus Judas Iscariot and Brutus and Cassius find themselves at the lowest level of hell (canto 34) because they respectively betrayed Jesus Christ and Julius Caesar, who trusted them and were murdered on account of the betrayal. In essence, however, these remain crimes of betrayal because the principal intention that underlies them is that of betrayal; they are more serious than crimes of violence that are committed through akrasia and without the deliberation that makes them malicious.

In canto 11, Dante writes the seemingly simple proposition that, "of all malice that gains hatred in Heaven, the purpose is injury." The meaning is more complex, however, if we recognize that Dante understands the word injury in its root meaning of an injustice to others (Mazzotti 1993, 74). Malicious crimes are those that are directed against society as a whole, in a deliberate effort to aggrandize the perpetrator and deprive others of their due; moreover, they are not usually confined to a single harmful act, but are part of a way of life chosen through the distortion of the faculty of reason (Reade [1909] 1969, 226ff.; Gilbert 1971, 56). For Dante, the obligation between persons that is violated by crime arises not so much out of individual rights and their infringement, as out of a mutual social debt rooted in the Christian duty of care. Dante identifies injustice with avarice, used in its broadest sense—with the effort to gain an advantage over others; the denizens of a just society, conversely, show care for one another. It is here
that Dante is most clearly a desert theorist. Some contemporary theorists have argued that a criminal “deserves” punishment because he has taken advantage of others; his punishment “right the balance” (Murphy and Hampton 1988, ch. 4). It is not clear, however, apart from crimes against property, how crime works to the advantage of the criminal in contemporary terms; one who assaults another certainly injures the victim, but it is not clear what advantage is obtained nor how punishment can right the balance. Contemporary society does not have a generally accepted ethical system in which the force of mutual benefits and burdens is taken for granted (Mackie 1982; Braithwaite and Pettit 1990, 157–60). Under Dante’s ethic, however, it is at least more nearly clear how duties of care are violated by crime.

Through the ethic of care, which led to his perceiving the crimes that breach social bonds as particularly malicious, together with his analysis of intention as the deliberate use or misuse of reason, Dante joined together intentionality and breach of trust to make crimes of betrayal into an especially heinous class of crimes. That joinder is largely foreign to contemporary law because both intention and the harms of crimes are conceived in ways that are radically different from Dante’s. As Joan Ferrante puts it: “For Dante, individual morality cannot be dissociated from social responsibility because the individual is a citizen, and to be a good individual, he must be a good citizen” (Ferrante 1984, 136).

The Social and Political World

The concept of “citizen” was contested in Dante’s Italy. In Florence “there was no government as we understand the word today; the dominant bonds that gave cohesion to this society were those of clan or guild or religious order or vassalage or even neighborhood . . . certainly not those of state” (Becker 1967, 16). Its communal system of city government (Brucker 1983, 109ff.) could not eliminate the strife arising out of “the extreme complexity of such a coexistence, in the same city, between a ‘commune,’ a Guelf Party, a Ghibelline Party and a popolo, all four with their own rectors and their own councils and armed formations, not to mention the individual organisms of the consor tierie [coalitions of nobles], guilds and city districts, all capable of varying degrees of political activity” (Tabacco 1989, 258). In the absence of a strong government, violent acts were part of political life. “[P]olitics made no sense without them; without such acts the political discourse was missing an essential term, for often, as on occasion citizens and subjects clearly perceived, violence was the only vehicle for getting the redress of just and urgent grievances. This being so, we are driven to the surprising conclusion that violence had the potential for being a constructive force in politics” (Martines 1972, 349).
We might try to explain the readiness to use violence, and the reliance on loyalty for protection, as an aspect of an honor-based society. The aristocracy in Italy, as well as prosperous merchants, drew upon chivalric standards and upon a tradition of vengeance for slights to personal and family honor (Becker 1967, 15-16). No doubt this is part of the social background to *The Inferno*, but as a textual matter, Dante rarely mentions chivalry and never seeks to justify vengeance. It seems that there must be an explanation still more basic for Dante’s tolerance of violence, relative to other sins and crimes.

Dante was writing at a time before the onset of those “civilizing” influences—the refinement that accompanied the growth of the state—of which Norbert Elias has written. Elias tells us that life before the development of the modern state “permits the warrior extraordinary freedom in living out his feelings and passions, it allows savage joys . . . of hatred in destroying and tormenting anything hostile. But at the same time, it threatens the warrior, if he is defeated, with an extraordinary degree of exposure to violence and the passions of others, and with such radical subjugation, such extreme forms of physical torment as are later, when physical torture, imprisonment and the radical humiliation of individuals has become the monopoly of a central authority, hardly to be found in normal life” (Elias 1982, 236-37). For men in Dante’s time, violence was not only taken for granted; it helped to give life its savor. *The Inferno* itself is a representative text of the time before the urge to violent vengeance, as well as punishment, was curtailed by the state monopoly of force and the accompanying growth of decorum in personal relations. The uninhibited gruesomeness of some of the punishments for the damned in *The Inferno* reflect the fact that the appetite for the strongest expression of feeling, even through what we would call the “brutal,” had not yet been veiled by the habits of civility and the pacification of modern life.

The Florentine government, weak though it was, nevertheless considered acts of violence a serious problem of social order. In Dante’s lifetime the commune sought unsuccessfully to control the violence of the powerful; a “magnate” came to be defined partly by the commission of a violent crime of the sort that was considered characteristic of the class (Stern 1994, 174; Tabacco 1989, 271). Violence was not viewed as a vice of the poor or of any particular class; rather it was nearly universal and if anything was thought of as characteristic of the mighty. Violence was the norm; what was rare and precious was the steady support of loyal allies who could protect against it. Thus the most serious crime for Dante was the betrayal of that loyalty.
Although many of Dante’s contemporaries did not share his acceptance of the proposition that calculated betrayal was the gravest of crimes, there were elements in the criminal law and in the patterns of crime at the time that encouraged and supported him. His views about the importance of intentionality for culpability were consistent with some contemporary jurisprudence derived from canon law and the revival of Roman law; Cicero had supported, if not originated, Dante’s opinion that fraud was the most despicable crime. Lucas of Penna, a legal theorist in the century following Dante, argued that the essence of crime was in the intention. Lucas also took the view, as had Dante, that the criminal law was designed to punish only a wrong to society as a whole (Ullmann 1946, 145); the principle requiring a social injury was a particularly important one for jurists like Lucas, who were trying to escape from a legal world in which vengeance for private wrongs was a chief means of enforcement of the criminal law. Out of ideas such as these arose the basic standard of desert that has come down to us: a criminal deserves punishment based upon the wrong done to society and the state of mind attending the act (Berman 1983, 181–94).

That standard was still not clearly accepted in legal proceedings in Dante’s Italy. In the Germanic legal tradition, introduced into Italy after the collapse of the Roman Empire, there was little use of fine distinctions about intention and malice. By the late middle ages, nevertheless, a finding of guilt depended heavily, both in doctrine and practice, on values of trust and betrayal. In the law of homicide, for example, a killing was a murder if it was underhanded—a killing in secret, for example, by lying in wait, by poison, or if it appeared for other reasons to be the result of a betrayal of confidence (Bar [1919] 1969, 102, 165). This doctrine was rooted in the fact that violence, including homicide, was so widespread and so frequently justified in some way by the perpetrator (e.g., by a claim of self-defense or defense of honor) that the most serious finding of liability was reserved for the cases where circumstances suggested that no such justification could be given. Thus in practice, the criminal law did not bracket intentionality with betrayal as Dante did in The Inferno but instead accepted proof of betrayal through circumstances.

The administration of criminal law also relied on the concepts of trust and betrayal. Vengeance was still recognized as a means of redress, encouraged in the Italian cities by the factional strife of the commune, the guilds, and other corporations (Calisse 1928, 173). In the thirteenth century governments sought to limit the scope of vengeance by payments of composition and by “peace-pacts,” through which the warring parties accepted a payment and swore to keep the peace (Stern 1994, 208, 253; Bar [1919] 1968, 66, 98). Such peace-pacts were used by the city of Florence at the end
of the thirteenth century to control the magnates by limiting their violent feuding. A magnate was required to give guarantees that he would keep the peace, and in fact the status of magnate was partly defined by the requirement to give such guarantees (Becker 1967, 5; Stern 1994, 133–35). The resulting crime was, then, not centered around the act of violence, which, even though a serious social disruption, might in one way or another be justified, but rather around the breach of the compact not to use violence; it was the betrayal that became the more serious crime, just as murder was recognized primarily as a crime of betrayal.

In light of the background of the law of crime, then, as well as the philosophy and politics of the time, we see how breach of faith could loom so large in Dante’s estimate of the proportional gravity of crimes. Violence was ordinary; it might be committed by anyone, certainly by the most aristocratic individuals, and its meaning was ambiguous. The meaning of breach of faith was clear.

CRIME AND SOCIETY AFTER DANTE

A version of the desert standard for culpability, requiring that the criminal make a choice to inflict harm, has been used by courts and lawmakers for generations. Modern politics has largely abandoned, however, the broader system of political ethics that Dante accepted, in which care for others, including for their place in the world, was a chief value, and the worst crime revealed the ill will that was the antithesis of that care; where reason was the supremely human faculty and choosing the crime through the abuse of reason was a source of culpability. The religious struggles of the succeeding centuries destroyed the framework in which the medieval scheme of sins was accepted as the command of God in the political realm and the corresponding virtues were believed to be necessary to a moral life. Modern law does not, as Dante did, require as proof of moral guilt the deliberation that shows the abuse of human reason, because the medieval notion of intention has faded. Treason and fraud are no longer bound up with malicious deliberation.

The break with Dante’s view of ethical obligations is most dramatic in the work of Hobbes. In Leviathan (1651, ch. 13–14) men are, apart from circumstance, of approximately equal abilities and seek their own aggrandizement; selfishness is essential to human nature. Hobbes’s self-seeking model of man has since been absorbed in law and politics, as well as in the ethics of the marketplace. The imaginative power of the image of the self-interested individual, pursuing aims that may be in conflict or even incommensurate with the aims of others, remains undiminished and has probably increased in recent decades. He is economic man, seeking to satisfy his desires to the maximum; the same figure has been adapted to politics as the
actor who rationally pursues his personal aims through voting or other sources of power in institutions.

The notion of a person as a self-interested individual, however, made the problems of political coordination formidable. Hobbes thought that it was the job of the sovereign, through a contract among citizens, to control their drive for personal power, but as the sovereign has been conceived less as a dictator and more as the representative of the people, it has become clear that joint political action is difficult to imagine, much less carry out in practice, without trust among the participants (Dunn 1988; Putnam 1993). Nevertheless, the model of individual action has continued to exert a strong pull on modern thinkers. James Coleman reviewed the situation in 1990:

There is a broadly perpetrated fiction in modern society, which is compatible with the development of the political philosophy of natural rights, with classical and neoclassical economic theory, and with many of the intellectual developments (and the social changes which generated them) that have occurred since the seventeenth century. This fiction is that society consists of a set of independent individuals, each of whom acts to achieve goals that are independently arrived at, and that the functioning of the social system consists of the combination of these actions of individuals. (Coleman 1990, 300)

The legal regime came to emphasize rights among individuals—rights to one's person and property and rights not to be interfered with by others, either by violence or by theft. In this ethical world, the evil of avarice, if it has one, arises when a person poaches on the property or the rights of another; the desire for wealth, taken by itself, is no evil. Blackstone, reflecting commonly accepted views of his day, argued "that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action" (Blackstone 1803, Introduction sec. 2).

This view, however, has focused the law of crimes on the narrow range of harms to "physical integrity" and property of individuals (Hirsch 1985, 66-71) or institutions that the law treats as persons through legal fictions. The modern emphasis on such harms has tended to obscure the social nature of the wrong done through a crime. Since the inception of the modern concept of crime, the intervention of the state, as the protector of society, to punish the perpetrator of an attack against the person or property of an individual has been justified by the claim that the attack is a "social" harm that tends to disrupt society as a whole (Berman 1983, 188; Kleinig 1978). But for many crimes, such as, for example, a grudge attack based on personal enmity, it is difficult to see how the crime does affect the rest of society, except by the circular conclusion that the commission of the crime displays a contempt for the legal obligation not to attack another, and by the fact
that the victim of the attack, or his family, would likely retaliate if the law
did not punish the perpetrator. But these arguments come close to justifying
criminal punishment by the mere fact that the state has declared the act to
be a crime or by the function of the criminal law in replacing personal
vengeance. Such justifications serve poorly to explain the social and public
nature of the wrong.

The state, however, was not so concerned with the coherence of the
criminal law; the punishment of attacks on private persons and property
served a broader political aim. In the modern world, the state was a “civiliz-
ing” influence, taking control of violence and pacifying the populace. There
was, as Martin Wiener has put it, a “war on impulse,” particularly after the
eighteenth century (Wiener 1993, 152–53). Where governance of the pas-
sions was the aim of society, violence was disorderly and frightening, beyond
the purview of well-regulated citizens under the protection of the state.

The project of civilizing the populace and controlling the passions was
part of a larger project of taming the world, including the social world, by
means of science and management. Through the methods of modern pro-
duction and education, in the factories, the markets and the schools, as well
as through other bureaucracies, life was regulated; through the physical and
social sciences, it was analyzed. These held out the hope of controlling the
vicissitudes, even the quality, of life and the risk of death. As control of the
risks seemed to grow more certain, the fear of death kept pace; when once
people felt they had some control of life and health, they were the more
determined to avoid death. During the eighteenth and nineteenth centu-
ries, as Foucault put it (Foucault 1990, 145), people came to believe in a
“right to life” of which they could not have conceived when death and
other vicissitudes were more a matter of chance. For societies seeking to
reduce risk and shun disorder, the crimes that induced public terror were
those that posed a danger of life-threatening violence. The notion of vio-
lence was itself socially constructed; domestic violence was little noticed
until much later, and the attention of the public as well as of the law was
directed to robberies, rapes, and other assaults by strangers (Domestic Vio-
lence 1993). Such crimes were the province of the “dangerous classes,”
those who were thought of as impulsive, in need of control.

The state sought to govern offenders just as it did other citizens,
through scientific and bureaucratic means. Positive criminology explained
the offender’s behavior either through biology or through the action of so-
cial forces, in the economy or the milieu, or in the offender’s perception of
social expectations for success (Downes and Rock 1998; Merton 1938).
Though crimes continued to be defined and graded by the courts and even
the legislature according to traditional standards of culpability, based on the
offender’s state of mind as well as the harm done or threatened, the new
theories about offenders and their treatment left little room for the moral
agency of the actor. In the twentieth century, when there was, as Francis Allen put it, “a sufficiently strong and widespread belief in the malleability of human character” (Allen 1981, 11), society aimed to rehabilitate offenders. In the resulting systems of indeterminate sentencing—through which the offender was imprisoned until he was thought to be less dangerous—the penalty imposed or served bore only a limited relation to the crime of which he was convicted. The sentence served was often in fact longer than it would have been otherwise (Walker 1998, 210).

In the last generation, there has been a loss of confidence in the ability of society to understand and control the social and physical world. The belief has been fading that science can prescribe answers to problems that will not have hidden consequences or that public institutions will make honest efforts to understand and reveal the consequences of social proposals. At this very juncture, the problem of trust in politics and society, continuously at issue since the time of Hobbes and before, has taken on renewed urgency.4 Knowledge about social action, both on the part of actors and others in society has become “reflexive” in the sense that “social practices are constantly examined and reformed in the light of incoming information about those practices, thus constitutively altering their character” (Giddens 1990, 38). People have the power to be critical, to decide whether they ought to trust in institutions and persons, and how they ought to try to control that trust. Political scientists have noted that public confidence in officials and private professionals has been on the wane over the last generation (Coleman 1990), even as social actors have become increasingly interdependent. Thus while living in a risk society increases mistrust, at the same time it increases the need to find a basis for trust. When people travel by air or seek medical assistance, they have to trust the pilot or the doctor, while at the same time they insure against injuries in flights or medical treatment. When they insure against such risks, in turn, they have to trust the insurer to calculate the risks in an honest way and be willing to pay claims. Trust is becoming scarce and precious because, while the faculty of critical

4. In political science, the subject of trust is treated as an aspect of “social capital” in Coleman 1990, Putnam 1993, and Fukuyama 1995. In sociology, it is viewed as a central problem for the increasingly self-conscious “risk society” (Beck 1992; Giddens 1990). Analysis in the following paragraphs relies on these sources.

The current scholarly interest in trust may be seen to have arisen in part out of changes in Eastern Europe over the last 15 years. It is argued that the governments there were unable to sustain their rule, because, among other reasons, they had destroyed the institutions of civil society that might have supported them (Levi 1998; J. Braithwaite 1998). Similarly, the corruption and weakness of the governments and market economies that have succeeded the regimes could be explained as a Hobbesian struggle among actors who have no reason or tradition for trusting one another as individuals to act honestly on decisions of policy or market decisions (Holmes 1997). Those actors took literally the rhetoric of laissez faire, while the capitalist democracies were in fact operating out of a fund of social capital, insufficiently understood and acknowledged but nevertheless essential.
reflexivity constantly questions any existing bases for trust, the need for trust to cope with risk is growing.

While the economic model of the individual pursuing preferences continues to prevail among many social scientists as a methodological assumption, then, trust is at the same time widely perceived as an indispensable element of social capital that makes it possible to carry out collective actions, whether governmental or private, because actors can rely on others to take roles that they have taken in the past and not to act in their own interest in a way that will damage the collective action. It is clear at last that trust is an aspect of social capital, essential to the functioning of society, only after market forces and the ideology of individualism have cast it into shadow.

The rising doubts about society's ability to analyze and change the social world have been reflected in attitudes toward crime and punishment. Policymakers and the public in the United States and Europe (Beckett and Sasson 2000, ch. 4; Taylor 1998) have been dismayed by a perceived rise in crime, which is itself an aspect of the sense of a loss of control; it seems that the exposure to risk has increased, while the fear of life-threatening harm remains undiminished. As a result, crime is increasingly puzzling and intimidating. Although people try to compensate for the risks through insurance and the tort system, that is but a poor substitute for the waning sense of control; compensation usually cannot appease the sense of violation created by crime. In many cases, furthermore, the tort system cannot compensate for injuries due to crime, because offenders cannot be found or are judgement proof, that is, poor. At the same time, since society no longer claims to understand the behavior of offenders, crimes of violence imply a danger that is pervasive, unpredictable and, unlike other risks, malevolent.

Under these circumstances, the rehabilitative ideal as a rationale for criminal sentencing was widely rejected; the attack came from all sides. Those who believed that the criminal justice system had failed to assign blame to offenders for what were antisocial choices thought that the response to crime ought to be outright punishment instead of rehabilitation. Penal reformers, who believed that sentences were already too harsh, claimed that prisons were merely incarcerating and thus in fact punishing in the name of rehabilitation. Both sides shared a sense that rehabilitation programs had failed, that they did not reduce recidivism among offenders (Walker 1998, 218; Allen 1981, 57–8). The point was that society did not know whether offenders could be rehabilitated, much less how to go about it.

Into the gap in theory flowed desert. In the 1970s, the tension between the older legal conception of guilt rooted in the offender's choice and the hope for scientific intervention in the offender's life was being resolved in favor of tradition. A principal difficulty with the traditional standards for
grading crimes, however, was and is that contemporary policymakers do not have a clear idea of the basis for desert. The conception of the state of mind required for criminal liability has been overwhelmed by the social forces that have made the fear of the risk of death so important in modern society. The meaning of the social nature of the harm required for liability has also been obscured, although it may be illuminated once again through the renewed perception of the value of trust as social capital. That renewed perception poses a question for the understanding of the grading of crimes: Does the criminal law accord trust and betrayal the importance they deserve? The answer to the question lies through an understanding of the way fear of harm has shaped the notion of desert and of the way the law conceives crimes of betrayal.

DEsert, INTENT, AND THE FEAR OF VIOLENCE

A chief source of the legitimacy of grading crimes according to "desert" has always been the claim that the offender "chooses" an action that leads to a social harm. For modern criminal codes, an offender's culpability is smaller if he has only chosen behavior that gives rise to a risk of injury, for example, through recklessness or negligence, and greater if he has "intended" injury. The "choice" is of course rooted in the Christian notion of the sinner's exercise of free will. As The Inferno shows, that conception originally brought with it a psychology—not an empirical psychology to be sure, but rather one rooted in the requirements of philosophy. The use or abuse of reason was required for the free exercise of the will, and thus for Dante the most willful crime was the most grave. As those roots withered, the notions of choice, and the intent that infuses choice in the criminal law, lost any clear connection with reason in the sense that Dante understood it. The problem is not that the meaning of the rational, in Dante's sense, is lost to the language. Such rationality, however, is now seen as a property of disciplined activities, like the work of the legal system itself. The law has always, for example, claimed to treat the determination of guilt or liability as deliberate and rational in just this sense. Judges, for example, try to explain their decisions in light of values and earlier decisions; when they visibly fail to do so, critics say their decisions are not legitimate. But crime is hardly seen to participate in this sort of rationality; it is on the verge of the irrational.

The change in the meaning of intent for culpability over the generations can be seen by tracing the phrases that have been used to describe the special sort of intent required for the extremely serious crimes, of murder at common law or of first-degree murder in Pennsylvania in the late eighteenth century and later elsewhere in the United States. The state of mind was styled as "malice aforethought" for murder at common law or as "premeditation" for first-degree murder in the United States.
At an early date, it is said, the meaning of "malice aforethought" in Britain was close to Dante's understanding of malice as ill will; "aforethought" seemed to emphasize the element of calculation. Yet the medieval meaning drained out of the phrase over time. Oliver Wendell Holmes Jr. summarized the situation as it was in the last half of the nineteenth century:

Malice, as used in common speech, includes intent, and something more . . . [W]hen an act is said to be done maliciously, it is meant not only that a wish for a harmful effect is the motive, but also that the harm is wished for its own sake, or . . . for the sake of the pleasurable feeling which knowledge of the suffering caused by the act would excite. Now it is apparent . . . that of these two elements of malice the intent alone is material to murder. . . Malice, in the definition of murder, has not the same meaning as in common speech, and . . . it has been thought to mean criminal intention. (Holmes 1881, 2–3)

The notion of premeditation as a prerequisite for first-degree murder in the United States passed through a parallel process. The original formula adopted in Pennsylvania, distinguishing capital (first-degree) murder from lesser degrees, was "all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." It is clear that the original purpose of the formula was to limit the penalty of death to cases where the killing was a "deliberate assassination." And yet, in Pennsylvania as in many other states, "premeditation" has been reduced to no more than the work of a moment. In 1928, Judge Benjamin Cardozo complained to the New York Academy of Medicine that the breakdown in the conceptualization of deliberation had destroyed any viable distinction between the degrees of murder. "If intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and premeditated, since choice is involved in the hypotheses of the intent" (Cardozo 1931, 100–101).

In the generation after Cardozo, many American states, often following the formula of the Model Penal Code, abandoned the traditional formula for degrees of murder, defining murder simply as an intentional killing or even a reckless killing under some circumstances (ALI 1985, § 210.2; N.Y. Penal Law § 125.25). But now the meaning of intent had receded. Once the philosophical psychology familiar to Dante had been abandoned, notions

5. The Report of the Royal Commission on Capital Punishment (1953, 28) asserts confidently that in England the term malice aforethought originally meant "a deliberate, premeditated intent to kill formed some time beforehand." Other research suggests that the meaning of the term was never clarified in the early cases (Kaye 1967).

6. The language used seems to be similar to that used to designate the crime of murder in the late Middle Ages, which, as described earlier in this article, did not require a clear proof of intent. Nevertheless it seems clear that the Pennsylvania drafters at first meant to require deliberation (Keedy 1949, 770).
like premeditation or intent in general lost any clear connection to concepts in psychology or for that matter in the other social sciences. Empirical psychology has not been able to illuminate the usage of intent in criminal law precisely because the meaning of the word is rooted in a normative concept of choice (Gilligan 1997, 92).

Some modern criminology has afforded a degree of moral agency to the offender; Sykes and Matza, for example, described the "techniques of neutralization" by which offenders seek to rationalize their failure to adhere to the norms of the law. Such rationalization can be seen as a version of akrasia—the unwillingness to adhere to what the offender knows is right—which Aristotle and Dante understood as a state of mind that can accompany crime (Sykes and Matza 1957; Hampton 1990). But that description has hardly clarified our understanding of the state of mind required for criminal liability; it tells us rather that offenders may obscure their knowledge of their state of mind even from themselves.

It has been left to the law to construct its own definition of intent for its use in grading crimes. Contemporary penal codes use the term intent, or the synonym purpose, as in the Model Penal Code (ALI 1985, § 2.02), to fix the gravity of crimes generally. Intent is not, of course, at present linked to the betrayal of trust. The Federal Sentencing Guidelines recognize "abuse of a position of public or private trust" as a factor that may somewhat increase the sentence for any crime (18 U.S.C.A., Federal Sentencing Guidelines § 3B1.3) but only as 1 factor among some 18 others. The New York Penal Law states that a person acts "intentionally with respect to a result . . . when his conscious objective is to cause such result" (§ 15.05[1]), language that is careful to distinguish intent from recklessness and negligence, but is otherwise quite opaque. The best approximation to the meaning of intent may still be the one suggested by Cardozo: we perceive that a person has acted intentionally when he has "chosen" his action. But that definition is close to a tautology: to deserve severe punishment, an actor must choose the criminal conduct, and we define his intent precisely as the making of the choice and no more.

There were no doubt several reasons why the conception of the state of mind for murder evolved (or devolved) through formulas suggesting calculated planning, such as premeditation or malice aforethought, ending up requiring no more than an intent that does not imply any planning. Often it is difficult to prove that a crime has been planned, even though it may have been in fact; thus the determination whether or not a murder has been premeditated in the full sense depends as much on the vicissitudes of the evidence as it does on the actual state of mind of the killer. But that problem would not, by itself, have been sufficient reason to abandon the requirement if the system of justice recognized it to be important. The courts have demanded the proof of a state of mind that is difficult to establish, for
example, in prosecutions for tax evasion, where the government has to prove that the defendant was aware that his actions violated the law (i.e., ignorance of the law may be an excuse in such cases) (United States v. Cheek, 498 U.S. 192 [1991]). The difficulty was rather that the requirement of calculation did not seem to pick out the worst crimes; society was more frightened by the harm of a homicide than by the state of mind that accompanied it. The requirement for true premeditation in premeditated murder dissipated over time, because crimes without deliberation were just as “bad,” that is, just as harmful, as deliberate crimes. The law is more concerned now to control the risks of such harms, in part by establishing crimes that are based in states of mind that are less than intentional, as in reckless manslaughter and negligent homicide. Even when the law requires proof of intention, as in most versions of murder, it is looking to the harm or the threat rather than at the mind of the killer. The law says that a crime ought to be viewed as more serious as the element of intention increases, and yet society cannot shake its concentration on the fear of violent injury. As a practical matter, the meaning of intent has been shaped over decades by the demands upon penal policy to accommodate the fear of the risk of life-threatening harm.

Even though the usage of intent is tailored to the law, it inevitably implies some sort of psychology, because it is connected to concepts such as state of mind. When the contemporary use of intent in the criminal law is viewed as if it were empirical, its implications are puzzling. The peculiar psychology implied in the legal usage of intent can be seen in the recent tendency in the United States to treat children who have committed acts of violence as adults, capable of the state of mind required for a serious felony (U.S. Department of Justice 1998). The notion of a “child” is partly defined by the fact that the child is morally and cognitively undeveloped; the child does not have the training or experience, or indeed perhaps the capacity, to understand the consequences of actions in the way that normal adults do. The influences on the child’s will are confusing; the child is not able to choose among them in the same way that an adult does (Schapiro 1999). Yet when a child does something, s/he may in some sense intend to do it; if the law requires no more than an instantaneous knowledge that an act is what it appears to be, then the child has “intent” within the meaning of the law. In the absence of the reflective background that might be part of a more purposeful construction of intent, then, it becomes permissible to believe that a child is capable of it.

A similarly thin psychology can be seen in the debate in the United States about whether an offender “deserves” greater punishment for an offense if he is convicted of it a second time. In his argument for the desert theory of punishment, von Hirsch claimed that a recidivist could be deemed more culpable than a first offender (Hirsch 1976, ch. 10). George Fletcher
and other commentators have disagreed (Fletcher 1978, 460–66; Hirsch 1985, ch. 7); the argument is that, however much the law may increase a sentence for a recidivist as a measure of incapacitation, looked at purely from the point of view of culpability, a given offense is the same on each occasion. If the components of the offense are harm and intent, and the intent is viewed as of the instant of the crime or just before the crime, then it is easy to argue that there is no difference from one occasion to another. If intent were conceived as part of a purpose more broadly considered, the second offense might change one’s understanding of the offender’s state of mind. Repeated offenses may suggest in some cases that the commission of the crime is part of a set of choices to which the perpetrator is in some way committed, a different intent from the decision of a moment. In other cases, the circumstances of a repeated crime may suggest that the offender has even less volitional control than he seemed to have in the first instance.7

The fear of violence that is driving punishment is obscuring the fact that a crime is a peculiarly human performance. Much of the popular rhetoric about violent crime has the effect of eliding the distinction, made since the time of Aristotle, between the malicious and the bestial. Horrifying acts of violence are called “brutal” or “bestial” crimes, as though their “bestiality” made them especially condemnable, instead of especially difficult to understand. Society fears the perpetrators of such acts as it fears a wild animal and is the more willing to expel them. Those who work on death penalty cases under contemporary procedures in the United States, in which the determination of guilt of the defendant is separated from the penalty phase, remark on the fact that in the penalty phase the prosecution typically makes an effort to dehumanize the defendant (Haney 1997). Jurors are more willing to take life from a creature whom they fear but cannot understand than from a person whom they can (or might try to) understand.

It is perhaps by analogy to the bestial that narcotics crimes have been made into crimes that can inspire fear. According to one common view, the person intoxicated with drugs is bereft of the ability to do what reason would tell him he ought to do; he cannot control his need for the drug or limit his ways of trying to obtain it. Thus the person who supplies the narcotics can be seen as engaged in a business of depriving people of the ability

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7. The federal statutes defining RICO (Racketeer Influenced and Corrupt Practices) crimes, 18 U.S.C. ch. 96, have sought to penalize patterns of crime, such as the conduct of an enterprise through or the investment of profits from “a pattern of racketeering activity,” where racketeering is defined as the repeated commission of specified felonies. These statutes may be seen as trying to come to grips with offenders who are committed to crime as a business. Nevertheless, the mens rea for the RICO crimes is buried in the crimes that are the components of racketeering. The courts have been puzzled to assign states of mind to other aspects of RICO crimes. It is unresolved what state of mind must link the crimes to make them parts of a “pattern” for a RICO offense, H.J. Inc. v. Northwestern Bell Telephone, 492 U.S. 429 (1989) or how much control over the management of an “enterprise” is required for a charge of RICO for conducting such an enterprise through a “pattern of racketeering activity” Reeves v. Ernst & Young, 507 U.S. 170 (1993).
to control their impulses, of their ability to adhere to the standards of the law; he is in a sense "bestializing" them. Engaging in such a business for profit can then be seen as a serious crime.

As fear of danger has had increasing influence in the administration of criminal law, policy has looked more and more to the control of risk. "A central feature of the new discourse," Feeley and Simon tell us (1998, 234) "is the replacement of a moral or clinical description of the individual with an actuarial language of probabilistic calculations and statistical distributions applied to populations." Police and other administrators have emphasized a variety of preventive measures, including drug testing for employees and others, the creation of perimeters employing private security agents around building complexes and even neighborhoods, and the establishment of neighborhood watches. Through such measures, officials and the public hope to get some control of the fear of crime, to make crime less a malevolent threat than a predictable risk like other possible sources of injury, against which insurance and other reassuring devices can be used. For the actuarial approach to crime, the moral dimension, the state of mind driving the criminal, would seem to be of no interest; it is the danger that matters.

At this point, it might seem wise to step back and ask whether it makes sense for us to continue to try to rationalize the meaning of intent and to grade crimes as modern criminal law has done. We may accept the proposition that the definition of the most serious harm has been thrust upon us by the history of our civilizing influences and our demand for a right to life; these have made violence the symbol of the wild, the uncontrollably risky. We may accept the proposition that history has exerted pressure on the meaning of intent until it is little more than a signal by which we identify the crimes that most frighten us; that desert has been turned, as nearly as possible, to the purposes of the control of risk. In light of the fact that contemporary law has not found any workable formula for describing an offender's state of mind, relying on the severity of harms that most frighten people might seem an acceptable way of determining the gravity of crimes. A postmodern analysis might strengthen such an approach, with the argument that the subject and his or her intentions, whether conceived as deliberate or instantaneous, are entirely a social construct, with no reality outside the context in which they are cast (Litowitz 1997).

One difficulty with such solutions is that they ignore the fact that the criminal law has always had something in common with Dante; for most

8. See Bakalar and Grinspoon 1985; Luper-Foy and Brown 1994. I do not mean to suggest that the very long sentences for some narcotics crimes that prevail in the states and the federal system are truly intended by legislators to be explained on a theory of desert. It would seem impossible to explain the sentences for narcotics crimes entirely on the basis of desert; they must be rooted in chiefly in an effort at deterrence. Nevertheless, given the widespread current use of desert as an explanation for the grading of crimes, I draw upon a basis for punishment rooted in desert.
offenses there is no crime unless the offender has chosen a criminal course of action. The offender must have meant to harm the victim or at least to run a risk of harm; and, for most purposes, the first is more serious than the second. The solution is at odds with the general understanding of what crime is; in the modern period, a person is not imprisoned just because he has harmed or threatened another. The law of crimes does not have the purpose only, or even primarily, of controlling the risks of harm; it has a purpose of punishment. If the law continues to punish with long incarcerations, or even with death, and more important, if it distinguishes between crimes for purposes of punishment, there must be reasons why the offender deserves punishment. The offender’s state of mind is one of those reasons.

If society is to continue within the present framework of criminal law, then we ought to try to understand what harms should be viewed as injuries to society serious enough to warrant criminal punishment and what is the nature of the intentional state of mind that is claimed to make a crime particularly culpable. Taking my cue from Dante, as well as from the renewed interest in trust as social capital, I shall use crimes of betrayal of trust as a laboratory to inquire further into the nature of public harms and the importance (or lack of importance) of state of mind.

BETRAYAL AND THE LAW OF CRIMES

Crime control based on risk runs on mistrust; in the administration of street policing, for example, it is essential that police be suspicious, be on the lookout for those who ought to be arrested, given a summons, or at least interrogated (Ericson and Haggerty 1997). And yet the contemporary sociology and politics of the risk society teaches that the other side of mistrust has to be trust; at the simplest level, people have to trust the police, lawyers, judges, and administrators to select those who really seem to present a danger and not overlook dangers for corrupt or discriminatory reasons. More broadly, the presence of mistrust rooted in fear implies that people seek others—friends, family, associates as well professionals—to protect them or at least not to present a threat; such relations are essential and difficult to come by. Trust, whether it is face-to-face or the more abstract trust in professionals with whom one does not necessarily have personal relations (Giddens 1990, 80) seems scarce and increasingly valuable. Some of the risks against which people seek to form relations of trust are even life threatening; people depend upon the advice of medical doctors and engineers, for example, in situations that may lead to results more serious than a theft or even an assault. Thus trust is of great importance to the sense of control of risks; by the same token, betrayal of trust increases the sense of threat that has given rise to the contemporary risk-based approach to crime. The importance of trust raises the question whether contemporary law grades
crimes of betrayal in ways that are consistent both with their deliberateness and the harm they do to society.

Crimes of political betrayal are sometimes in a special class. During times when there is widespread fear of a foreign enemy, crimes of political betrayal have loomed larger in the public imagination in the United States than crimes of physical violence. Early in the Cold War, for example, the espionage case of Julius and Ethel Rosenberg and the perjury case against Alger Hiss represented images of particularly frightening and despicable crimes (Schrecker 1998, ch. 5; Caute 1978, ch. 3). The circumstances surrounding them bear a structural resemblance to crimes of betrayal for Dante; these crimes were committed, it was said, to aid a powerful and unfriendly power. If these betrayals had delivered the nation into the hands of the Soviet Union, as many feared, then there would have been no legal or other governmental redress; the damage was irretrievable. In the supposedly lawless world of international conflict, loyal solidarity alone could protect the nation, and betrayal of that solidarity was experienced as the most serious crime. Apart from situations of intense ideological conflict, where the fate of the nation has seemed to be at stake, such betrayals have been less important. The case of Jonathan Pollard, convicted of espionage on behalf of Israel, for example, did not capture the public imagination in the same way, because Israel did not present a threat to the United States. For those public officials for whom loyalty is of paramount importance, in the intelligence agencies, however, Pollard’s crime was viewed as very serious. In 1998, when President Clinton, during negotiations with Israel, was considering clemency for Pollard, the director of the Central Intelligence Agency threatened to resign if Pollard received a pardon (Risen and Erlanger 1998).

Apart from cases like the Cold War espionage and perjury cases, where the betrayal concerns something beyond the state, for which the law can give almost no redress, betrayal has been at something of a discount as a category of crime. Although it is true that intentional betrayals of trust like fraud are recognized as crimes, they are not counted among the most serious crimes; for example, the federal sentencing system continues to rank them comparatively low. This is often analyzed as class justice; many crimes of betrayal are white-collar crimes, commonly committed by middle-class or rich people rather than common criminals. The actors have more power than most defendants to resist prosecution, and moreover their crimes often grow out of a legitimate business; society has an interest in encouraging the business to continue and to report actions that may turn out to be against the law (Braithwaite 1986). Thus white-collar crimes are frequently treated as a cost of doing business. While I believe such a theory helps to explain why the justice system ends up treating white-collar crimes more leniently, it does not seem fully to explain why such crimes are graded relatively leniently in the criminal statutes themselves or sentencing guidelines. In short,
it does not quite tell us why such justice is not perceived as class justice; why it is socially and legally acceptable to see such crimes as less deserving of punishment than common crimes such as crimes of violence.

One reason that society is lenient toward crimes of fraud and betrayal is that the injured expect to be compensated in case of breach of trust, whether by mistake or even by a deliberate act, because those in whom they place their trust—commonly professionals—are often middle class or wealthy. Society commonly treats the risk of betrayal as something insurable; such professionals have insurance—often they are required to carry it—and victims are compensated, insofar as they can be. In this respect trust relations are different from relations with those who are strangers or who have no assets to pay compensation, as is often the case in crimes of violence (Posner 1985, 1201–5).

But the reliance on insurance and the tort system cannot entirely explain the relative unimportance of such crimes in the criminal justice system. Even when the consequences of the crime cannot be adequately compensated by insurance and the tort system, because the betrayal is discovered before it results in compensable injury or because it affects a vast number of people in ill-defined although potentially serious ways, still the law is surprisingly lenient. In the case of a medical doctor convicted of fraud in federal court in California for falsifying the results of tests of new, experimental drugs and equipment by deliberately altering the records of patients and re-using materials from earlier experiments, the sentence was 15 months (Eichenwald and Kolata 1999), even though it would seem that the lives of all those who might use the drugs and equipment were jeopardized by the crime in ways that might have hidden and incompensable consequences.9 In another case, executives of a major jet-engine repair company were convicted of fraud for falsifying their repairs, deliberately using inadequate materials or cosmetically covering up defects that were related to the safety of the airplanes they repaired. Significantly, the defendants thought their crime such an enormous breach of trust that they argued unsuccessfully to the court that they had a right to waive a jury in favor of a bench trial, because the fear of accidents in flying “would arouse the jurors’ passions against defendants” (United States v. Gabriel, 125 F.3d 89, 94 [2d Cir. 1997]). Nevertheless, after trial the judge imposed a sentence upon the lead defendant consisting of a prison term of three years and a fine and restitution totaling $110,000. A sentence of three years is a long one, of course, for the defendant who has to serve it; nevertheless, it is short in relation to sentences that are available for crimes of violence.

9. This case and the Gabriel (125 F.3d 89 [1997]) and O’Hagan (521 U.S. 642 [1997]) cases that follow are federal cases. Sentences in the federal system are not, of course, solely governed by desert theory, but they are nevertheless heavily influenced by it under contemporary conditions.
One reason that crimes of betrayal are not experienced as more serious may be that the criminal process in the United States depends heavily on betrayal for the success of its administration. Informers are introduced into organizations suspected of crime, opportunities are offered to prospective perpetrators, and, most commonly, promises of leniency are made to offenders for testimony against their accomplices. Such testimony is taken every day in courts in the United States, and prosecutors depend upon being able to persuade juries that it is credible; without such evidence, law enforcement against many crimes is claimed to be difficult if not impossible.10 When the jury at a criminal trial is asked to believe testimony produced by such a paid betrayal, and the press reports it, the justice system is in effect teaching that a betrayal of trust is of less importance than the crime with which the defendant is charged, whether theft, extortion, or some other crime. It is argued that the informer can be believed because he is, after all, only acting in his own interest in testifying; he may be acting to save his own skin, but that is to be expected and is not a sufficient reason to reject his testimony.

Here we are nearing the heart of the reason that betrayals of trust are not taken more seriously as crimes. The self-seeking individual is taken as the norm in contemporary society, even if he takes advantage of others. Lawyers, investment bankers, and managers are commonly trusted because they are able practitioners in their chosen field; their ability to advance their own interests is often similar to or an integral part of their ability to advance the interests of those who trust them. When they betray that trust, they have not necessarily shown that they are not able practitioners, at least in a narrowly technical sense; sometimes the betrayal seems so minor relatively that people continue to employ them because they believe they cannot find practitioners who will do a better job. In a striking case in 1998, a large publishing company continued to retain a building consultant for an important project, even though he had been convicted of taking bribes from contractors, thereby distorting the market for construction work in New York City (including the market on the job for which he was retained). The publishing company claimed that it found the man to be essential to the project, despite the bribery conviction (Bagli 1998).

The crime of insider trading in securities shows how slight the distinction can be between a criminal fraud and acceptable practice in the market.

10. In the case of United States v. Singleton, 165 F.3d 1297 (en banc), cert. denied, 119 S. Ct. 2371 (1999), the prosecution practice of promising leniency in return for testimony was challenged by the defendant as a violation of the federal bribery laws. Even though there was a substantial argument in favor of the defense proposition based on the text of the bribery statute, the majority of the circuit court held that the statute should not be construed to reach the actions of federal prosecutors in making nonmonetary promises to witnesses, partly on the ground that "no practice is more ingrained in our criminal justice system" (165 F.3d at 1301). See a news story concerning the significance of the case, Glaberson 1998.
Regulations of the Securities and Exchange Commission provide that "a person commits fraud 'in connection with' a securities transaction . . . when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information" (United States v. O'Hagan, 521 U.S. 642 [1997]). As a partner in a law firm representing a company involved in a proposed merger, O'Hagan bought options and stock based upon his professional knowledge of the proposed merger and later sold them at a profit. This was held to violate his fiduciary relation to his law firm and its client, resulting in a sentence of 41 months; the courts held that there would have been no liability in the absence of the violation of a trust relation.11 "There is no 'general duty between all participants in market transactions to forgo actions based on material, nonpublic information'" (1997, 662). In Dirks v. SEC (462 U.S. 646 [1983]), by contrast, an investment analyst had received information about a massive fraud inside a corporation and assisted his clients in selling their holdings in the corporation under circumstances where others in the market who did not have the benefit of the information not only could not benefit but also might suffer due to the decline in the value of the corporation's securities. The use of the information violated no duty to the corporation or anyone else and thus could not be made the basis of the fraud of insider trading. The distinction between a permissible market transaction and the fraud of insider trading is so difficult to draw that a strong element of deliberation is required for the crime; conviction is possible only if the government proves that the violation is "willful" and can result in incarceration only if the offender is aware of the law he is violating.12 The point for us here is that merely trading in the market for securities, using whatever expertise may be available, is not the crime of insider trading until it goes beyond the mere market relation and becomes clear cut as a form of stealing, that is, misappropriating information obtained in a relation of trust.

The similarity between some market behavior and some cases of betrayal does not seem quite enough, nevertheless, to explain the puzzle of the grading of crimes of breach of trust. If we consider the state of mind of the offender, as well as the harm to society, there would seem to be good reason to view such crimes as very serious. They are among the most deliberate of crimes, often requiring a calculated violation of duties to others. In economic terms, they are more costly to society than common crimes

11. O'Hagan was also convicted under SEC rule 14e-3(a), which penalized the use of nonpublic information to acquire securities in connection with a tender-offer even in the absence of a fiduciary relation, and that conviction was affirmed on the theory that the danger of fraud in connection with tender-offers was great enough to justify a blanket rule against the use of nonpublic information.

12. The term willfully is often used in interpreting the meaning of federal crimes to imply an especially strong awareness on the part of the perpetrator, particularly an awareness of the fact that the perpetrator is violating the law (Davies 1998).
(Braithwaite 1986, 62; Pepinsky 1986); and more important, they are injuri-
ous to values that are of utmost importance to society as a whole. They
destroy an element of social capital that seems to be diminishing; in fact
betrayals of trust may be one reason that social capital is diminishing. As
betrayal becomes more familiar, and as the public recognizes that the crimi-
nal law does not attach a great deal of importance to it, the reluctance to
trust others and the cynicism about betrayal can be expected to increase. So
an essential element for the accomplishment of societal ends is worn away
by such crimes. And yet the idea that the law might impose sentences for
such crimes that are as great as the sentences for crimes of violence against
individuals, such as robbery, continues to be strange; we may even feel that
such a sentence would be disproportionate.

The deliberateness of crimes of betrayal does not make them horrify-
ing. On the contrary, society is not moved to punish by the fact that such a
crime is more “human,” in Dante’s sense that it abuses the human faculty of
ratiocination.13 Perhaps that even makes the crime seem more familiar, less
threatening because it is the more human. Those who manage or advise
about the affairs of others are expected to be ambitious, to try to advance
their own interests; when they step over the line and betray the interests of
others to advance their own, they are exaggerating, distorting, what is oth-
erwise a virtue. It is not a great fault for them to engage in sharp practice in
the market for their own gain; their practices are actionable in tort or crime
only when they betray a trust. But the moral distinction is not so pro-
nounced as to make the crime deeply condemnable; it does not repel as does
a crime of violence. We direct our desire to punish not primarily at what we
can understand to be deserving of condemnation, but at what is frightening
because (we like to conceive it as) beyond the bounds of our understanding.

Moreover, because of the prevailing emphasis on the “rational” selfish
actor, both in the market and politics, it is not fully clear how breach of
trust is deserving of condemnation; the possible gravity of the crime escapes
attention. It is difficult to grasp that the “fiction” of independently acting
individuals of which James Coleman writes “is just that—for individuals do
not act independently, goals are not independently arrived at, and interests
are not wholly selfish” (Coleman 1990, 300–301). The importance of
crimes of betrayal in society is discounted because the law does not take
account of the importance of the social capital that is expended through
breach of trust. Fancying that society functions through the competitive
endeavors of individuals, many resist the proposition that the success of
such endeavors is also rooted in the reliability of others.

13. The use of the word human in contemporary common parlance is ambiguous. While
it seems that we do not deny that reason is a human faculty, we often use the word human as
an excuse for fallibility, as in the phrase, “I’m only human.” We do not, however, accept such
fallibility as an excuse for crime.
The contemporary view of crimes of betrayal bears a curious resemblance to Dante’s view of crimes of violence. Betrayal is not conduct that is characteristic of the poor or of any economic class. Indeed, the more important crimes of betrayal may be committed by more important persons just because of their power to command the trust of others. The risk of betrayal is a necessary consequence of trust, which is indispensable in contemporary life; and the possibility of betrayal is raised by the fact that trusted people are seemingly able, ambitious, and willing and able to handle the affairs of others. Thus the risk of betrayal is a familiar part of present-day economic and political life. In Dante’s world, crimes of violence were prevalent across classes and were, if anything, thought characteristic of the powerful. The willingness and ability to use violence were essential to the conduct of political life, and thus violence was not only familiar but might, even at its worst, be the failing of a person otherwise respected and distinguished. The very term magnate was defined in Dante’s time by a person’s propensity to commit certain outrages; such crimes of violence were, in a sense, the white-collar crimes of Dante’s Florence. Crimes of breach of trust are not accounted very grave at present because they are the errors, distortions, or extremes of conduct that is otherwise thought of as acceptable, even indispensable to modern life, just as violent crimes were, for Florentines in Dante’s time, the extreme forms of conduct that was acceptable and sometimes indispensable. In the contemporary world, the risk of betrayal is tolerated as part of the ethic of individual self-reliance, just as Dante tolerated the risk of violence in connection with his ethic of care.

CONCLUSION: DESERT AND VENGEANCE

Let us reconsider the formula for desert as the basis for grading crimes—the gravity of the harm to society and the accompanying intentional state of mind—in the light of Dante’s understanding of the elements of that formula, as contrasted with the way the formula is and has been applied at the present time and in the recent past.

Contemporary understanding of intent and its allied concepts is at best out of focus. The concept of intent does little more than mark off the cases in which the offender has no firm grasp of the consequences of his actions—where he is grossly careless or at worst “reckless.” Malice does not require

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14. In the Model Penal Code, the concept “reckless,” a state of mind less than intentional (purposful in Model Penal Code language) is used to mean that the actor “consciously disregards a substantial and unjustifiable risk that [a] material element exists or will result from his conduct” (ALI 1985, § 2.02(2)(c)). This language would seem, on one interpretation, to imply that the actor knows that another will likely be injured by his actions. But if the actor consciously knows the probable consequences of his actions, then he generally intends them, within the meaning of intent as it appears in contemporary law. Therefore, if the term reckless refers to some state of mind that is less than intentional, then it must mean that the actor
any considered ill will, nor intent any reflective formation of the will. The puzzle of the contemporary understanding of intentional crimes can be seen in cases where the crime appears to be voluntary, but there seems to be no reason or insufficient reason for it, as, for example, where the offender’s actions seem to grow out of a rage that is beyond his control, although he is not insane within the meaning of the law (Morse 1996). In those cases, the crime is said to be intentional chiefly because it cannot be described as unintentional. But the structure, the content of the supposed intent, as a psychological or even a moral matter, is all but vanishing; the existence of the intent is inferred from the lack of any other explanation.

The legal system cannot abandon the notion of responsibility and of the rational individual on which it depends, however, not least because the law depends on rationality for its own decision-making processes; legal decisions are justified as policy choices that can be and are explained rationally. The inability to explain fully the intentional acts of individuals or the basis of rationality does not permit the system to do without them. In the realm of the criminal law, branding crimes intentional is a way to identify them as morally evil and to justify a substantial prison term for the offender. The criminal law clings to the fragment of choice that is implied by the word intent; if that is lost, nothing remains of the notion of criminality. It is partly for this reason, it appears, that the criminal justice system is so determined to control narcotics. Narcotics are often characterized as substances that deprive people of their ability to have intentions, to make the choice that is essential to defining action as criminal.15 The public is led to feel that, if the sale and possession of narcotics are not treated as crimes, society faces the prospect of actions by addicts that are dangerous but not voluntary and thus beyond the reach of punishment in the name of crime. The sense of control implied by the notion of intent will be lost, and society will confront risks even greater than those against which the criminal law, however inadequately, tries to protect it.

The grading of harms as more or less serious is a social construct. The harms that intimidate, that raise a cry for substantial punishment, are those that carry a threat of harm to the rights of individuals. The criminal law stands in for the hope of controlling risks that seem nearly uncontrollable. The grading of crimes reinforces the attempt to repress the intrusion of violence; it feeds the hope that violence can be excluded from respectable life.

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15. The belief that narcotics addiction may deprive persons of their power to make choices is discussed in Bakalar and Grinspoon (1985); Luper-Foy and Brown (1994).
There should be nothing surprising in the fact that the grading of harms is socially determined. The difficulty lies in the fact that policymakers and even philosophers (e.g., Murphy 1994) think that the grading is natural and morally required; there is a strong sense that violence against individuals just is worse than other wrongs. As a result, the element of harm to society, which has traditionally been thought to be the reason that crimes are prosecuted by the state rather than reserved to private redress and thus to be of the essence of crime, has become obscure. If societal harm could be understood independently of harm to the individual, then perhaps harms to individuals would not loom so large in the grading of crimes. In politics as well as social science, however, the individual is the important social actor; it is difficult even to conceive how a harm to a larger social entity that results, for example, from betrayal of trust could be as serious as an attack on an individual.

The criminal justice system responds to harms that seriously damage individuals because those harms cannot be satisfied through the system of civil justice, and because there is a popular political outcry against officials if they do not respond. Thus, finally, because the grading of harms is driven by fears of such intrusions on the rights of individuals as acts of violence and because the attribution of intent is driven by those fears, desert, insofar as it is not entirely erased, is assimilated to private redress. The clearest purpose for the criminal justice system becomes the replacement of revenge.

A popular understanding of desert appears when offenders sentenced to death or very long prison terms are said to “get what they deserve.” However obscure the meaning of desert may be as a result of my analysis here, for politicians who are calling for a “get tough” policy on crime, what a criminal deserves is clear enough. He deserves vengeance.

It is because it turns out that what the criminal deserves, as a practical matter, is something like vengeance, that the criminal justice system finally is so unyielding, so cruel in its punishments. To satisfy vengeance, sentences must be long, incarceration must be harsh, and sometimes death alone will serve as an adequate response to the demand for revenge.

Such an understanding of desert, nevertheless, is only confusion. Desert cannot be revenge; the point of culpability in the criminal law was to replace revenge with a deserved response to a blameworthy act. The desire to control risks of violence at almost any cost, with the accompanying loss of a clear concept of the intentional state of mind, has all but destroyed the basis for desert.

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