

# Criminal Justice Without Moral Responsibility: Addressing Problems with Consequentialism

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**Abstract:** This paper grants the hard determinist position that moral responsibility is not coherent with a deterministic world view and examines hard determinist alternatives to traditional punishment. I claim that hard determinist accounts necessarily involve consequentialist reasoning and discuss problems stemming from them. I also argue that a revised model of traditional consequentialism called complex consequentialism, a view in which multiple values may be considered as ends, provides the best moral framework for a hard determinist account. Ultimately, I examine a criminal justice model that draws heavily on public health ideals and argue that it should be considered a complex consequentialist account.

It is generally held that in order for individuals to be responsible for their actions they must have a hand in choosing these actions. However, in the past few decades there has been significant research in fields such as psychology, sociology, and neuroscience that suggests much of our behavior is not as much in our control as previously thought. Some philosophers have taken the stance that all our actions are determined by forces beyond our control. In making this claim, that all our actions are determined, these philosophers must then make sense of our notions of moral responsibility. Those who conclude that determinism is true and incompatible with moral responsibility are generally referred to as hard determinists.

In this paper I take for granted the hard determinist position, that moral responsibility is not coherent with a deterministic world view, and examine several views on how we are then to deal with the criminal justice system. I begin by examining a few common models for crime management that function without moral responsibility and some common objections to these models. I argue that the hard determinist position necessitates at least some degree of consequentialist reasoning and discuss some possible ways the problematic implications of consequentialist approaches to crime can be addressed. I argue that complex consequentialism, a view in which multiple values may be considered as ends to be maximized,



provides the best moral framework for a hard determinist account. Ultimately, I examine a criminal justice model provided by Greg Caruso that draws heavily on ideals found in public health. Though not explicitly noted by the author, I believe that Caruso's model is a complex consequentialist account, and I argue that it provides the best hard determinist model.

### **Quarantine Model**

Derek Pereboom defends a quarantine model for criminal detention as the best policy for dealing with crime in the absence of the notion of moral responsibility. Pereboom presents his theory for criminal detention as analogous to the commonly recognized right to quarantine. Pereboom argues that if we are allowed to quarantine people who serve as carriers of serious communicable diseases in order to protect society, then we are also allowed to “isolate the criminally dangerous.”<sup>1</sup>

Pereboom begins his analogy by noting that just as we do not hold carriers (or victims) of disease morally responsible for their condition, we would also not (under this model) hold criminals to be morally responsible. And, like quarantine, the degree to which detainment is acceptable would depend on the degree of danger to society. According to Pereboom, just as less dangerous diseases allow for less invasive and preventative measures, the less dangerous the criminal, the less invasive and legitimate preventative methods would be as well.<sup>2</sup>

### **Rehabilitation**

Another important aspect of the proposed quarantine model is the need for rehabilitative measures as a part of the system. Pereboom ties the need for rehabilitation into his quarantine model by claiming that when society quarantines a sick individual, it is, to some degree, obligated to provide medical care. According to Pereboom, when society quarantines a sick individual, that individual is made to experience deprivation that she did not merit because she is not morally responsible for being ill. However, society benefits from this deprivation. Thus, it is a matter of fairness that society does what it can (within reasonable bounds) to make the quarantined individual

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<sup>1</sup> Derek Pereboom, *Living Without Free Will* (Cambridge: Cambridge University Press, 2002), 174.

<sup>2</sup> *Ibid.*

safe and ready for reentry into society. Similarly, it becomes a matter of fairness that society does what it can within reason to make those detained for criminal behavior, behavior for which they are not morally responsible, fit for release and reentry into society as soon as possible.

There is an inherently consequentialist rationale in the hard determinist approach to crime management. Without moral responsibility, we limit our available reasons for justifying what we would generally think of as punishment. No longer can punishment be justified on the ground of desert. Punishment must now be justified as a means to some ends that serve to benefit society.

### **Common Criticisms**

Some critics argue that hard determinist alternatives to punishment would result in untenable conclusions that raise concerns for our general conceptions of human dignity.<sup>3</sup> These arguments tend to take issue with what I have argued is the necessarily consequentialist reasoning involved in hard determinist alternatives to punishment. Critics argue that hard determinist alternatives to punishment do not have the same obvious limits to the amount of time one could spend in incarceration for a given crime that traditional punishment has. Thus, they argue, if someone was determined not to be sufficiently rehabilitated, or there was not much hope for an individual's rehabilitation, their indefinite incarceration may be justified by this model. Another concern is the possibility of preventative detention for those deemed to be an inevitable danger to society.<sup>4</sup> There are also concerns with the idea of treating criminality as one would an illness. Some critics claim that treating those who commit crimes as people who are in some way ill would lead to unfortunate and unnecessary psychological consequences for those being "treated."

These criticisms indicate some common concerns. They identify a need for limitations, claiming that there are not obvious limitations in the hard determinist alternative to punishment like there are in our traditional conceptions of actual punishment. Thus, these criticisms suggest that a working account would need to involve other moral value systems in addition to traditional consequentialism.

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<sup>3</sup> *Ibid.*, 179.

<sup>4</sup> *Ibid.*, 176.



## Responses to the Need for Tempering Consequentialism

A weakness of standard consequentialist views is the inability to consider non-utilitarian values. While hard determinist punishment alternatives have a large and necessary degree of consequentialist reasoning, consequentialism as it is traditionally conceived is not sufficient to address the common practical concerns faced by these punishment alternatives. The supplementation of additional values provides limits on what is justifiable but may also involve goods we wish to maximize in their own right, even if they themselves are not justified by utilitarian reasoning. Thus, I wish to defend a more sophisticated account of consequentialism which Neil Levy calls “complex consequentialism,” in which a series of moral values are taken into account as ends. Levy places this complex consequentialist account in contrast with what he calls “simple maximizer” consequentialist positions.<sup>5</sup>

Simple maximizer views seek to maximize a single good. Levy brings up hedonistic utilitarianism as an example of this type of simple maximizing view. In Levy’s conception of consequentialism there is not just one good, or one value, which the view seeks to maximize. Instead, there can be a series of values between which actors must seek a balance.<sup>6</sup> Thus, values like human dignity or fairness may be considered final ends in themselves that actors can seek to maximize in their own right. Complex consequentialism is the view in which ends other than utility are considered intrinsically valuable and interact with other values to influence the consequentialist outcomes.

Complex consequentialism serves as the most coherent framework under which hard determinist alternatives can function. Hard determinist accounts of criminal justice cannot exist without relying, at least in part, on consequentialist reasoning. Once we abandon retributivist justifications for punishment, in which punishment can be administered in the direct service of justice itself, we can only be justified in using criminal sanctions as a means to some betterment of the society. However, I wish to contend this does not rule out values such as justice and autonomy from playing a role in the complex consequentialist model.

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<sup>5</sup> Neil Levy, “Skepticism and Sanction: The Benefits of Rejecting Moral Responsibility,” *Law and Philosophy* 31 (2012): 484.

<sup>6</sup> *Ibid.*, 486.

## Quarantine Model Updated

Greg Caruso presents a formulation of hard determinist punishment alternative that is in many ways similar to the quarantine model provided by Pereboom. Caruso uses a justificatory framework that I think can be seen as relying on a complex consequentialist reasoning, though not recognized as such by Caruso himself. Caruso calls his model the “public health quarantine model.” Like Pereboom it takes the quarantine analogy as its starting point, but Caruso seeks to develop the model within a “broader justificatory framework drawn from public health.”<sup>7</sup>

The public health quarantine model focuses not entirely on the individual in need of treatment (as is more the focus in other quarantine models) but on benefitting the population as a whole. Caruso argues that much like public health is a communal good, so too is public safety. Thus, it is important to understand the community as a whole when examining and sanctioning criminal behavior. This theory’s shift in focus from the individual to the communal, while still primarily consequentialist, leads to some more acceptable conclusions than alternative theories—especially when it comes to preventative measures.

The preventative measures advocated by Caruso’s model do not involve preventative detention, which for many seems like a fundamental flaw in consequentialist views, and instead focuses on addressing the social issues that lead to criminal activity. This again returns to the commitment to social justice entailed in the public health model, saying, the “public health model would advocate addressing the systematic cause of crime, such as social injustice, poverty, systematic disadvantage, mental health issues, and addiction.”<sup>8</sup> Caruso then argues that under his model this type of prevention would become the main focus of the criminal justice system, and in cases in which an individual did need to be incapacitated, treatment and rehabilitation would be the goal.

In addition to supplementing these consequentialist grounds with social justice concerns, Caruso also leans on principles found in traditional medical ethics to help guide his theory. These principles are autonomy, beneficence, nonmaleficence and justice. Caruso sets it as his task to provide a justification for quarantine that relies on public health ethics but incorporates the values found in

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<sup>7</sup> Greg Caruso, “Free Will Skepticism and Criminal Behavior: A Public Health–Quarantine Model,” *Southwest Philosophy Review* 32, no. 1: forthcoming.

<sup>8</sup> *Ibid.*



traditional medical ethics. In this way, Caruso achieves a complex consequentialist justificatory framework for his approach. Because both the principles of beneficence and nonmaleficence are largely concerned with the maximization of good and the minimization of harm, they can be considered as part of a more traditionally utilitarian approach. Thus, I will focus on autonomy and justice in further explaining how these principles function to create a complex consequentialist account.

Caruso's model incorporates a concern for autonomy by emphasizing "the liberty, privacy, and informed consent of individual persons in the face of a health intervention carried out by other parties."<sup>9</sup> Thus, autonomy can be understood as acknowledging the rights of individuals to act in accordance with their personal beliefs. The possible sacrifice of autonomy in the quarantine model is regrettable. However, in a complex consequentialist account, autonomy can still function as a value to be sought within the quarantine model, and because hard determinists hold that criminals do not justly deserve punishment, the justificatory burden remains with those who wish to limit the individual's autonomy.<sup>10</sup> When addressing the problem of when to preserve autonomy and when to override it, Caruso turns to John Stuart Mill's harm principle according to which the only justification for interfering with the liberty of an individual against their will is to prevent harm to others. Caruso holds that while this harm principle is an important central factor in respecting individual autonomy, it "should always be coupled with the principle of least infringement, which holds that the least restrictive measures should be taken to protect public health and safety."<sup>11</sup> Here the public health-quarantine model has an advantage over other non-retributive accounts concerning common objections. It is often argued that only retributivist accounts of justice can provide for proportionality in punishment since there is an upper limit for the harshness of response allowed. However, the public health-quarantine model ensures that the harshness is proportional to the danger posed by an individual to the public safety, and anything exceeding this is unjustified.

Caruso also develops the principle of justice, which demands that individuals are treated equitably and that benefits and burdens are distributed fairly. According to Caruso, when applied to quarantine, this principle means that decisions "for the application of

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

quarantine be made using a fair process, include a publicly available rationale for those decisions, a mechanism for dispute resolution, and a regulatory body to enforce decisions.”<sup>12</sup> Justice is essential to ensure the proper application and rationale for quarantine, but the importance of this principle as it functions within public health ethics extends far beyond this. In the version of public health ethics Caruso defends, social justice is viewed as foundational. With social justice as a value in public health ethics, the failure of public health institutions to secure the social conditions necessary for adequate health is considered a serious injustice. In discussing how this approach applies to criminal behavior, Caruso says that a “core moral function of the criminal justice system is to identify and remedy social and economic inequalities responsible for crime.”<sup>13</sup> Caruso argues that while poverty, racism, and other systematic inequalities are recognized problems for public health, they also have clear negative effects on public safety. Thus, the broad approach to criminal justice that Caruso advocates places social justice at the forefront of their concerns and prioritizes the reduction of harmful social inequalities.

### **Further Objections Considered**

Caruso argues that his public health approach to the quarantine model focuses less on the individual and their own motivational set and more on the social causes behind crime as a social phenomenon. Thus, Caruso’s approach offers a new understanding of what is meant by preventative action under the quarantine approach. With social justice as one of its cornerstones, it focuses on addressing the social issues that result in crime. The kind of preventative focus offered by Caruso is much more tenable than one possibly justified by other quarantine models in which an individual’s dangerous behavior is deemed so inevitable as to justify their preventative detainment.

However, if we grant ourselves the liberty of imagining a future in which Caruso’s suggested approach has been successfully applied, we may find it has some problematic conclusions of its own. Though practically unlikely, it is possible to imagine a future in which Caruso’s approach has been so successful as to result in its own dystopia, a future in which there is no longer the rich diversity of human behavior that makes up society today. Because of our enthusiastic use of social remedies for anti-social behavior, we will

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.



have created a society in which crime is no longer an issue. Instead, the population is so managed that people are turning out to be much too similar and much too tame.

## **Conclusions**

Throughout this paper I have claimed that consequentialism is an inescapable justificatory facet for hard determinist accounts of criminal justice. However, when examining criticisms of the view, it becomes clear that this is also one of the aspects of many hard determinist accounts that people find the most worrisome. Most criticisms of the consequentialist aspects of hard determinism take for granted a certain, perhaps more traditional, formulation of consequentialism that seeks to maximize a single utility or good (e.g. hedonistic utilitarianism). However, complex consequentialism provides an account of consequentialism that can take into account a number of variables and involve a number of values believed to have intrinsic worth. By supplementing the traditional notions of consequentialism, we can address some of the conclusions brought on by the simple maximizing of individual or social benefit that seem to go against our moral intuitions.

This sort of supplementary or “complex” approach to consequentialist reasoning is exemplified by Caruso’s model. Using a complex consequentialist public health framework, we can avoid many of the criticisms generally launched at hard determinist theories of criminal sanction. In addition to standing up better to criticisms aimed at consequentialism, this view also addresses critics concerned with practicality by extending the quarantine analogy and placing it in a more fully developed framework with clearly defined values and methods. By teasing out the implications of the quarantine model and adapting it to the public health model, Caruso provides the most plausible account of criminal justice without moral responsibility.

However, even Caruso’s model has its potential objections. Just as all values in the complex consequentialist model must be balanced between a number of concerns, this balance will need to be re-calibrated if it were to impact the diversity of ways of life.