Notre Dame Journal of Law, Ethics & Public Policy

Volume 10
Issue 1 *Symposium on Culpability and the Law*

Article 2

1-1-2012

Crime, Culpability, and Excuses

John Robinson

FOREWORD

Crime, Culpability, and Excuses

JOHN ROBINSON

Two conflicting contemporary phenomena give rise to this symposium. One is the pervasiveness of violent crime in American life. Annual fluctuations in the crime rate to one side, murder, rape, arson, and the like occur so often as to erode the social fabric by which we are knit together in community.[1] The second phenomenon is the emergent ability of apparently guilty persons to escape punishment for the criminal violence in which they have engaged. The O.J. Simpson case to one side, should Lorena Bobbit have been found not guilty after she cut off her husband's penis while he slept?[2] Or should Erik and Lyle Menendez have escaped conviction when they were tried for the murder of their parents, whom they shot while they watched television in the family room of their home?[3] More generally, should post-traumatic stress syndrome[4] or the battered woman syndrome[5] constitute defenses to charges of murder, attempted murder, or other crimes of violence? Is Alan Dershowitz correct in asserting that abuse defenses have proliferated to the detriment of the criminal justice systems of the state and federal governments?[6] Or is the proliferation of abuse defenses evidence of the moral maturity of those criminal justice systems? It is questions of that sort that we

1. *See* UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, FIG. 5.1 & NO. 350 (114th ed.) [hereinafter STATISTICAL ABSTRACT] for data on murder, rape, arson, and other violent crimes in 1991. For more recent data, *see* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1994).

2. On the Bobbit verdict, *see* Joel Achenbach and Richard Leiby, *We Find the Defendant . . . The Bobbit Verdict From the Court of Public Opinion*, WASH. POST, Jan. 22, 1994, at D01.

3. On the Menendez case, *see* HAZEL THORNTON, HUNG JURY: THE DIARY OF A MENENDEZ JUROR (1995).

4. On post-traumatic stress syndrome, *see* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 424-429 (4th ed., 1994).

5. *See* LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984).

6. *See* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE (1994).

hope to answer in this symposium, but we are conscious that our readers will assess our proffered answers against the background of an intolerably high rate of violent crime. In this Foreword I will argue that clear thinking about culpability is one component of any adequate assessment of the role that excuses of different sorts should play in the administration of criminal justice. I will also argue that clear thinking about culpability is more difficult and more rare than one might suspect.

I understand culpability to mean blameworthiness, and I understand culpability to operate in two distinct, if intimately related, spheres: the moral and the legal. In both spheres paradigmatic culpability involves three elements: wrongful conduct, actual or constructive awareness of its wrongfulness, and a reasonable level of control over one's own conduct. With respect to each element, monumental debates rage, but the fact of those debates should not obscure the paradigm. As I conceive of them, legal culpability is not coextensive with moral culpability, neither is the former a proper subset of the latter. Not everything that is morally culpable is legally culpable, and there may well be instances of legal culpability attaching to a person who is free of moral culpability with respect to the conduct in question. Brief reflection on why both those assertions are true will shed some light on the structure and function of culpability in ways that will be useful to the consideration of excuses and of their alleged abuse.

A strong swimmer is swimming to shore when he sees a child drowning in six feet of water. The swimmer is not the child's parent or care-taker, neither is he a lifeguard at that beach. He swims to shore, letting the child drown. A good case can be made for the swimmer being morally culpable with respect to the child's death, but even someone convinced by that case should still regard the swimmer's legal culpability as an open question. What is it about legal culpability that keeps it from being concluded by a determination of the moral culpability of the conduct in question? The first component of an answer to this question must refer to the differing roles that culpability plays in legal as opposed to moral contexts.

In moral contexts, we address culpability in order to fix blame, to be sure, but also in order to think through how persons generally should act in certain situations. If we say of Harry Truman, for example, that he was culpable with respect to the

dropping of the atom bomb on Hiroshima and Nagasaki,[7] we are both blaming him, albeit posthumously, and contributing to a larger discussion of the conditions, if any, under which the deliberate use of lethal violence on noncombatants in wartime might be justified. In legal contexts, however, a multiplicity of nonmoral considerations enter into the picture. Where, for example, moral theory usually proceeds as if the mental states of moral agents were transparent to moral evaluators, legal theory must assume the relative opacity of the mental states of those persons whose culpability is in question. As Blackstone said:

> For though, *in foro conscientiae*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know.[8]

Where, moreover, moral theory can proceed in blissful indifference to political considerations, legal theory cannot; it must factor into its construction of legal culpability the effect of that construct on the ability of the state to interfere in the lives of its citizens. If, for example, a state were to construct legal culpability in such a way that it encompassed the use of contraceptives by married couples, it would have established a predicate for police searches of "the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives."[9] Many citizens would find this to be outrageous in itself as well as a demented allocation of scarce police resources. If, on the other hand, a state constructs legal culpability in such a way that it either left some species of heinous conduct out of the realm of the culpable or treated it as only minimally so, that decision might provoke private citizens to take the law into their own hands in ways that weaken political and moral community.

Where, finally, moral theory is to a great extent an end in itself, legal theory should never be oblivious to the function that legal culpability plays in the operation of any legal system; culpability in every morally adequate legal system serves as the ordinary gatekeeper to that system's punitive institutions. Because of the close nexus between culpability and punishment, a few words

---

7. On President Truman's decision to order the dropping of atomic bombs on Hiroshima and Nagasaki, *see* ROBERT MADDOX, WEAPONS FOR VICTORY (1995).

8. 4 WILLIAM BLACKSTONE, COMMENTARIES *21.

9. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

on punishment must be said before we can conclude these introductory thoughts on culpability.

In the spring of 1994 Hutu Rwandans slaughtered eight hundred thousand Tutsi Rwandans.[10] During that same year Bosnian Serbs massacred several thousand Bosnian Muslims at several different places in Bosnia.[11] Two decades earlier the government of Cambodia systematically killed over one million of its citizens in an effort to purge the nations of its intellectual elite.[12] In Chile,[13] Argentina,[14] Brazil,[15] and Paraguay,[16] military dictatorships caused the death of thousands of dissidents in recent decades. And before then, Hitler,[17] Stalin,[18] and Mao[19] killed millions and turned millions more into slaves of their monstrous states. Every single murder, rape, and robbery recapitulates on a small scale the wickedness of these mass atrocities, and every single instance of fraud, larceny, or drunk driving shares with those more heinous offenses many of the same morally intolerable elements.

Implicit in each of these wrongs—the genocidal and the individual—is a message that the wrongdoer addresses to the victim and to the relevant community. That message is both false and destructive. It calls out for a true and reconstructive response. The message asserts the moral superiority of the wrongdoer and the moral triviality of the victim. It denies the moral community that in fact binds the wrongdoer to the victim and that prohibits the wrongdoer's trivialization of the victim.

---

10. On the slaughter in Rwanda, *see* ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY (1995). *See also* GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE (1995).

11. On the Bosnia massacres, *see* NORMAN L. CIGAR, GENOCIDE IN BOSNIA (1995). *See also* DAVID RIEFF, SLAUGHTERHOUSE: BOSNIA AND THE FAILURE OF THE WEST (1995).

12. On the Cambodian purge, *see* MICHAEL HAAS, GENOCIDE BY PROXY (1991).

13. On the Chilean dictatorship, *see* REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (1993).

14. On the Argentinian dictatorship and its abuses, *see* WILLIAM DAVIS, WARNINGS FROM THE FAR SOUTH (1995).

15. On the Brazilian dictatorship and its abuses, *see* ARQUIDIOCESE DE SÃO PAULO, BRAZIL: NUNCA MAIS (3d ed. 1985).

16. On the Paraguayan dictatorship and its abuses, *see* AMERICAS WATCH COMMITTEE, PARAGUAY: LATIN AMERICA'S OLDEST DICTATORSHIP UNDER PRESSURE (1986).

17. On Hitler, *see* GERALD FLEMING, HITLER AND THE FINAL SOLUTION (1984).

18. On Stalin, *see* ROBERT CONQUEST, THE GREAT TERROR: STALIN'S PURGE OF THE THIRTIES (1973).

19. On Mao, *see* JOHN BYRON, THE CLAWS OF THE DRAGON (1992).

The response must assert the moral equality of wrongdoer and victim; it must reassert the prohibition that the wrongdoer has denied. As the wrongdoer's assertion was embodied in conduct independent of the assertion, the community's response must go beyond mere assertion. It is for that reason that for so long as humans are capable of wrongdoing, punishment will be a necessary feature of those institutions whose purpose it is to maintain human community among us.[20]

Why is it so difficult for us to see punishment as, at its core, a reconstructive response to an intolerable assertion of moral exceptedness? Surely part of the answer lies in the ugliness of punishment as we know it. Whether our knowledge of punishment comes from first-hand acquaintance or from third-hand description, we know it to be terrible. Memories of childhood punishment remind us of failure, shame, anger, and worse. Both the history of punishment and its current practice at the governmental level chill us to the bone with their sheer brutality.[21] So resistant have punitive institutions proven to amelioration that one could be forgiven for concluding that as necessary as punishment is to the maintenance of moral community among humans, no human can safely be trusted to administer punishment justly. As a result, one might further conclude, moral community is bound to fail. Those who resist so dire a conclusion must either deny the necessity of punishment or attempt to cleanse it of its brutality. Let us consider each of those tacks briefly here.

If choice is in principle illusory, if, that is we are all in fact determined by endogenous[22] and exogenous[23] factors that at the moment of apparent choice are beyond our ken or control, such that our apparent choosing is not choice at all, then punishment as a reconstructive response to an intolerable assertion of moral exceptedness makes no sense at all.[24] If choice is illusory, then the institution of punishment should give way to other institutions, institutions designed to deter, to reform, to rehabilitate, or to incapacitate as current social theory may suggest. If, on the

20. For an earlier effort on my part to develop the claims made in this paragraph, *see* John Robinson, *Adolescence, Choice, and Punishment*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y, 257, 261-62 (1991).

21. On the ugliness of punishment in America today, *see* MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995).

22. On the endogenous factors in crime, *see, e.g.*, LAWRENCE TAYLOR, BORN TO CRIME: THE GENETIC CAUSES OF CRIMINAL BEHAVIOR (1984).

23. On the exogenous factors in crime, *see, e.g.*, KEITH HARRIES, CRIME AND THE ENVIRONMENT (1980).

24. For one popular argument for the unintelligibility of punishment when the conduct in question is determined by factors outside of the control of the agent, *see* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971).

other hand, choice is not illusory, if, that is, after the immense influence of endogenous and exogenous factors has been acknowledged, we remain free to kill or not to kill, to rape or not to rape, to steal or not to steal, then punishment as response does make sense and should be maintained. This becomes evident as soon as we reflect on the peculiar psychological structure of wrongful choice.

Wrongful choice is tricky, but not mysterious. None of us is wholly ignorant of it, either from our own conduct or from the conduct that others have directed at us or at others about whom we care. At its core is one form of unwarranted self-preference or another, some form of illegitimate distortion of moral community. All but the most arrant wrongdoers can live with this distortion only by rationalizations that for the moment hide the distortion even from themselves. "It is what he would have done to me," the wrongdoer says, or "She had no right to it in the first place." For moral community to exist among us, these rationalizations must be vigorously repudiated. If ever they should pass for legitimate reasons for action, then the Hobbesian war of all against all would break out and moral community would collapse. Hence the need for punishment as a communal repudiation of the rationalization implicit in all wrongdoing. If punishment *is* that repudiation embodied in a burden that a community deliberately and authoritatively imposes on a wrongdoer for his wrongdoing, then the case for its necessity as an institution has been made.

What then of the ugliness of punishment? What of its brutality? Here too culpability plays a crucial role even if a different one from the role it plays in justifying punishment as an institution. If the *raison d'etre* of punishment is the reassertion of the basic requirements of moral community in response to their effective denial by the wrongdoer, it follows that the punisher must take great care to make sure that that reassertion is heard, that it is not drowned out by the way in which the one being punished is treated. This consideration supports the massive efforts over the past two centuries first to reform and later to rehabilitate incarcerated wrongdoers,[25] and it counts against cur-

25. On the reform of punishment in Western Europe in the eighteenth century, *see* MARCELLO MAESTRO, CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM (1973). On efforts to reform punishment in nineteenth century America, *see* ADAM JAY HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA (1992).

rent efforts either to do away with them or to lock them up and throw away the key.[26]

When James Fitzjames Stephen said that it is "highly desirable that criminals should be hated"[27] and that "the punishments inflicted upon them should be so contrived as to give expression to that hatred"[28] he was, I think, disastrously wrong. It is not criminals that we should hate, but criminality. We should hate our own tendency to rationalize unwarranted self-preference, and we should resist the spread of that tendency in the populace generally. As for criminals, we should hate what they have done, and we should support, without illusions, efforts to help them to live in authentic moral community with the rest of us,[29] but we should not hate them. Indeed our hatred for them might appear to justify their brutalization when it is their brutalization that drowns out the reassertion of the basic requirements of moral community that is constitutive of punishment as an institution.

Worse still, hating criminals feeds the tendency to think of them as vastly different from ourselves, almost as members of another, and morally inferior, species. Given the role that race, class, and other forms of marginalization play in the composition of prison populations,[30] anything that widens the gap between the imprisoned and the rest of us is troublesome. Even if no such gap existed, however, hating criminals would still be an ill-advised practice, and any conception of punishment that presented it as endorsing and facilitating the hatred of prisoners would be a misconception of it. It is not the moral difference between us and them that should concern us. It is instead the moral similarity between them and us that should be our concern. While murder, rape, and arson may not tempt us now, none of us is free of the rationalizations by which both they and

---

26. On the current tendency to respond to the intolerably high crime rate with lengthy sentences, *see* Hon. J. Anthony Kline, *Comment: The Politicization of Crime*, 46 HASTINGS L. J. 1087, 1088-1090 (1995). *See also* Fox Butterfield, *California Courts Clogging Under Its "Three Strikes" Law*, N.Y. TIMES, Mar. 23, 1995, at A1, A9.

27. 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 82 (London, MacMillan 1883).

28. *Id.*

29. On alternatives to incarceration as a mode of punishment, *see* NORVAL MORRIS AND MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990). *See also* INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES (Michael Tonry and Kate Hamilton eds., 1995).

30. On the racial composition of state prisons in America in 1986 and 1991, *see* STATISTICAL ABSTRACT, *supra* note 1, at No. 340. *See also* STEPHEN P. KLEIN, RACIAL DISPARITIES IN SENTENCING DECISIONS (1991).

we hide from ourselves our failure to live up to the obligations implicit in membership in the moral community.[31]

If reflection on the function of punishment convinces us that culpability is necessary to just punishment, further reflection on the function of punishment should suggest that culpability also imposes a ceiling on how severely wrongdoers can be punished. In an age in which deterrent, rehabilitative, and incapacitative objectives are assigned crucial roles in the determination of the severity of punishment, we risk weakening the institution of punishment and treating convicted criminals unjustly if we disregard the culpability cap in our distribution of punishment. It may be that nothing short of life without the possibility of parole will convince would-be drug dealers not to deal in drugs, but to give that sentence to a convicted drug dealer without determining also that dealers deserve sentences of that sort is to threaten punishment with its own self-destruction.[32] I do not mean to suggest that desert determinations are easy to make; the incommensurability between crime and punishment makes them extremely difficult. Without some desert determination, however, punishment could lose its ability to function as a reconstructive response to the intolerable message implicit in all wrongdoing, and that would be an unmitigated disaster.

What then of excuses? Two extreme positions spring to mind. The purist position would say that whatever exculpates morally exculpates legally, making legal culpability a proper subset of moral culpability.[33] Realists, led by Oliver Wendell Holmes, Jr., have trenchantly criticized the purists' position as excessively sensitive to the moral situation of alleged wrongdoers.[34] Realists follow Holmes in permitting the state to sacrifice individuals and their freedom whenever the state determines that a sacrifice of that sort is necessary to its own continued existence.[35] We should be both more suspicious of governmental determinations of the necessity for individual sacrifice and more respectful of individual freedom than Holmes was, and we should worry more than he did about what the punishment of

31. I take this to be the central point of Hannah Arendt's study of evil in EICHMAN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1971).

32. For a heated exchange among the Justices of the United States Supreme Court on this question, *see* Harmelin v. Michigan, 501 U.S. 957, (1991). *See also*, People v. Bullock, 485 N.W.2d 866 (Mich. 1992).

33. *See*, for example, Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932). *See also* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 146-170 (2d ed. 1947).

34. *See*, for example, OLIVER WENDELL HOLMES, JR., THE COMMON LAW 39-76 (1881).

35. *Id.* at 43.

the morally exculpated will do to the institution of punishment. But how suspicious, how respectful, and how worried should we be? For answers to those questions, we must turn to our symposiasts.

In *Culpability and Commonsense Justice,* Norman J. Finkel, a psychologist, argues that jurors do a better job of determining culpability than the law books do. He also suggests that the common-sense justice that is revealed in jury verdicts can assist the law in its effort to get culpability questions right. He says, for example, that community sentiment in America today distinguishes sharply between true murder and felony murder, prescribing a significantly more severe punishment for the former than for the latter. With respect to insanity as an exculpator, Finkel argues that common sense rejects its medicalization in favor of an insanity test that is more closely connected to the defendant's capacity to make responsible choices. With respect to manslaughter, finally, Finkel argues that common sense does a significantly better job of determining an enraged killer's culpability than does the criminal law with all of its fine distinctions. Finkel would have us learn from jurors (real and mock) that judgments in criminal cases are just only when they reflect the blameworthiness of the accused, and he would have us realize how regularly the law, as it is currently constructed, ignores blameworthiness in favor of attractive but illusory alternatives.

In *Transferred Intent,* Douglas Husak undertakes a critique of the hoary doctrine according to which a person can be punished for victimizing a person other than his intended victim. His goal in this critique is not to exculpate the victimizer. It is instead to produce a better account of why the victimizer deserves punishment than current doctrine can produce. Unlike Finkel, whose research is highly empirical, Husak proceeds by way of a consideration of twelve variations upon the focal case of transferred intent. Each of these variations is intended to call attention to a constitutive feature of the focal case. From this inquiry Husak concludes that the whole idea of transferred intent is a fiction—intents not being the sort of thing that can be transferred. He also finds this particular legal fiction to be quite useless. Husak proposes that we discard it in favor of an approach that focuses directly on whether or not the defendant deserves to be punished as severely as someone who had succeeded in victimizing his or her intended victim in some particular way. To this extent, Husak and Finkel are in agreement; they both believe that a legal system improves as it transcends mere doctrine and addresses the hard but dispositive questions of culpability.

In *The Relevance of Conduct and Character to Guilt and Punishment*, Benjamin Sendor does not deviate from the Finkel/Husak consensus. Sendor's focus, however, is quite different from theirs. What Sendor wants to do is to show that the overall moral goodness or badness of a person—what he calls the person's character—should *not* be a criterion of guilt or innocence in a well-ordered criminal justice system. He therefore rejects what he calls the "character theory" of criminal liability, distinguishing it carefully from what he calls a moral agency theory. Sendor admits that character is relevant to punishment, but he believes that it should be limited to the time of sentencing and should not be considered when the guilt or innocence of the accused is being decided.

Sendor justifies this limitation on the role that character can play in the criminal process on grounds of political morality. A well-ordered state, he says, leaves its citizens alone until they have done things that justifies the state in interfering in their lives. Sendor argues, furthermore, that a conduct-driven criminal justice system can serve as an incentive to socially acceptable behavior in ways that a character-driven system could not. Finally, Sendor says, a conduct-driven criminal justice system is both more fair to citizens generally and more compatible with the restorative function of punishment than a character-driven system would be. It is for these reasons that Sendor would confine considerations of character to the sentencing phase of the criminal process. Sendor is careful not to dismiss character theorists out of hand. He is in substantial agreement with them on several points, especially with respect to the claim that criminal conduct ordinarily expresses something to which any well-ordered legal system must respond. He differs from character theorists as to what it is that criminal conduct expresses.

For all three of our lead authors, therefore, culpability determinations are crucial to the proper functioning of a criminal justice system. All three, furthermore, find excuses to be crucially important to culpability determinations. Our hope is that their discussions of culpability and excusing exculpators constitute a significant contribution to the important national debate on this issue that is being conducted in the courts, in the several legislatures, and in the media.