Introduction: Punishment and Culpability

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Culpability in the criminal law has two principal meanings. In a broad sense, it is more or less synonymous with moral blameworthiness. In a narrow sense, it refers to MPC-style mental states (or, in the case of negligence, pseudo- or quasi-mental states) that apply to elements in the actus reus. The articles in this symposium—produced by some of the most creative and penetrating criminal law theorists writing today—explore aspects of both forms of culpability, and the relationships between them, across a diverse range of problems and puzzles. This introduction briefly previews the seven contributions that follow.

Culpability in the narrow sense contributes to or partially determines culpability in the broad sense. Presumptively, an actor who has narrow culpability with regard to each material element of an offense is broadly culpable—i.e., blameworthy—and an actor who lacks narrow culpability with regard to each material element is not broadly culpable—i.e., not blameworthy. But as Douglas Husak reminds us in "*Broad" Culpability and the Retributivist Dream*,[1] this biconditional is *only* presumptive. An actor who is narrowly culpable with regard to each material element might not be blameworthy because, say, he did not commit a voluntary act or has a valid defense of justification or excuse. An actor who lacks narrow culpability with regard to one or more material elements might be blameworthy because, say, the elements with respect to which he lacks narrow culpability are not necessary for separating wrongful and blameworthy conduct from neighboring conduct that would not be blameworthy.

Because narrow culpability is neither necessary nor sufficient for blameworthiness, a full theory of the latter must address much besides the former. Yet, Husak observes, while "[r]espectable progress has been made about narrow culpability, . . . the remaining part of a theory of blame is radically under-theorized."[2] His task, however, is not quite to supply all that remains to be done on that score given the overwhelming complexity and difficulty of the project.

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[1] Douglas Husak, *"Broad" Culpability and the Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 561 (2012).

[2] *Id.* at 571. I said above that culpability in the broad sense is more or less synonymous with blameworthiness. Husak might emphasize the "less," cautioning that "[e]ven when joined to a theory of narrow culpability, a theory of broad culpability is a far cry from a comprehensive theory of blame." *Id.* at 571. For purposes of this very brief and partial summary, I will ignore the components of blameworthiness that, in Husak's estimation, lie outside not only of narrow culpability but of broad culpability as well.

Instead, the ambition of his important present paper is to make progress toward the larger goal by focusing attention on one prominent desideratum that any adequate theory of broad culpability must satisfy—namely, that each component must make it possible "to conceptualize blame in shades of grey rather than simply in black or white."[3]

Husak develops this idea by applying it to five particular issues that fall within the rubric of broad culpability: the defenses of justification and excuse; the capacities for criminal responsibility; the voluntary act requirement; the relevance or irrelevance of an actor's motives; and questions that arise when an actor lacks awareness that his conduct is morally wrongful or criminally proscribed. This last issue, Husak maintains, is the thorniest and the one of the five to which he devotes the greatest attention, especially on the "radically under-theorized" variant of ignorance of law (as distinct from the variant that we might label ignorance of morality).[4] In order to satisfy the desideratum that broad culpability be manifest in degrees, he proposes that the structure of narrow culpability that applies to mistakes of fact should be reproduced with respect to mistakes of law too. That is, blameworthiness and thus punishment should vary depending on whether the actor violated the law purposely, knowingly, recklessly, negligently, or non-negligently.

Kenneth Simons' contribution to this symposium, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*,[5] picks up just where Husak's leaves off: on mistakes of law and their proper treatment relative to mistakes of fact. Agreeing with Husak that the broad topic encompasses a host of sub-issues that are not yet well understood, Simons focuses particularly on the notoriously tricky problem of how the law should treat that class of mistakes variously described as mistakes of "noncriminal," "different," or "collateral" law. Famously, this problem has both exculpatory and inculpatory dimensions. That is, when an element of an offense is satisfied but the actor believes otherwise because of ignorance or mistake about the non-penal legal rule that makes that the case (say, a rule from property law or marriage law), then the actor's mistake might properly be treated just as a mistake of fact, warranting the actor's acquittal on grounds of lack of (narrow) culpability. Conversely, when an offense element is not satisfied but would be if the actor's mistaken belief about some non-penal legal rule were correct, then his mistake might render him punishable for an attempt.

The questions that arise under these headings are too numerous, and Simons' analyses too rich and complex, to permit easy encapsulation. That said, at least three distinct contributions of his article should be identified. First, Simons sheds light on the much-observed fact that the boundary between mistakes of criminal law and of noncriminal law is vague or contestable. In particular, he distinguishes three recurrent situations that warrant careful attention: when the criminal law

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[3] *Id.* at 562.

[4] *Id.* at 571.

[5] Kenneth Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 599 (2012).

incorporates a civil schedule of prohibited items, when the criminal law merely criminalizes acts that a civil regulatory regime itself prohibits, and when a criminal law term draws its meaning from both criminal law and noncriminal law. Second, he denies that mistakes of noncriminal law must be treated either just like mistakes of criminal law or just like mistakes of fact. Rather, he argues, "we should at least contemplate whether to require a different level of culpability for each of the three categories."[6] Third, he powerfully undermines the assumption that mistakes of noncriminal law must be treated symmetrically for inculpatory and exculpatory purposes.

These three general ideas can be made more concrete with an example supplied by Husak. "When I dispose of the drained batteries from my flashlight," he confesses, "I am vaguely aware that the rules in my jurisdiction might require these batteries to be recycled in special containers. Am I right or wrong? I honestly do not know."[7] The answer, fortunate for Husak, is this: while New Jersey law prohibits disposal of rechargeable batteries, the legal regulation of single-use alkaline batteries varies by county; and Husak's home county of Middlesex (the self-proclaimed "greatest county in the land," incidentally) permits their ordinary disposal. Less fortunate for Husak is that his frank if injudicious admission that he is aware of a risk that the law requires that his drained batteries be recycled might make him susceptible to criminal punishment for the *attempted* criminal disposal of batteries that must be recycled. To resolve whether Husak should be convictable on this theory, we might profitably attend to Simons' analyses: first, of whether this is a mistake about criminal law or about the noncriminal regulatory law governing waste disposal and recycling; second, if this is a mistake of noncriminal law, of what level of culpability should govern a mistake of this sort in the exculpatory context; and third, of whether this is or is not a case properly calling for symmetrical treatment of inculpatory and exculpatory mistakes.

Very generally, mistakes of law (at least mistakes about governing law) instantiate the possibility that a defendant might be narrowly culpable with respect to all offense elements and yet not be blameworthy. Plausibly, the law's treatment of voluntary intoxication exemplifies the converse possibility that one might be blameworthy even when lacking narrow culpability with respect to all elements. In particular, under what Gideon Yaffe dubs "the intoxication recklessness principle," the law of many jurisdictions attributes recklessness—conscious awareness of an unjustifiable risk—to a voluntarily intoxicated actor who lacks such awareness. In effect the law punishes such voluntarily intoxicated actors for a recklessness level of blameworthiness (or broad culpability) even though they lack the narrow culpability of recklessness with regard to offense elements.

In *Intoxication, Recklessness, and Negligence*, Yaffe defends the intoxication recklessness principle against its academic critics who worry that punishment in

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[6] Husak, *supra* note 1, at 594.

[7] *Id.* at 594.

the absence of narrow culpability results in punishment absent or in excess of broad culpability.[8] His defense, however, is only partial. After providing an ingenious formal model of the ways that negligence and recklessness both constitute and evidence blameworthiness, Yaffe explicates the conditions that must be satisfied for the law to be warranted in attributing to non-reckless voluntarily intoxicated actors a degree of blameworthiness usually associated with reckless sober action.

Recall that one constituent of broad culpability that Husak discusses involves an actor's motives for engaging in prohibited conduct, even holding narrow culpability constant. For example, an actor who purposely causes the death of another human being might be less blameworthy than he would otherwise be if he is motivated either by compassion for the victim's suffering (euthanasia) or by vengeance for the victim's own wrongdoing (provocation manslaughter). In previous work, I have focused attention on a different way in which motives might be relevant to the criminal law—namely, by helping to explain why certain conduct the criminalization of which is puzzling might be criminally prohibited in the first place. Specifically, I argued that the paradox of blackmail could be solved by recognizing; that the fact that an actor has conditionally offered not to disclose embarrassing information if paid to remain silent is ordinarily powerful (but not conclusive) evidence that, were he subsequently to make the disclosure on failure of payment, the actor would knowingly be causing harm without justificatory motives; that such action is morally blameworthy; and that the law has ample reason to criminalize blameworthy decisions to cause or risk harm.[9] In *Why the Paradox of Blackmail is So Hard To Resolve*,[10] Peter Westen carefully assesses that proposed solution to the blackmail paradox, along with a slew of other extant proposed solutions, and finds them all wanting.

Offering a five-part taxonomy of blackmail proposals—one informed by a far more thorough investigation of the statutory landscape than is customary in the theoretical literature—Westen argues that criminalization of four of the five is entirely unproblematic. The blackmail paradox, he claims, arises only with regard to proposals to disclose true, non-incriminating information about another that was obtained without wrongfully intruding upon that person's privacy under circumstances in which the disclosure would not be wrongful given "what is known of the legitimate interests of the public or individual disclosees."[11] While

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[8] Gideon Yaffe, *Intoxication, Recklessness and Negligence*, 9 OHIO ST. J. CRIM. L. 709 (2012).

[9] Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998). More recently, I have offered a variant on that initial theory that focuses not on the actor's motives, but rather on his beliefs. Mitchell N. Berman, *Blackmail*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 37 (John Deigh & David Dolinko eds., 2011). I do not, however, disavow the fundamentals of my earlier analysis.

[10] Peter Westen, *Why the Paradox of Blackmail is So Hard To Resolve*, 9 OHIO ST. J. CRIM. L. 657 (2012).

[11] *Id.* at 673.

opining that my motive-based solution enjoys some advantages over most competitors, Westen concludes that it fails for essentially the same reasons that, he believes, doom the doctrine of double effect. Briefly: "The fact that someone is a bad person who is worthy of contempt does not mean that he has committed a bad act that is deserving of punishment. That an actor's evil purpose can aggravate the blameworthiness of a completed wrong does not mean it can transform blameless completed conduct into blameworthy completed conduct."[12] Westen ends with the provocative suggestion, long espoused by libertarians, that criminalization of his category-five blackmail might not in fact be justifiable. People have been socialized for generations to believe that such conduct is properly criminalized, he allows. But if reason undermines those widespread beliefs, then perhaps they can now be socialized to support its decriminalization.

Larry Alexander and Kimberly Ferzan share with Westen the dominant view among criminal law theorists that criminal punishment may justly be imposed only for blameworthy conduct. But, they observe in *Danger: The Ethics of Preemptive Action*,[13] this principle, when combined with limits on the use of civil commitment, produces a situation both "unsatisfactory and unstable."[14] While criminal punishment is appropriate only for morally and legally responsible agents who engage in blameworthy conduct, civil commitment of dangerous persons is reserved for persons who are morally and legally nonresponsible. This leaves society without an obvious means to protect itself from dangerous persons who are not mentally ill and who have not yet committed culpable acts that would justify the imposition of criminal punishment—persons Alexander and Ferzan dub "responsible but dangerous." The right response to this gap in society's means for self-protection, they argue, is to make greater use of "preemptive restrictions of liberty" ("PRLs").

Full exploration of the possible variety of PRLs and the proper limitations on their use is, inescapably, well beyond the scope of this one article. Yet one illustration takes center stage: PRLs, Alexander and Ferzan argue, might serve as useful and legitimate means to deal with incomplete attempts. Now, this suggestion will surprise many readers unfamiliar with Alexander and Ferzan's past work on this subject,[15] given the orthodox view that in a great many cases, though surely not in all, incomplete attempts do constitute blameworthy conduct for which criminal punishment would be fully justified. They believe otherwise. Their controversial contrary position holds, in short, that an actor is blameworthy hence justly punished only for "unleash[ing] a risk of harm that he believes he can no

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[12] *Id.* at 708.

[13] Larry Alexander & Kimberly Kessler Ferzan, *Danger: The Ethics of Preemptive Action*, 9 OHIO ST. J. CRIM. L. 449 (2012).

[14] *Id.* at 450.

[15] Alexander and Ferzan have put forth this view in several prior works, but most notably (though not initially) in their much-discussed recent book, LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009).

longer control (through…will and reason alone),"[16] and that incomplete attempts do not satisfy this condition. A substantial portion of their co-authored article is devoted to elaborating and defending this heterodox claim against their critics.

Whereas her jointly authored contribution to this symposium starts from the familiar premise that (broad) culpability is a precondition for the legitimate imposition of criminal punishment, Ferzan turns attention in her sole-authored article, *Culpable Aggression: The Basis for Moral Liability to Defensive Killing,*[17] to a very different respect in which such culpability arguably matters to the criminal law—namely, by helping to ground the permissibility of the use of defensive force.

As Ferzan explains, theorists of self-defense have tended increasingly to emphasize a conceptual and normative distinction between whether it is permissible for an actor to use defensive force against an actual or perceived attacker and whether the person against whom defensive force is used has made himself liable to the use of defensive force by another. Although Ferzan acknowledges that liability might not be necessary to ground permissibility—that is, an actor might have non-liability-based permission to use defensive force—she believes that liability often does ground permissibility and, furthermore, that it is an importantly distinctive ground of permissibility. For example, whether permissibility is grounded in liability or alternative considerations might generate different consequences for such matters as whether third parties may or must intervene, and on whose side, and whether the person against whom defensive force is used may deploy defensive force of his own.

While philosophers have increasingly accepted the cogency and value of a liability/permissibility distinction, they have not coalesced on any single theory of what makes an actor liable to the use of defensive force by another. Accordingly, Ferzan explicates two prominent accounts of liability—those advanced, respectively, by Judith Jarvis Thomson and by Jeff McMahan—and subjects each to powerful and sophisticated criticism. She then develops and defends her own alternative account in which culpability is a necessary condition of liability.

The principal reasons why we do or should care about blameworthiness have been mostly implicit in my discussion so far. Let me finally make them more explicit. We care about blameworthiness because of its relationship to desert. Plausibly, one's negative desert is a function of one's blameworthiness, perhaps among other things. We care about negative desert for two principal reasons. First, retributivism maintains, to a first and necessarily rough approximation, that criminal punishment is justified in terms of or by reference to an offender's negative desert. Second, many of those who do not accept that negative desert provides any affirmative justification for punishment, and would instead justify punishment by reference to its projected good consequences, nonetheless accept

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[16] *Id.* at 197.

[17] Kimberly Kessler Ferzan, *Culpable Aggression: The Basis for Moral Liability to Defensive Killing*, 9 OHIO ST. J. CRIM. L. 531(2012).

that (presumptively or conclusively) the state may not seek to achieve good consequences by punishing those whom it knows or believes to lack negative desert, or in excess of their negative desert. This position is frequently termed weak retributivism, negative retributivism, or side-constrained consequentialism.[18]

In the final article of this symposium, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*,[19] Marc DeGirolami challenges the systematizing impulse or commitment that leads today's theorists and scholars of punishment overwhelmingly to classify and label justificatory accounts of punishment along such lines as I have just outlined. DeGirolami presses his case against the modern theorist's drive toward tidy classifications in surprising, even striking, fashion: through a learned examination of the work of the nineteenth century English judge and scholar James Fitzjames Stephen, and of Stephen's subsequent treatment by the scholarly community.

The devil is very much in the details of DeGirolami's illuminating study of Stephen. However, the gist is that Stephen's own work was subtle and complex, involving unexpected mixtures of disparate elements, and that it has been deeply misunderstood by following generations. To illustrate: DeGirolami shows that scholars over the years have divided almost evenly over the seemingly basic question of whether Stephen was a retributivist or a consequentialist. In fact, DeGirolami argues, he was both—and therefore neither. And the principal reason scholars have failed so thoroughly to grasp Stephen's nuanced views, DeGirolami concludes, "has been exactly the effort to pin down Stephen's ideas about punishment as retributivist, or consequentialist, or a specific hybrid. The drive to systematize Stephen's thought has had the regrettable effect of flattening it, in some cases unrecognizably."[20]

Ultimately, as I have suggested, DeGirolami's interest is not only, or even principally, in Stephen. This work of this interesting and idiosyncratic Victorian jurist is worth our attention mostly, DeGirolami offers, because of what it might teach about punishment theory in the twenty-first century. Today's punishment theory, he says, "is a complex, variegated, technical, and increasingly fragmented enterprise."[21] No doubt, the move toward increasing precision and philosophical sophistication has produced benefits. But, DeGirolami warns, it also comes with costs. To the extent that intellectual history and philosophy are partners in shared project, he maintains, the methodological commitments prevalent in today's punishment theory might obscure as much as they reveal.

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[18] For elaboration on these thumbnail sketches, see Mitchell N. Berman, *The Justification of Punishment*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW (Andrei Marmor ed., forthcoming 2012).

[19] Marc O. DeGirolami, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*, 9 OHIO ST. J. CRIM. L. 481 (2012).

[20] *Id.* at 481.

[21] *Id.* at 529.

For a punishment theorist of a "systematizing" bent, DeGirolami's conclusion constitutes a mildly dispiriting note on which to end this Introduction. Of course, it is a separate question whether, dispiriting or not, the conclusion is correct. Possibly, the other articles in this wide-ranging and thought-provoking symposium might go some small distance toward either substantiating or undermining DeGirolami's bold thesis. Whether they do—and, if they do, how they point—I leave for the reader to decide.