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Foreword

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The papers in this symposium span a remarkable breadth, taking on topics that range from moral and philosophical theories of criminal liability to empirical analyses of deterrence and recidivism. Criminal punishment is an enduring subject worthy of scholarly attention, and this volume happily extends from the timeless principles of Aristotle and Aquinas to the contemporary issues of white collar crime and novel constitutional limits on legislating morality. And indeed, the contributions here constitute a forceful testament to the intellectual vitality of criminal law scholarship. But, as the volume bespeaks, these issues are not merely intellectual. Writing as a judge, even as an appellate judge, I confess that perhaps no decision invokes—or ought to invoke—greater fear and trembling for a judge's soul than his or her decision to mete out punishment or to affirm its imposition. Those involved in administering justice in this world will, of course, be called to account for each decision in the next. It is appropriate and fitting, therefore, that a journal whose foremost intellectual commitment is the reconciliation of ethics and law would tackle punishment as its symposium topic. I applaud the contributors for treating the subject with the sobriety and moral seriousness it requires.

I.

What then does the reader have in store? It is perhaps most fitting to start with sacred scripture. In his fascinating piece, Professor George P. Fletcher explores the notions of guilt and shame in biblical thought and their lessons for contemporary criminal law. Among the questions he tackles is that of why we employ the morally laden language of "guilt" to describe that essential prerequisite for punishment. The puzzle arises, he suggests, because the decision to punish does not turn on the defen-

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dant's subjective feeling and acknowledgment of guilt. Taking his readers on a fascinating journey that begins with the creation narrative in the Hebrew scriptures, he reveals how the concept of guilt has involved both an external conception of guilt as well as one more focused on the inner, human experience. The impulse to punish, Professor Fletcher reasons, arises in large measure from the external, objective conception of guilt as pollution—which can be symbolically cleansed, as the scriptures reveal, by reparation and punishment.

In contemporary life no symbolic cleansing is more controversial than capital punishment, the subject of pieces by both Professor Christian Brugger and Judge Rudolph Gerber. While much of the American political discussion of capital punishment arises from worries about verdict reliability and sentencing inconsistencies, Professor Brugger poses the more difficult question of whether Aquinas's defense of justifiable intentional homicide can bear the weight it has historically borne in undergirding the traditional Catholic philosophical defense of capital punishment. If, as Aquinas allows, the norm against killing admits of exceptions, Professor Brugger asks, what can justify the killing of the guilty? By critiquing Aquinas's primary justifications, including those relating to human dignity and the prerogatives of legitimate civil authority, Professor Brugger reasons, not immodestly, that the traditional Western intellectual defense of capital punishment rests on a faulty foundation.

Judge Gerber, in contrast, draws less from philosophy and more from economics, but reaches a similar result, concluding that the game is not worth the candle. Deterrence is Judge Gerber's object, and he draws on history and his experience as an Arizona judge to evaluate how well capital punishment satisfies four prerequisites for effective deterrence, namely that punishment be executed swiftly, with certainty, that it be proportionate, and that the punishment be performed publicly, to disseminate the deterring message broadly. Examining each criterion in turn, he argues that the modern implementation of capital punishment is just the opposite: long-delayed when ultimately executed, unlikely to be imposed as a sentence, antiseptic, and relatively private. Thus Judge Gerber, too, concludes that the death penalty fails to fulfill its promise.

II.

Aside from capital punishment, a second issue very much in the public eye is white collar crime. Its costs have become starkly evident in the past few years, as corporate scandals have littered

the economic landscape. In his prescient contribution, Professor Stuart Green asks why so many white collar prosecutions target conduct whose moral character is ambiguous. Routine street crimes, in contrast, only rarely present genuine questions of whether the proscribed conduct was wrongful. He proposes a dozen factors that explain, in part, why moral ambiguity often surrounds white collar criminal conduct, including the absence of a mens rea requirement for strict liability crimes and the diffusion of responsibility in large business enterprises. The greatest factor, he suggests, is the practical difficulty in distinguishing between criminal behavior and aggressive—but acceptable—behavior in the white collar context. The important implication of Professor Green's analysis is that, by understanding the sources of this moral ambiguity, white collar criminal enforcement can be refined and sharpened to reduce such ambiguity, rather than inviting decriminalization.

III.

A.

Two pieces examine the boundaries of the criminal justice system, asking who properly falls within its scope. Professors Gordon Bazemore, Leslie Leip, and Jeanne Stinchcomb present a detailed study of truancy programs in an urban county in the Southeastern United States. What they show is that criminal juvenile justice agencies are expanding outside their historic role and taking on social control functions that would otherwise be considered the province of educators, religious and community institutions, and families. As juvenile offenders have more often found themselves in adult courts, the juvenile justice system has maintained its jurisdiction by "reaching down" to intervene in deviant but non-criminal youth behavior that was previously outside its reach. In many cases, they argue, expansion of the formal justice system does more harm than good, weakening community relationships and efforts to deal with the same problems. But rather than advocating a criminal justice libertarianism, they argue that new forms of restorative justice in the educational and community context offer more promising alternatives.

Student author Quinn Vandenberg examines another boundary in criminal law: its intersection with immigration law in the aftermath of the terrorism attacks of September 11, 2001. After offering a brief history of central issues in immigration law, Vandenberg takes as her focus recent statutory changes that increase the crime-related grounds for deportability. In combi-

nation with procedural and institutional changes, including the assumption of immigration functions by the Department of Homeland Security, Vandenberg argues that immigrants now live in a "rights-deprived" environment. The criminal justice system and the administrative immigration system need to have a heightened awareness of each other's policies. And yet, she stresses, the potential for manipulation and injustice that arises from the interaction between the two separate but increasingly interrelated legal regimes has increased.

B.

Two authors address a second issue of scope, asking not how the law treats certain persons, but rather inquiring into whether certain conduct should be forbidden. Senator Orrin Hatch, a longtime advocate of stricter child pornography and exploitation laws, decries the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*,[1] in which the Court struck down provisions of the Child Pornography Prevention Act of 1996[2] as violative of the First Amendment. Those provisions forbade production and viewing of virtual child pornography, that is, pornography made using computer-imaging technology. In response to a suggestion in Justice Thomas's concurrence, which argues that the government should not be foreclosed from prosecuting child pornography laws if technology reaches the point where "real" and "virtual" pornography is indistinguishable,[3] Senator Hatch describes the subsequent passage of legislation that, he hopes, will succeed in better protecting children.

Professor Keith Burgess-Jackson's reflection on the Supreme Court's decision in *Lawrence v. Texas*[4] continues the philosophical debate on the legitimacy of morals legislation. This debate, of course, was famously popularized in the Hart-Devlin debates, and continues to this day. As Professor Burgess-Jackson explains, John Stuart Mill urged that prevention of harm to others constitutes the only legitimate basis for limiting liberty. Thus, prevention of harm to oneself, prevention of offense to others, and prevention of harmless wrongdoing were all beyond the state's reach. If the Supreme Court's decision in *Bowers v. Hardwick*,[5] which upheld Georgia's anti-sodomy laws, stood for the legitimacy of legal moralism, the *Lawrence* decision, Professor Burgess-

1. 535 U.S. 234 (2002).
2. Pub. L. No. 104-208, 110 Stat. 3009.
3. *Id.* at 259–60 (Thomas, J., concurring).
4. 123 S. Ct. 2472 (2003).
5. 478 U.S. 186 (1986).

Jackson suggests, embraces a Millian vision of the Constitution. According to Professor Burgess-Jackson, Justice Scalia's prediction that *Lawrence* "effectively decrees the end of all morals legislation"[6] follows from Justice Kennedy's language, which resonates with Millian overtones. If Justice Scalia is correct, *Lawrence* represents a seismic change in the scope of what the state can punish.

IV.

Two pieces address restorative justice explicitly, taking different tacks. Before we reach those two pieces, however, Professor Abbe Smith provides important context in her deeply personal account of being a criminal defense attorney. In her twenty years of criminal practice, she notes, the crimes have not changed; the sentences, though, have grown much more severe. She describes the consequences of what she calls "the national obsession with punishment," focusing not only on the destruction of families and communities, but also on the hardening and social withdrawal of prisoners serving longer and longer sentences. One cannot but wonder, after reading Professor Smith's piece, what can be done?

Chuck Colson and Pat Nolan believe one answer is restorative justice, and they too write from powerful personal experiences, though as federal inmates, not as the lawyers they once were. Their piece challenges the dominant view of crime as offenses committed principally against the state, rather than against the injured victim. Their contribution—indeed, their life's work—explores how best to reform the lives of the more than two million Americans currently incarcerated, and the unfortunate reality that two-thirds of released inmates are rearrested within three years. Arguing that crime's cause is bad moral decision-making, they share the important work of Prison Fellowship Ministries and, in particular, the success of its InnerChange Freedom Initiative, which now operates in four states. By emphasizing the role of faith and moral formation in otherwise spiritually void prisons, the Initiative, they report, has significantly improved prisoner rehabilitation rates and, correspondingly, reduced recidivism rates among program participants. As they explain, one of the program's foremost exercises involves prisoners learning from crime victims and, in doing so, beginning to understand and to assume responsibility for the injuries they have caused.

6. 123 S. Ct. at 2495 (Scalia, J., dissenting).

Moving from the particular to the theoretical, student author Christa Obold-Eshleman explores the relationship between restorative justice and the victims' rights movement. She argues that restorative justice is based upon a "relational worldview," whereby relationships among people are foremost, and in which crime disrupts well-ordered relationships. This contrasts, she suggests, with the traditional criminal law's—and the victims' rights movement's —more individualistic and organic worldviews, that focus respectively on individual autonomy and the defense of the community. In a lengthy exposition, Obold-Eshleman warns that by failing to understand restorative justice's alternative premise, the concept can too easily be captured by the traditional regime, for example, by conversion into merely a sentencing tool. The promise of restorative justice, she believes, is far greater, but requires embracing a relational approach to criminal justice. Often, she stresses, this means recognizing that the line between victim and offender is more blurred than the idealized portrait often presented in some of the key victims' rights tracts.

V.

Let me conclude by pointing out three fine pieces of theoretical import. Professor Kyron Huigens probes whether a comprehensive theory of punishment is possible and, if so, what it might look like. His piece is an explicit response to Antony Duff, who has urged a healthy dose of skepticism about the project of developing a single model of criminal liability, advocating instead for an eclectic mix of interrelated models.[7] Professor Huigens first defends the possibility of a grand theory in criminal law, arguing that the source of much skepticism arises from critics' misunderstanding the relationship between theory's normative and descriptive components. Properly understood, he argues, criminal theory need not be procrustean. He then asks what such a comprehensive theory might look like, and defends his longstanding interest in a virtue ethics-based theory of punishment, or so-called aretaic legal theory.

What justifies the authority to impose punishment? This question, asked by Professor Daniel N. Robinson, is even more basic than identifying what constitutes proportional punishment or how one might objectively calibrate punishment to a certain offense. How, specifically, can *state* authority to punish be justified? Professor Robinson develops a Kantian theory that state

7. R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147 (2003).

authority is justified insofar as it acts as a proxy for those to whom a wrong is done. But because the victim may not seek only what is right, the state stands as a proxy for the populace's ideals, for "their morally best selves." After fleshing out his theory in the context of punishment by the state, Professor Robinson explores the symmetrical question of how the state can forgive on behalf of others.

And third, Professor Russell Christopher attacks a discrete but perplexing issue of theory: the punishment differential between attempt and completed offenses. This is the so-called question of moral luck. According to Professor Christopher, both proponents and opponents of the punishment differential rely upon a faulty premise: their assumption that the achievement of the prohibited result is the only factor that can distinguish the two scenarios. Drawing on the work of Leo Katz, Professor Christopher presents several hypotheticals to demonstrate that a perpetrator who then seeks to prevent or undo the very harm he sought to cause may deserve lesser punishment. This accords with affirmative notions of duty to help, according to Professor Christopher.

VI.

Without further introduction, I invite you now to turn to the pages here assembled. They present, as I believe you will discover, a rich array of scholarship and learning. It is work befitting the Journal that presents it.