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What is Philosophy of Criminal Law?

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Review of John Deigh & David Dolinko, The Oxford Handbook of Philosophy of Criminal Law (2011)

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Introduction: State-Centered and Individual-Centered Theories

What is philosophy of criminal law? The seventeen essays in this book, as a whole, provide an excellent place to start in answering that question. Editors John Deigh and David Dolinko state that they put together this volume of "seventeen original essays by leading thinkers in the philosophy of the criminal law" in order to create "an authoritative handbook" representing "the state of current research on the major topics in the field that arise from issues in the substantive criminal law" (p. v).

So what is the field, and what are its major topics? There are many ways to organize this field, but I would start by observing that we can divide the world of philosophy of criminal law into two different types of theorizing: state-centered and individual-centered. The state-centered theory focuses on the proper limits of the state's power to criminalize and punish, while the individual-centered theory focuses on questions of innocence and culpability. This division is, of course, somewhat artificial. Both approaches can and do coexist, often within the same piece of scholarly work, but the two approaches are distinctive, and keeping both theories in mind is helpful in making sense of the field.

The existence of the state-centered approach is in some ways more obvious and easier to justify than the individual-centered approach. Because much scholarly work in philosophy of criminal law speaks in terms of wrongdoing, justification, and excuse, which are familiar concepts from moral philosophy, it may appear that philosophy of criminal law is nothing more than a type of moral philosophy. However, setting aside the possibility of defining political philosophy as a special type of moral philosophy – that is, a type of moral philosophy that focuses on what the state is or is not morally permitted to do – it is a mistake to view philosophy of criminal law as a kind of moral philosophy and nothing more. It is, after all, philosophy of *criminal law*, and criminal law is, at bottom, an exercise of state power. Any comprehensive philosophical account of criminal law must, therefore, explain and justify the role of the state, and much work done in the field of philosophy of criminal law focuses on it.

What explains, then, the presence of the individual-centered approach? Curiously, while there is consensus that criminal wrongs do and should mirror moral wrongs, and that the state should not punish people unless they engage in wrongful conduct, there is no consensus as to why that is. This is not an idle question. Criminal law is one thing and morality quite another, and the relationship between the two is neither obvious nor

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straightforward. I am not taking a position in general jurisprudence here. The only observation I am making is that criminal law and morality, quite obviously, are two distinctive modes of setting, articulating, regulating, and enforcing norms, and an explanation as to how the two are related is called for.

I. Criminal Law-Morality Connection: A Working Hypothesis

Why should there be a close relationship between criminal law and morality? One possibility is that people who commit morally wrongful acts deserve to be punished, and it is therefore a good thing for the state to give people what such people deserve by punishing them. Michael Moore, for instance, has argued that "criminal law is a functional kind whose function is to attain retributive justice" and that "[r]etributive justice demands that those who deserve punishment get it."[1]

However, simply saying that some acts are wrong or that some people act wrongfully and deserve to be punished does not explain why the *state* should and can be the one to criminalize those wrongs and mete out punishment. As a general matter, the state is not in the business of ensuring just deserts. Bad things may happen to good people, just as some people may achieve far more success than they deserve. But it is not, as a general matter, the state's job to correct this state of affairs. We thus need to move beyond the simple assertion that some people deserve certain things when explaining what criminal law has to do with morality.

This is not the right place to develop a comprehensive theory of criminal justice. But let me suggest how one such account might go as a way of understanding why criminal law theory should look the way it does and what its importance is. We can start by exploring the rationales for criminal law. I highlight two in particular here. First, criminal law functions to reduce harm to the individual through its system of prohibitions and punishments. Second, as John Gardner has argued, criminal law functions to *displace* feelings of resentment and desires for personal vengeance by punishing wrongdoing.[2] These two rationales explain several key aspects of our criminal justice system, namely that it is *coercive*, *judgmental*, and *preemptive*.

Its *coercive* aspect reveals itself most dramatically and obviously through the process of apprehending and punishing offenders. This is essential for ensuring order and physical security—a key function of criminal law.

The criminal justice system is *judgmental* in the sense that when we punish, we also blame, condemn, and stigmatize the offenders. Stigmatization personalizes punishment, and sends the message that certain acts reflect badly on offenders. The judgmental aspect derives partly from the displacement function of criminal law. A core purpose of punishment is to manage the punitive and retaliatory emotions of victims (both direct and indirect) and to provide an outlet for their feelings of resentment toward the wrongdoers. The success or failure of a society's criminal law system thus depends on how well it responds to the punitive emotions of its citizens.

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[1] Michael Moore, Placing Blame: A General Theory of Criminal Law 33 (1997).

[2] *See, e.g.*, John Gardner, Crime: In Proportion and in Perspective, in Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch 31 (Andrew Ashworth & Martin Wasik eds., 1998).

Finally, the criminal justice system is *preemptive* in that the state is the exclusive agent licensed to punish criminal wrongdoing. The basic idea of retribution—that people should receive what they deserve—is silent as to *who* should be the one giving wrongdoers what they deserve, but the government is the only legitimate punisher, and the law prohibits self-help. This preemptive aspect is essential to both the harm prevention and the displacement functions of criminal law.

Once we have these features of criminal law in place, we can better understand why criminal law should have a close relationship to morality. The government enjoys an enormous amount of power, not only to interfere forcefully with people's lives and to brand individuals with the stigma of blameworthiness, but also to prohibit others from doing the same. For the government to remain the exclusive legitimate wielder of this power, it must act so as to demonstrate that its criminal justice system adequately replaces and improves upon a system of private prevention and vengeance. It follows that a properly functioning system must speak in a voice that is recognizable from the perspective of common sense moral intuitions about wrongdoing and responsibility.

The criminal law-morality connection, then, is a feature that flows neither from the laws of morality nor from some general principle that people ought to receive what they deserve. Rather, it is one of many conditions that attach to the government's exclusive power to criminalize and punish. Only by respecting such constraints can the state maintain the legitimacy of its exclusive control.

Such constraints are, however, constantly under pressure. The harm prevention and displacement functions of criminal law demonstrate how the power to punish can be abused. Punitive passions, while frequently and correctly based on the belief that a moral wrong has occurred, can be excessive and driven by other less desirable sentiments such as cruelty, sadism, inhumanity, and racial hatred or prejudice. Such sentiments may drive punishments well beyond what is appropriate in a given case. In addition, the pressures the state faces to reduce crime could lead it to excessive and unwarranted uses of its power to criminalize and punish. Therefore, a clear understanding of the ways in which criminal law doctrines are congruent with, or depart from, morality is essential in order to place some of the excessive tendencies in criminal law in check.

The claim here is not that most criminal law theorists would endorse a story like this as to why we have criminal law and what warrants its close relationship with morality. Rather, the argument is that a framework like this can explain why there are and should be state-centered theories and individual-centered theories in philosophy of criminal law and how such theories relate to one another. Also, a framework like this is a useful way of motivating various questions that scholarship in philosophy of criminal law addresses, and they may be organized roughly as follows.

First, although there is a close relationship between criminal law and morality, they are not one and the same, and there is a question as to how to articulate the proper domain of criminal law. State-centered theories are needed to address such questions of boundary-setting. Second, once we establish the proper domain of criminal law, there are questions as to what criminal law and its prohibitions ought to look like. Assuming that criminal prohibitions should closely track moral prohibitions, individual-centered theories are needed to articulate what is morally wrongful and how criminal law doctrines should be designed so that they capture morally wrongful activities. Third, even after we establish the proper

domain of criminal law and articulate criminal prohibitions, there still is a question as to how such prohibitions ought to be enforced. State-centered theories address this question of state punishment. These three groups of topics roughly correspond to the sequence of essays in this volume.

II. Limits of Criminal Law

The editors see the first three essays by Gerald Dworkin, Wayne Sumner, and Mitchell Berman as addressing the questions "concerning the justifiability of the state's outlawing certain acts as criminal offenses" (p. vi). Traditionally, the debate on the limits of criminal law has been framed as a competition between the "enforcement of morals" side advanced by Lord Patrick Devlin, and the "harm principle" side advanced by John Stuart Mill, H.L.A. Hart, and Joel Feinberg. This way of framing the issues is somewhat deficient, however, because, as philosophical slogans go, "the enforcement of morals" and "the harm principle" can, at least initially, obscure more than clarify.[3]

For one thing, the phrase "enforcement of morality" is not helpful to pick out what is distinctive about one side of the debate. Clearly, the state may legitimately enforce morality. Criminal law punishes murder and rape, for instance, and as it does so, it speaks in a heavily moralistic voice. How could the state do anything other than enforce and reinforce morality in the process?

The phrase "harm principle" does not do much better. First, there are wrongful behaviors that harm others that the state should not criminalize. Adultery, for example, can be wrongful and harmful to children and spouses, and they do not consent to it. The same goes for behaviors like deception, defamation, insults, and emotional cruelty to friends and associates. Second, cases often thought to be instances of harmless immoralities are easy to describe as causing harm to others.[4] We often justify the criminalization of prostitution and assisted suicide out of concerns that such practices involve unwilling participants and, in the case of drugs and prostitution, their association with violent crimes, such as human trafficking, false imprisonment, and murder. In fact, many in favor of criminalization of such behaviors on harm reduction grounds probably do not even believe that prostitution, drug use, and assisted suicide are immoral, meaning that the problem of criminalization of such conduct is not a problem of state enforcement of morality. Therefore, notwithstanding its considerable historical pedigree, there are some real doubts about whether the "enforcement of morals"-"harm principle" debate is the most productive way of approaching the problem of criminalization and drawing a principled line.

How, then, do we frame the problem of the limits of criminal law? We need to begin by recognizing that many topics fall under this issue. First, there is the traditional issue of when the state may curtail certain fundamental rights, such as the right of free expression, the right to die, or the right to sexual autonomy, by prohibiting hate speech, obscenity,

[3] The discussion here is, by necessity, quick, dirty, and impressionistic. For a more detailed discussion, see R.A. Duff, Answering for Crime: Responsibility and Liability in the Criminal Law 123-35 (2009); A.P. Simester, Enforcing Morality, in The Routledge Companion to Philosophy of Law 481 (Andrei Marmor ed., 2012).
[4] For a discussion, see Bernard Harcourt, The Collapse of the Harm Principle, 90 J. of Crim. Law and Criminology 109 (1999).

assisted suicide, euthanasia, or prostitution.[5] The phrases "enforcement of morals" and "the harm principle" come out of this traditional debate.

The second topic addresses the question of which immoralities the state can properly criminalize assuming that criminal law "enforces" morality. One may argue, for instance, that the state cannot properly criminalize the betrayal of one's spouse, a harmful immorality, not just because doing so would be a poor (say, wasteful and counterproductive) use of state power, but also because it is not properly within the state's jurisdiction.[6]

The first topic may be said to be about the criminalization of "harmless immoralities" (although it frequently deals with conduct that is neither harmless nor immoral) and the second about the criminalization of "private immoralities." The third and fourth topics, by contrast, can be said to be about the criminalization of conduct that may be neither immoral nor harmful. How can such a category exist? We might think of "malum prohibitum" as constituting this category.[7] The state frequently criminalizes certain conduct not because it directly causes harm but because it is thought to lead to or contribute to harm. Various possession offenses – drugs, weapons, child pornography – may be categorized in this group of risk creation offenses, and the topic of such offenses may comprise the third topic of limits of criminal law.[8]

The fourth topic concerns the criminalization of conduct that in itself may be morally neutral but is easier to detect and is associated with certain types of criminal behavior. Money laundering is an example of a crime like this, as is the requirement that one declare the amount of currency one is carrying abroad over a certain minimum. Drug possession with intent to distribute can fall under this heading, too. The third and fourth topics are, arguably, the most pressing issues facing us in criminal law today. It is lamentable, therefore, that they do not receive a lot of attention from theorists.[9]

The fifth and final topic that arises when delineating the limits of criminal law is the distinction between civil and criminal modes of regulation. The state can regulate behavior in ways other than prohibition and punishment. For example, the state can make private civil damages available (through devices like tort lawsuits), implement regulatory tools such as licensing and inspection, and utilize civil commitment mechanisms such as quarantine or preventive detention of terror suspects. The question is then when it is it appropriate for the state to regulate behavior through criminal law. For instance, rape is criminal, but sexual harassment in the workplace, even if it involves arguably coercive sex (quid pro quo), is regulated in other ways. Employment discrimination is not criminal in the United States, though it is in several European countries.[10] A related question is how to prevent the state

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[5] For a discussion of a gruesome case that combines both the right to die and the right to sexual autonomy in one place, see Youngjae Lee, Valuing Autonomy, 75 Ford. L. Rev. 2973 (2007).

[6] For a discussion of criminalization that is framed in this way, see, for example, Sandra Marshall and R.A. Duff, Criminalization and Sharing Wrongs, 11 Canadian Journal of Jurisprudence 7 (1998).

[7] For good starting points, see R.A. Duff, Crime, Prohibition, and Punishment, 19 J. Applied Phil. 97 (2002); Douglas Husak, Malum Prohibitum and Retributivism, in Defining Crimes: Essays on the Special Part of the Criminal Law 65 (R.A. Duff & Stuart P. Green eds., 2005).

[8] See, e.g., R.A. Duff, Perversions and Subversions of Criminal Law, in The Boundaries of the Criminal Law 88 (R.A. Duff et al., eds., 2010)

[9] One important exception is Douglas Husak whose sustained focus on these topics has been invaluable. See Douglas Husak, Overcriminalization: The Limits of the Criminal Law (2008).

[10] Julie Suk, Procedural Path Dependence: Discrimination and the Civil-Criminal Divide, 85 Wash. U. L. Rev. 1315 (2008).

from bypassing restrictive constitutional principles that govern criminal prosecution and punishment by characterizing what is "really" a criminal sanction as a civil penalty.

These five topics belong under the heading of "limits of criminal law." Two of the three essays that, according to the editors, address the question focus on the first topic. The third essay by Mitchell Berman is not properly characterized as part of this group, notwithstanding the editors' view. None of the other topics are addressed in this book.[11] In other words, the criminalization debate has moved on well past the traditional Hart-Devlin debate both in law and in academic literature, and it is a significant deficiency of this book that its treatment of the limits of criminal law continues to focus only on a debate that, while important, has largely been beside the point for quite some time.

In any event, here I offer some comments about individual essays that fall under the heading of limits of criminal law in the book. Gerald Dworkin's essay, all-too-brief at fourteen pages, considering its broadly worded title, "The Limits of the Criminal Law," speaks in general terms about the first topic. In particular, it focuses on 1) when it is proper to criminalize harming a person who consents to be harmed (pp. 10-13) and 2) whether state neutrality is a sustainable idea (pp. 14-16). Wayne Sumner's essay, "Criminalizing Expression: Hate Speech and Obscenity," also falls under the first topic, and the essay is a thoughtful discussion focusing on the propriety of criminalizing certain types of speech. Sumner, after a lucid discussion of Canadian free speech jurisprudence and the harm principle of Mill, arrives at some suggestions about when the harm of hate speech or obscenity may be concrete and serious enough to justify criminal regulation.

The excellent third essay, "Blackmail" by Mitchell Berman, the longest essay in the book at seventy pages, is an indispensable guide to the debate on the wrongness of blackmail. Rather than as an essay on the limits of criminal law, I would characterize it as an essay about a type of conduct that people generally believe is properly criminalized even though it is difficult to articulate what exactly is wrong with it. Particularly valuable is the discussion towards the end where Berman discusses why blackmail has so fascinated theorists and how solving the blackmail puzzle may illuminate other questions in law.

III. Criminal Liability and Defenses

Once we are in the realm of behaviors that the state may properly criminalize, we face the task of defining criminal prohibitions and defenses. Here the focus is primarily on the individual. Essays that belong to this group comprise the bulk of this book, and they address several questions. First, what are the minimum conditions that must be satisfied before one can be held criminally responsible? Second, what makes a person criminally culpable? Third, how are specific crimes defined? Fourth, what are exculpatory defenses?

A. Criminal Responsibility

John Deigh's essay, "Responsibility," and Walter Sinnott-Armstrong and Ken Levy's essay, "Insanity Defenses," attempt to define the minimal conditions of criminal responsibility. Deigh's essay is divided into two parts, which describe two different types of responsibility, one under the retributive rationale for punishment and one under the

[11] One exception is Andrew Ashworth's discussion of what he calls "preparatory or preinchoate offenses," which belongs to the third topic, in his essay on attempt liability (p. 127).

deterrence rationale for punishment. He calls the first conception "desert-based" conception of criminal responsibility and the second, "consequence-based" (p. 195).

Deigh's discussion of the desert-based conception of criminal responsibility goes as follows. Retributivists think that a person should be punished for an act only if he is criminally responsible for it. For retributivists, criminal responsibility is closely related to moral responsibility, which in turn implies the free will of the actor. The problem is that there may be no such thing as free will. Without free will, moral responsibility and criminal responsibility are both threatened. Can a person be held morally responsible even if that person could not have "willed to act differently from the way he has in fact willed to act"? (p. 196). To address this question, Deigh draws from Harry Frankfurt's and P.F. Strawson's accounts, each of whom creates room for moral responsibility even assuming that one's actions are determined by factors outside one's control and no one can choose to act otherwise.

The problem of free will is rarely a central topic for criminal law theorists. Yet it nevertheless always hovers in the background, especially as new technologies provide fresh fodder for discourse about how our behaviors are caused by factors outside of our control.[12] For those interested in preserving the possibility of criminal responsibility in the midst of ever-changing trends to drown the choosing self in a sea of environmental and historical factors, Deigh's discussion of desert-based conception of criminal responsibility offers a valuable guide.

Analyzing responsibility under the deterrence rationale of punishment, Deigh distinguishes between two types of theories: pure deterrence theory and mixed theory. The principle that only those criminally responsible can be punished "appears to be at odds with pure deterrence theory," given that sometimes punishing non-responsible actors may "prove to be a more effective deterrence than punishment whose infliction conformed to [the] principle" (p. 208). Deigh then describes Jeremy Bentham's argument that, as a matter of deterrence, it would be wasteful to punish those who are unable to choose, given that they are not responsive to threats of sanctions and are thus undeterrable. However, as H.L.A. Hart famously pointed out, this argument falls short (p. 209). Nothing in the idea of deterrence limits the relevant group of offenders to be deterred to the group whose fate would be directly affected by the punishment practice in question. That is, if executing an insane person fails to deter insane people generally from committing crimes but successfully deters a sane person from committing a crime, then that deterrence value has to be counted in the overall calculation; there is no reason to leave it out of the analysis. Deigh's summary of Bentham's argument and Hart's refutation is useful, as the United States Supreme Court and death penalty opponents repeatedly make the same erroneous argument in death penalty cases.[13] Deigh then correctly concludes that, depending on how one's deterrence calculation goes, deterrence theory may or may not adhere to the principle that only the criminally responsible be punished (p. 210).

Deigh thinks, however, that one can "combine the value of deterrence and the value of justice," and under this different, "consequence-based" conception, "criminal

[12] For a (literal) diagnosis, see Stephen Morse, Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note, 3 Ohio St. J. Crim. L. 397 (2006).
[13] Youngjae Lee, The Purposes of Punishment Test, 23 Fed. Sent. Rep. 58, 59 (2010).

responsibility for an offense entails that the offender exercised or could have exercised . . . . deliberative and executive powers that enable people to adjust their conduct in response to offers and threats" (p. 195). The key question this conception of responsibility asks is whether people have had "ample and reasonable opportunity" to avoid criminal liability. There is such opportunity "if the threat of imposition is made public with enough advance notice to enable people to change their plans so as to avoid it and if the threat is well-publicized" (p. 211).

This conception differs from the desert-based conception, according to Deigh, because there is no requirement that a person "act from a morally blameworthy state of mind" in order to be considered criminally responsible (p. 195). I was not convinced by this assertion. We need to distinguish between criminal responsibility and criminal culpability. Criminal responsibility is a minimal set of behavioral and mental conditions that must be met before one can be blameworthy; criminal culpability, on the other hand, is about blameworthiness itself. In order to be culpable, one must first be capable of responsibility, but not everyone who acts with responsibility is culpable. Seen this way, what Deigh refers to as the "consequence-based" conception of responsibility seems to me to be potentially a definition of responsibility that retributivists could live with, so the contrast he sets up between the two conceptions of responsibility is illusory. The source of the illusion is the elision of distinction between responsibility and culpability. This elision does not threaten his discussion of the problem of free will and its implications for criminal responsibility, but it injects a potential for confusion throughout the essay.

Be that as it may, Deigh argues that under this conception of responsibility, strict liability and negligence offenses would be problematic. I am not so sure. Statutory rape is a strict liability crime, but one can avoid criminal liability by not having sex with someone if there may be even a remote suspicion that he or she is under age. Felony murder is a strict liability crime, but one can avoid criminal liability by not committing a felony. Certain public welfare offenses having to do with food or drug manufacture may be strict liability offenses, but one can avoid criminal liability by not working in certain industries or not manufacturing or selling certain items that carry the possibility of strict criminal liability.

What all of these people – statutory rapists, felony murderers, drug adulterers -- "bargain[] for" (p. 212), when entering certain activities, is the possibility of being found criminally liable if things go wrong, even if in ways unanticipated. In all of these cases, "punishment is a foreseeable outcome of an action one rationally chooses to do knowing one has the option of forbearing," meaning that they do not lack "fair opportunity to choose to avoid the imposition" (p. 212). Therefore, Deigh's test of criminal responsibility appears to be met in these cases, and strict liability offenses seem justifiable under this conception of criminal responsibility. In fact, one of the purposes of strict liability crimes is to simply reduce the incidence of certain activities without outlawing them, which relies on the idea that people pay attention to threats and adjust their behaviors accordingly.

The same goes for negligence crimes. If vehicular manslaughter is a negligence crime, there is ample opportunity to avoid it. One can stop driving, invest in resources in advance to ensure careful driving (spend time adjusting mirrors and seats, avoid driving when one is tired), avoid texting or applying makeup while driving, avoid driving altogether if one is a hopelessly bad driver (even if good enough to get a driver's license), and so on. The point is not that Deigh's consequence-based conception of responsibility is wrong, but

rather that much more work needs to be done to refine the principle in order for it to generate the kinds of conclusions Deigh wants to draw from it. Finally, Deigh's claim that the question of culpability of negligence "does not arise on desert-based conceptions of responsibility since negligent wrongdoing . . . is unquestionably blameworthy" is overstated given the ongoing debate on the question among desert theorists (p. 213).[14]

Another way of approaching the question of minimum requirement of criminal responsibility is by studying the insanity defense, which is a way of drawing a line between those who are capable of criminal responsibility and those who are not. It seems axiomatic that those who are not capable of criminal responsibility should not be punished and that those who are incapable of criminal responsibility due to insanity should have a defense of insanity. Yet defining "insanity" is notoriously difficult, and many different approaches exist. Sinnott-Armstrong and Levy's essay, "Insanity Defenses," surveys the different definitions, such as the M'Naghten test, irresistible impulse test, the product test, and the Model Penal Code test, and deftly discusses doctrinal, policy, and philosophical issues that each formulation raises. Sinnott-Armstrong and Levy also usefully highlight the way in which the insanity defense lies at the intersection of medicine and law and summarize the debate over whether the defense should be abolished. This is an excellent essay, and is in my view the best overview of major issues surrounding the insanity defense.

B. Criminal Culpability

Criminal responsibility, the way I have been discussing it in this review, concerns the minimum conditions that render a person capable of being blameworthy. The next question to ask is what makes a person criminally culpable. Essays by Douglas Husak, Andrew Ashworth, Christopher Kutz, Michael Moore, and Larry Alexander examine criminal culpability. All in all, this set of essays covers a lot of ground, touching on numerous topics concerning general principles of criminal liability (a notable omission being mens rea).

Alexander's essay, "Culpability," is different from others. Instead of focusing on one aspect of criminal culpability, such as the act requirement or causation, it proposes a comprehensive definition, capable of generating answers to all questions of culpability. For Alexander, the foundational aspects of criminal culpability are as follows: "Culpable acts are culpable in that they manifest insufficient concern for the interests of others. They manifest insufficient concern when the actor wills an action that he believes unleashes a risk of harm to others' morally protected interests, and he does so for reasons that do not justify the risk he believes he has unleashed" (p. 219). The idea of "unleashing a risk" is crucial, and by that he means creation of "a risk that the actor believes is then beyond his control to affect" (p.220).

This formulation has several provocative implications. Results do not matter to one's culpability (as it's the unleashing of the risk that is culpable, not the realization of such risks, which is out of the actor's control) (p. 218). Negligence is not a form of culpability (since there is no belief on the actor's part that risk is being unleashed) (pp. 230-233). Incomplete attempts are not culpable acts (since risks have not been unleashed) (pp. 233-

[14] See, e.g., Larry Alexander & Kimberly Kessler Ferzan, Crime and Culpability: A Theory of Criminal Law 69-85 (2009); Michael S. Moore & Heidi M. Hurd, Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence, 5 Crim. L. & Phil. 147 (2011).

237), while forms of inchoate offenses that involve influencing or helping other actors to commit bad acts may be culpable (since others' acts are out of one's control meaning that risk has been unleashed by the helper) (pp. 236-37). Alexander has defended his distinctive and well-known positions on these issues and others more extensively with his co-authors in a recently published and widely reviewed book.[15] Unlike many other essays in this collection, Alexander's essay in this volume is not a survey piece but rather a succinct summary of a particular and compelling, if controversial, worldview.

Douglas Husak's essay, "The Alleged Act Requirement in Criminal Law," raises questions about whether the act requirement, taught in every criminal law class as a foundational requirement, in fact exists, and if it does, how it should be formulated, and how the requirement can be justified. Husak persuasively argues that what we have in criminal law in fact is not an act requirement but a control requirement. Husak's view is well-known, as he has defended it elsewhere,[16] and his arguments remain a must-read on the doctrine. In addition, his careful discussion seamlessly blends action theory, moral philosophy, and doctrine, making it an exemplary work of philosophy of criminal law, not only in the sense that his discussion of the doctrine is philosophically well-informed but also in the sense that his command of both law and philosophy enables him to identify the point at which more philosophical theorizing is not helpful for furthering our understanding of the law.

Michael Moore's "Causation in the Criminal Law" is similarly excellent. Moore's view that "causation of morally prohibited state of affairs" is a moral criterion for blameworthiness and therefore must have a place in criminal law is a useful and clear contrast to Alexander's opposing view, discussed above (p. 178). Moore undertakes a comprehensive overview of multiple existing doctrines of cause in fact and proximate causation. After this analysis, Moore observes that "causation . . . may be known better by common intuition in particular instances than by the abstract tests legal theorists have devised to 'guide' such intuitions" (p. 187). It is, however, legal academics' responsibility to try to make sense of these doctrines, and Moore's succinct and brilliant discussion of strengths and weaknesses of each of the "nine variations of cause-in-fact tests [and] seven varieties of proximate cause tests" is an invaluable resource (p. 187).

Andrew Ashworth's "Attempts" is also an extremely useful overview of the doctrinal and philosophical issues concerning criminal attempt. What makes this essay especially valuable is Ashworth's placement of attempt liability in the context of the broader heading of "nonconsummate crimes," that is, offenses of possession and risk creation, which are, as noted above, of enormous practical importance today (pp. 127-29, 141-43).

One of the most vexing doctrines in criminal law is that of complicity liability. Christopher Kutz's essay, "The Philosophical Foundations of Complicity Law," explores some of the puzzles of the law. After first summarizing some main features of complicity liability, Kutz argues that "accomplice liability is best conceived as a form of inchoate liability" and that the basis of accomplice liability should be one's "intent to participate" in a "common plan" shared with the principal, not necessarily one's causal contribution to the crime committed by the principal (pp. 150, 157).

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[15] Alexander & Ferzan, supra note 14.

[16] Douglas N. Husak, Philosophy of Criminal Law (1987); Douglas Husak, Does Criminal Liability Require an Act?, in Philosophy and the Criminal Law: Principle and Critique 60 (R.A. Duff ed., 1998).

Kutz's position, which deemphasizes the causal contribution aspect, is consistent with certain important features of the existing law, namely that accomplice liability has a minimal actus reus requirement and the difference between no contribution and infinitesimally small contribution is the gulf that divides innocence from guilt. Kutz, however, goes further than the existing law, arguing that we should not tie the accomplice's liability to the principal's ultimate act. Under the law, the accomplice's liability rises or falls depending on whether the principal does or does not commit an offense, so Kutz's suggestion that accomplice liability should no longer be "derivative" of the principal's liability would be a significant revision.

Labeling Kutz's view "revisionist" is not a criticism. Complicity is a baffling area of the law (as Kutz explains well (pp. 151-54)) and could use a wholesale theoretical reorientation. Many would, however, resist the notion that one can be "complicit" in another's bad acts, even if the bad acts are not committed. It is true that we might treat such a behavior as at least a case of attempted complicity. Imagine, for instance, a case of A, who, aware of B's plan to kill C, sends poison to B for B to use to kill C, but by the time the poison reaches B, B has already killed C by some other means. It seems fair to hold A liable for (attempted) complicity.

But what about a person who enthusiastically gives a friend a permission to use his or her car, under the mistaken belief that the friend will use the car to rob a bank, when all the friend wanted to do, and fact does do, with the car is to go to an Ikea? In what sense is the car owner "complicit" and what exactly is he "complicit" in? Or, is this not a case of complicity according to Kutz because there is no common plan? But if we are willing to take away the requirement of "contribution" to another's wrongdoing, which seems to imply some causal connection, as a necessary part of complicity, why should we hold onto the requirement of there being a common plan?[17] Why not instead simply assess the badness and dangerousness of the would-be accomplice the way we might do if we, as Kutz suggests, "shift accomplice liability from a harm to a risk, or inchoate, basis" (p. 157)?

It is also unclear why Kutz resists suggestions that we relax the mens rea requirement of complicity so that an intent to participate is not necessary and a knowing or reckless facilitation is sufficient for the purposes of accomplice liability (p. 164). Kutz seems to acknowledge the limits of philosophical analysis at this point, as he relies on the possibility that "the deterrence advantages of treating nonintending facilitators outweigh the risk of chilling their legal behavior" as a way to justify treating knowing participation and purposeful participation differently (p. 164). But if letting deterrence considerations come in at a crucial moment like this is considered a valid "move," then the question is why we should stop there. Why not reorganize complicity in terms of what doctrines would generate optimal deterrence? Kutz also worries that requiring only recklessness would be "a substantial, even dangerous weakening of the standard," which "confuses complicity law" (p. 164). However, it is again unclear why, if accomplice liability is an inchoate offense, we should draw the line where Kutz wants to draw it.

[17] Along these lines, consider the following sentence from the UK Law Commission, which Kutz approvingly quotes: "An accessory's legal fault is complete as soon as his act of assistance is done, and acts thereafter by the principal . . . cannot therefore add to or detract from that fault" (p. 158).

To answer these questions we must address why (and whether) we care about complicity as a distinct form of criminal liability, instead of reducing it to a form of, say, attempt liability. It seems to me that it matters why we call one thing complicity and another thing attempt or reckless endangerment, and the questions involved are not mere questions of arbitrary classification.

C. Offenses

The essays discussed in the previous section focus on the fundamental building blocks of criminal culpability that can be mixed and matched in defining crimes. However, the bulk of a typical criminal code is composed not of doctrines of general applicability across different crimes but of definitions of specific offenses, such as homicide, rape, and theft. This book, consistent with other similar overviews of philosophy of criminal law, focuses on the doctrines of general applicability. Other than blackmail, the only specific offenses that are discussed in any depth are voluntary manslaughter (provocation) and rape, both in Marcia Baron's essay, "Gender Issues in the Criminal Law."

One common criticism of the provocation defense is that its main beneficiaries are men who attack women. Baron effectively and helpfully disposes of this impression. After all, because men commit crimes more often than women, so naturally men will benefit more often than women from any defendant-friendly doctrine, including procedural protections such as the proof beyond a reasonable doubt rule. Baron argues that the problem with the provocation defense, rather, is that it is not "a concession" to human frailty, which is the common understanding, but to "male aggression, jealousy, a sense of entitlement to the devotion and affection of the woman he wants to make 'his,' and . . . a sense of ownership toward his wife or girlfriend" (p. 341). Baron examines the defense in detail and identifies its problematic elements. She focuses in particular on the idea of a temporary "loss of self-control," a popular justification for the defense, and raises serious problems with the idea. Her arguments are forceful, measured, and persuasive all at once, and the essay serves as an excellent introduction to the provocation defense.

Rape is a crime whose definition has been in considerable flux in the past few decades, with lots of difficult, unanswered questions. Baron's discussion goes through all the major debates about how rape should be defined, including what consent is, what nonconsent is, whether the force requirement is warranted, and what to do in situations of mistakes about the existence of consent. Her discussion is systematic, thorough, and again persuasive. It is difficult to imagine better overviews of rape and provocation than those provided in Baron's essay.

D. Defenses

Those whose conduct meets an offense definition may avoid conviction by successfully raising a defense. Criminal law defenses are typically classified as justifications or excuses, and Kimberly Ferzan's "Justification and Excuse" surveys the extensive literature and the debates on the nature of justification and excuse defenses and the distinction between the two. There is a preliminary question as to what belongs to offenses and what belongs to defenses, a topic of significant practical importance given that the constitutional

requirement of the proof beyond a reasonable doubt does not apply to affirmative defenses. Ferzan touches on that as well (p. 250).[18]

Ferzan's essay is sophisticated and comprehensive. This area involves, as Ferzan observes, "a complex interplay of moving parts," and she is a knowledgeable and dependable guide to the interplay. My only misgiving, which reflects on the state of the literature and not necessarily on Ferzan, is the common assumption that the essence of the defenses mirrors moral principles. A complex literature has grown from this assumption, and, as Ferzan observes, the assumption has been criticized (pp. 252-53). As discussed in Part I, it is important to articulate why a state institution like criminal law should be concerned with individual morality. It is in the area of defenses where law and morality seem to come apart in particularly striking ways. I have argued, as have others, that the reason for this is because criminal law defenses implicate not only questions of blame, culpability, and moral rights and wrongs, but also questions of political philosophy on how to outline the proper relationship between citizens and the state.[19] Ferzan addresses some of these issues in the essay (pp. 251-53) and in her other work,[20] but the overwhelming impression one gets is that questions of moral philosophy dominate the thinking in this area. It would be fruitful to attend more to the aspects of defenses that concern the terms of the citizen-state relationship.

There are several specific defenses, and self-defense, duress, and insanity are three defenses that receive some attention in this book. I have already discussed the essay on insanity in Part II. The discussion on self-defense appears in Baron's essay on gender issues in criminal law.[21] Baron's discussion of self-defense centers on the controversy surrounding battered women's self-defense claims, and the ways in which the doctrines of self-defense appear to fail to deliver the morally correct outcome in battered women type scenarios. This focus leads her to two primary issues: the reasonable belief requirement and the imminence requirement. Like her discussions of provocation and rape, her treatment of these issues is subtle and instructive.

Joshua Dressler's essay, "Duress," is another very useful overview. Dressler focuses on whether duress should be classified as a justification or an excuse – and he argues that it is better understood as an excuse. He also discusses the questions of whether duress should be available as an excuse for the crime of homicide and whether it should be available in cases where the pressure to violate the law comes from nonhuman sources, such as a natrual disaster.

IV. State Punishment

The next four essays deal with punishment. Punishment is a troublesome practice because it frequently involves intentional deprivation of liberty and infliction of pain by the

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[18] For a more detailed discussion of the distinction between offenses and defenses, see Duff, supra note 3, at 195-228; John Gardner, Fletcher on Offences and Defences, 39 Tulsa L. Rev. 817 (2004).

[19] Youngjae Lee, The Defense of Necessity and Powers of the Government, 3 Crim. L. & Phil. 133 (2009); James Q. Whitman, "Between Self-Defense and Vengeance/Between Social Compact and Monopoly of Violence," 39 Tulsa L. Rev. 801 (2004); George Fletcher, Domination in the Theory of Justification and Excuse, 57 U. Pitt. L. Rev. 553 (1996).

[20] Kimberly Kessler Ferzan, Self-Defense and the State, 5 Ohio St. J. Crim. L. 449 (2008).

[21] Another very useful overview of self-defense with a broader focus is Larry Alexander, Self-Defense, in The Routledge Companion to Philosophy of Law 222 (Andrei Marmor ed., 2012).

government on its citizens. For philosophers of criminal law who accept the existence of the institution, the overriding questions have always been how to justify its existence and how to design the institution to comport with our broader political theoretical suppositions concerning the proper relationship between the state and its citizens and the proper use of state power directed at its citizens. David Dolinko's essay, "Punishment," is about whether punishment can be justified and is a useful introduction to several traditional theories of punishment: retributivism, consequentialism, and mixed theory variants.

Carol Steiker's essay, "The Death Penalty and Deontology," on the other hand, focuses on capital punishment. Steiker starts her essay by noting an anomaly. In most debates concerning individual rights, deontological and consequentialist arguments assume familiar positions. Deontological arguments speak in favor of stringent to absolute protection of rights against consequentialist considerations, and consequentialist arguments, in favor of sacrificing such rights in order to produce the best outcome. The torture debate, for instance, takes this shape. But when it comes to debates over capital punishment, the configuration is different because the deontological corner in criminal law is occupied by retributivism, which is frequently associated, at least in popular imagination, with a pro death-penalty position, whereas the identity of the occupant of the consequentialist corner is the same as in other debates. It seems then that, when it comes to capital punishment, the deontological side is open to capital punishment (since if an offender deserves death, there is nothing wrong with the punishment), and so is the consequentialist side (since it all depends on whether capital punishment produces a desirable end state). Steiker wonders whether there is more to this, and she explores several possible deontological arguments against capital punishment.

Retributivist arguments against capital punishment turn out to be nonstarters because, even if it may be the case that many people who are sentenced to death do not deserve the punishment, a proponent of capital punishment has to come up with just one example of a person who appears to deserve it (because none of the typical mitigating factors applies) to illustrate that there is nothing wrong, in principle, with subjecting the deserving to capital punishment. Arguments based on unreliable procedures – that innocents are put to death or arbitrary distinctions are made – also do not strike deep enough, because, again, proponents would have no trouble naming those who seem to deserve to be punished to death, and for *those* people at least, the problem of arbitrary or erroneous classification does not seem to exist.

Steiker then turns her attention to arguments based on dignity. Even if we can believe that the recipients "deserve" such treatments, certain modes of treatment are simply considered off the table because of their moral repugnance, such as torture, drawing and quartering, and burning at the stake. Does ending a person's life not similarly offend human dignity? Perhaps, but the problem is that the term dignity is vague, and it is unclear where the correct line is. If capital punishment offends our dignity, can't we say the same about incarceration? If incarceration does not offend our dignity, then why does torture? Arguments based on dignity (like the phrase "shocks the conscience") tend to have this feature; they can be both intuitively compelling in individual cases yet completely unhelpful at the same time.

Steiker ends her essay with an intriguing suggestion that perhaps what is wrong with capital punishment is the practice's tendency to "over time erode human capacities such as

empathy and compassion" (p. 460). She argues that such capacities are necessary and assumed by deontological universalizing devices like Kantian categorical imperative and Rawlsian veil of ignorance (p. 460).[22] This argument is a version of the familiar "This practice lowers us" argument, except Steiker's argument contains the additional feature that the practice lowers us in a way that makes us less able to deliberate as autonomous moral agents. Therefore, it is not that deontological theories counsel against capital punishment but that deontological theories presuppose certain human capacities, which are in turn threatened by the practice of capital punishment. Even though this argument is based on certain empirical assumptions, Steiker argues, these capacities, being "essential preconditions for moral agency," must be protected militantly against "even a possible threat to their continued existence" (p. 461).

I found particularly interesting her proposal that we "analogize the moral case for the protection of qualities essential to moral agency to the democratic case for the protection of rights essential for democratic self-governance" and to our giving "specially protected status to rights such as free speech and political equality . . . in order to ensure that the preconditions for democratic self-governance continue to exist" (p. 461). This analogy nevertheless made me wonder why she needed to make an analogy to a political philosophical principle at all. Why not simply make a direct political argument that democratic self-governance is inconsistent with a system where the government has the power to extinguish the life of a fellow citizen in response to a past wrongdoing or, even worse, in order to set him as an example for others? Punishment may be appropriate, and even repentance for wrongdoing may be demanded from our fellow citizens, but a supposition that we can end each other's lives on purpose, as a matter of policy, when doing so is not immediately necessary to prevent another person's death,[23] seems to be in tension with the kind of respect we owe one another in a system of democratic self-governance.

This is of course just a sketch, but it seems to me that a direct line between the idea of democratic self-governance and a position against capital punishment can be drawn, and it was not clear to me whether Steiker's roundabout route was necessary. Steiker acknowledges that her arguments rely on controversial empirical assumptions about the impact of living in a society that sanctions capital punishment and the psychological impact of capital punishment on its observers.

Moreover, the implication of her argument that even a slight threat to the capacity for empathy should be extinguished may in the end go in directions that Steiker may not

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[22] Some would take issue with Steiker's reading of Kant as relying on "an ability to imagine the effects of one's actions on people entirely different from oneself" (p. 460). This is not a place to get into a debate over Kantian ethics, and I hesitate to make strong claims about a figure whose thoughts are as rich and complex as Kant's. But my understanding of Kant is that categorical imperative has little to do with putting oneself in someone else's shoes and trying to see and feel things from someone else's perspective, but rather has to do with consistency in action. See Onora O'Neill, Consistency in Action, in Constructions of Reason: Explorations of Kant's Practical Philosophy 81 (1989).

[23] It is true, as Cass Sunstein and Adrian Vermeule argued, if the death penalty can prevent deaths, that gives the state a reason to kill an offender in order to save lives of potential future victims. See Cass R. Suntein & Adrian Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703 (2005). But this is why, in order to defeat arguments of this kind, we need to speak in terms of basic terms of interaction between citizens and the state, instead of relying on arguments focusing only on the number of lives lost due to one's action or inaction and on the permissibility of such action or inaction. See Youngjae Lee, Deontology, Political Morality, and the State, 8 Ohio St. J. Crim. L. 385 (2011).

want. Would abolishing the death penalty erode people's capacity for empathy for victims of violent crimes in the long run? Would legalizing abortion over time erode people's capacity for empathy for the weak and the vulnerable? These are of course empirical speculations, but part of her argument depends on the supposition that, in a sense, facts of the matter do not matter because "even a possible threat" to capacities for empathy and compassion must be eliminated.

The next two essays, by R.A. Duff and Stephen Garvey, are not about punishing, but about not punishing. Duff's essay, "Mercy," sheds light on an idea that is frequently advocated yet not analyzed often enough. Duff argues that "[m]ercy is at odds with justice" and "at odds with the aims of criminal punishment as a distinctive institution," and "cannot be integrated into a criminal justice system" (p. 475). Yet, he adds, there may be times when mercy may be justified because "offenders are not just offenders, and sentencers are not just sentencers." Sometimes "other aspects of the offender, as a human being, demand our attention," and sometimes "the sentencer, not as a judge but as a fellow human being, should not close her eyes to those other aspects" (p. 479). In such situations, mercy – expressed as leniency in sentencing – may be justified. However, it is crucial to recognize mercy to be an "intrusion" from outside the criminal justice system, and not something that belongs within it (p. 487). Whether one agrees or disagrees with his conclusions, the framework he provides is extremely useful and insightful.

Stephen Garvey's essay, "Alternatives to Punishment," is not about shaming sanctions. Rather, his essay is about alternatives *to* punishment, as Garvey examines the case for abolition of punishment. Those who, after reading Dolinko's essay, despair of finding a justification for punishment might want to turn to Garvey's essay to begin thinking about a world without punishment. Garvey explains that people may arrive at the position of abolition through different routes. One may decide that punishment is not justified because it presupposes responsibility and responsibility is impossible because we lack free will. Another may decide that punishment is not justified because none of the rationales given for punishment can justify the amount of suffering that the institution intentionally inflicts on people. Both types of abolitionists, Garvey argues, would favor a system of prevention in some form, some perhaps more disturbing than others.

Conclusion

Despite my complaints above about the book's treatment of the topic of limits of criminal law, there is no denying that Deigh and Dolinko have put together a remarkable collection packed with insight and intelligence. Many important topics in philosophy of criminal law are covered, and many of these essays are the best surveys on their topics. It is not meant for someone to read, as I did, from cover to cover, although a future scholar seeking a crash course on the field might do so. It would be time well spent for such a person, as the authors are some of the best guides one could find. In addition, the level of sophistication of many of these essays makes the book a useful resource not only for those unfamiliar with the field but also for veterans.