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The Structure and Limits of Criminal Law

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ASHGATE

Introduction

If one were to construct a conceptual framework into which all criminal law rules would fit, what would it look like? The exercise requires a careful, sometimes judgmental, assessment of what distinctions are most important to criminal law doctrine. These distinctions will make up the largest beams of the structure.

The result can be something enormously useful for organizing in one's own mind a large collection of criminal law rules, but also quite powerful, as an analytic device revealing conceptual similarities and differences among doctrines that would not otherwise be evident. And these interrelations among doctrines can influence how they are formulated and applied. Knowing the rules governing the duress defence is one thing, but seeing the similarities in role and function that duress shares with other disability excuses – such as insanity, involuntary intoxication and immaturity – provides a new level of understanding, and a new set of arguments regarding interpretation and formulation that would not have been apparent without the conceptual framework. Part I presents writings that take up this framework challenge.

If one were constructing a criminal law, even if one had a conceptual framework worked out, one would still need to decide how each doctrine within that framework was to be formulated. Another volume in this series – *The Theoretical and Philosophical Foundations of Criminal Law*, edited by David Dolinko – will do much to answer the formulation question. This volume addresses a more specific issue: What are the limits within which such doctrinal formulations must operate? Beyond what boundaries can criminal law rules not go? Specifically, Parts II and III of this volume consider: What is the minimum that is sufficient for criminal liability? And what is the minimum that is necessary for criminal liability?

The literature in this area is commonly organized around debates about 'morality enforcement' and 'over-criminalization', including more focused conversations regarding 'regulatory offences' and 'preventive detention'. But we think these disputes raise important issues that can best be elucidated by segregating the issues of offence conduct and offender culpability. Thus, Parts II and III of this volume explore the issues in this form: in Part II we ask, what offence conduct, if any, ought to be necessary for criminal liability, and what conduct ought to be sufficient? In Part III we ask, what offender culpability, if any, ought to be necessary for criminal liability, and what culpability ought to be sufficient?

The Structure of Criminal Law

Part I contains five essays that consider how best to construct a conceptual framework for criminal law. (It is unfortunate that more scholars do not write on this fundamental topic. The existing literature gives sparse choices, hence the unfortunate over-reliance on writings by Paul H. Robinson.) Each essay touches on at least one of the three fundamental pillars of criminal law doctrine: offence definitions, doctrines of imputation and general defences.

The first pillar, offence definitions, has traditionally been subdivided into two separate components: *actus reus* and *mens rea*. The distinction between these two concepts represents one of the most basic organizing distinctions in criminal law today. Robinson, in Chapter 1, examines this distinction and ultimately recommends that it be abandoned.

The second pillar, doctrines of imputation, is systematically explored in the second essay by Robinson (Chapter 2). While the rules and doctrines of imputation have rarely been thought of as a fundamental conceptual category in the same league as offence definitions and general defences, there are good reasons to think that they should be. Imputation rules are essentially the reverse of general defences in that both represent opposite, but equally important, exceptions to the paradigm of criminal liability. Just as general defences define the conditions under which an actor will not be liable even though he satisfies the elements of an offence, doctrines of imputation define the conditions under which an actor *will* be held liable even though he does *not* satisfy the offence elements. In this sense, there is an organizational elegance and symmetry to each pillar's interrelation with the other.

General defences, the third major pillar of criminal law doctrine, are taken up in Chapters 3 and 4. The major controversy in this area centres on the nature of justifications and their relationship to excuses. Robinson, in Chapter 3, argues for an objective conception of justification (the 'deeds theory'), which looks to whether the conduct is objectively justified in the sense that it avoids a greater harm or evil and would be desired or at least tolerated were anyone to engage in such conduct under similar circumstances in the future. In contrast, Kent Greenawalt argues in Chapter 4 for a subjective conception of justification (the 'reasons theory'), which looks to the offender's reasons or motivation for acting. This approach puts justifications as not too distinct from many excuse defences. (The subjective 'reasons' theory of justification is the dominant view in the United States, but not in other countries.)

Chapter 5, again by Robinson, offers a different approach to constructing a conceptual framework. It ignores many of the organizing distinctions used by the existing law today and relies instead upon a new distinction that it argues is more foundational. It observes that criminal law performs two quite different functions: it defines *ex ante* society's rules of conduct – what people are prohibited, required or permitted to do on pain of criminal sanction. Then, upon a violation of the rules of conduct, the criminal law shifts to a different function of adjudicating *ex post* a violation to determine if the offender should suffer criminal liability and punishment for it.

Most enlightening about organizing criminal law around this 'functional analysis' is the doctrinal patterns it reveals. All doctrines serve one function or the other, and the division of doctrines between the two functions does not follow the distinctions to which criminal law traditionally gives importance. For example, some elements of an offence definition serve the *ex ante* announcing-rules-of-conduct function, while other elements serve the *ex post* adjudication function. Current doctrine makes no distinction between these two kinds of offence elements, yet the difference is important, not only for its theoretical implications but also for practical considerations as well. For example, the doctrines serving the two different functions address two different audiences and logically call for different formulation and drafting rules. The rules of conduct are addressed to society generally, while the principles of adjudication are addressed to and implemented only by the decision-makers in the criminal justice process.

To give readers a little more background to help prepare them to get the most out of the essays, we shall now provide a quick overview of what is to come in each of the essays in Part I.

In Chapter 1, ‘Should the Criminal Law Abandon the *Actus Reus-Mens Rea* Distinction?’, Robinson argues that the *actus reus-mens rea* distinction is incoherent and should be abandoned. For Robinson, what we refer to as *actus reus* requirements or as *mens rea* requirements are in fact a collection of entirely distinct doctrines. Four doctrines typically described as *actus reus* requirements include the act requirement, substitutes for an act (that is, an omission or possession), the voluntariness requirement and the objective elements of an offence (that is, conduct, circumstance and result elements). Four doctrines typically described as *mens rea* requirements include present-conduct intention, present-circumstance culpability, future-result culpability and future-conduct intention. While these doctrines are commonly grouped together under the banner of *actus reus* or *mens rea*, the doctrines within each group have no common characteristic and no common function. This inevitably creates confusion and invites analytic error. The criminal law would be better off, says Robinson, if it grouped these doctrines around its three primary functions: rule articulation, liability assignment and grading.

In Chapter 2, ‘Imputed Criminal Liability’, Robinson offers a thorough analysis of the doctrines of imputation, which he identifies as a distinct conceptual category of the same importance as offence definitions and general defences. Just as general defences can *exculpate* an actor who satisfies the offence elements, doctrines of imputation can *inculpate* an actor who does not satisfy the elements. Robinson identifies four theories used to support imputed liability. The ‘causal theory’ imputes liability to an actor who is causally responsible either for the conduct of another or for the absence of a required state of mind in himself or another. The ‘equivalence theory’ imputes liability to an actor who is thought to be as blameworthy as one who satisfies the missing offence elements. The ‘evidentiary theory’ imputes offence elements where proving them would simply be too difficult or too costly. The ‘non-culpability theory’ imputes liability where doing so serves other societal interests thought to outweigh the injustice of imposing liability on the blameless. Robinson then draws on these theories to analyse, critique and gain insights into several specific doctrines of imputation.

In Chapter 3, taken from his book *Structure and Function in Criminal Law*, Robinson offers a comprehensive analysis of the theory and structure of general defences. Organized best, says Robinson, general defences come in three forms: justifications, excuses and non-exculpatory defences. Justifications exculpate because the actor avoided a greater harm or evil. Excuses exculpate because the actor is blameless for his admittedly harmful conduct. Non-exculpatory defences exempt the offender from liability and punishment because, although he or she has acted culpably and harmfully, exemption is said to further an interest more important than punishing the offender at hand. There are two remaining ‘defences’ – absent element and offence modification defences – but these are best characterized as part of the offence definition.

Robinson then turns to the debate over the fundamental nature and theory of justification defences. For him, conduct is justified where it in fact avoids a greater harm or evil (‘objective approach’), not simply where the actor reasonably believes that it does (‘subjective approach’). The objective approach is preferable, says Robinson, for at least three reasons: it more effectively announces how people should behave in the future, it provides a more coherent and

workable account of when defensive force may be used and it avoids the erroneous liability results generated by a subjective approach.

In ‘Distinguishing Justifications from Excuses’ (Chapter 4), Kent Greenawalt argues that the law should not attempt to delineate bright-line distinctions between justification and excuse, since, morally speaking, it simply cannot. True, he says, an act is justified if it was the right thing to do in the circumstances, and an actor is excused if, though he did the wrong thing, he cannot be blamed for it. But this superficial clarity masks much ambiguity and complexity. What if elements of both justification and excuse inhere in the commission of a prohibited act? How should we characterize individuals who act under a mistaken belief about the existence of justifying circumstances? Greenawalt walks us through these and other difficulties. In ordinary life, he concludes, our moral evaluations can cope with such problems. The law, however, is a much blunter instrument. In the end, its labels of justification and excuse are simply too rigid and inflexible to track accurately our nuanced moral judgments. It would be helpful if it could, since this would offer useful moral guidance to the community, but the reality is that it simply cannot.

Finally, in ‘A Functional Analysis of Criminal Law’ (Chapter 5), Robinson suggests a new way of analysing and organizing criminal law doctrine. This proposal would restructure the existing system to reflect better the three primary functions of the criminal law: rule articulation, liability assignment and grading. *Rule articulation* refers to the need for the criminal law to announce the conduct that it prohibits or requires. The goal here is to offer clear *ex ante* guidance to the community as to how they should behave. *Liability assignment* assesses *ex post* whether the violation is sufficiently blameworthy to warrant the condemnation of conviction. *Grading* assesses the relative seriousness of the offence, which is usually a function of the relative blameworthiness of the offender, and which usually sets the general amount of punishment to be imposed. According to Robinson, the current conceptual structure of the criminal law uses distinctions that obscure each of these functions and that damage the law’s performance in each category. Criminal law doctrines should therefore be reorganized according to the particular function they serve.

The Limits of Criminal Law: Offence Conduct

Part II takes up the issues commonly referred to as ‘morality enforcement’ and ‘over-criminalization’. We think it most useful to frame the issues with these specific questions: What conduct ought to be sufficient to support criminal liability, and what conduct ought to be necessary? The five essays in this section are arranged in chronological order so the reader may get a sense of how the larger debate has developed over time.

Lord Devlin, in his classic debate with H.L.A. Hart, argued that the immorality of conduct ought to be enough to justify criminalization, with Hart arguing that the immorality ought to be insufficient. (Hart’s ‘Immorality and Treason’, reproduced here as Chapter 6, is not his most complete writing on the subject but it is probably the most accessible.) In Chapter 8, Norval Morris and Gordon Hawkins buttress Hart’s philosophical arguments with practical arguments against Lord Devlin’s approach to morality enforcement. By all accounts Hart won this debate, and it is now generally accepted that some actual harm to another ought to be required – the so-called ‘harm principle’.

If the immorality of conduct is itself insufficient for criminal liability, is it then the case, alternatively, that the harmfulness of conduct is sufficient? Many, such as Herbert L. Packer (Chapter 7) argue that it is not. Packer argues that the conduct ought to be not only harmful but also seen as condemnable by the community. (Robinson and Darley's 'Utility of Desert' in Part IV offers empirical support for Packer's philosophical arguments on this point.)

Under this view, neither immorality nor harm is itself sufficient for criminal conduct; both are necessary – at least 'immorality' in the sense of commanding a broad community sense that the conduct is condemnable. It is not clear, however, that this view has carried the day. While criminal law has been stripped of many of its pure immorality offences, it retains, and indeed is expanding, its application to conduct that is harmful in some broad sense but hardly condemnable, as in the enormous growth of 'regulatory offences'.

Indeed, as Bernard E. Harcourt makes clear in Chapter 9, the harm principle has been stretched so far as to become almost meaningless. (Harcourt's essay is quite long but we assure you it is worth the read.) Even conduct once thought of as pure morality enforcement, such as prostitution, has been recast in terms of the harm it causes – to the prostitute, the customer or society. With this 'collapse of the harm principle' in providing a meaningful limitation on criminalization, Packer's demand that the conduct also be seen as condemnable becomes an important limitation (if still ignored by many).

The debate over whether to adopt a harm principle has shifted to what the harm principle should require; perhaps harm of a certain sort or level of seriousness? Chapter 10 by Andrew P. Simester and Andrew von Hirsch is an example of an approach that both refines the harm principle and suggests supplements to it.

Again, we provide an overview of each of the pieces in Part II to help the reader get started.

In Chapter 6, 'Immorality and Treason', H.L.A. Hart responds to Lord Devlin's claim that conduct can be criminalized simply because it is immoral. Devlin argued that a shared morality is crucial to the existence of society, and that society is therefore entitled to protect itself by enforcing that morality through the criminal law. Conduct is immoral enough to be criminalized, according to Devlin, where the average person would view it with particularly strong feelings of intolerance, indignation and disgust.

Hart's response is that feelings of this sort, however strongly experienced, must always yield to logic and reason. We should subject our feelings to rational scrutiny, since they might be based on ignorance or prejudice. We should also ask whether criminalization of particular conduct is necessary to protect society from harm or, indeed, from moral disintegration. Often, says Hart, it will not be. Much immoral conduct takes place in private, hurting no one. And people are not likely to abandon their morality simply because some act of which they disapprove is not punished by law.

Chapter 7, 'The Search for Limits: Law and Morals', is a chapter from Herbert L. Packer's famous book *The Limits of the Criminal Sanction*. In it, Packer makes four main arguments. First, conduct should be criminalized only if it is widely viewed as morally condemnable. A different approach risks confusing the morality of the community and bringing the criminal law generally into disrepute. It also threatens to prompt resistance and subversion from key actors within the criminal justice system whose cooperation and acquiescence is required for the system to function properly. Second, and echoing Hart, conduct should not be criminalized simply because it is immoral: heterogeneous societies often disagree about morality, liberty requires substantial individual freedom in the realm of morality, and several

non-moral interests should be considered in determining the appropriate scope of the criminal law. Third, conduct should be criminalized only if it is harmful to others. This is a useful limiting principle because, while difficult to apply, it pushes us away from vague notions of morality and forces us to identify and weigh the concrete bad effects whose prevention is dependent on criminalization. Fourth, conduct should be criminalized only where doing so is likely to reduce the incidence of such conduct. General deterrence and incapacitation are the most promising principles here, followed by specific deterrence. Rehabilitation, on the other hand, should usually be ignored.

'The Overreach of the Criminal Law' (Chapter 8) is taken from the book *The Honest Politician's Guide to Crime Control*, by Norval Morris and Gordon Hawkins. Its central argument is that we have too much criminal law. And that this is a very bad thing. The criminal law should generally focus on preventing harm to others. When it strays beyond this remit, into the areas of morality and social welfare, it exceeds its proper limits at the cost of neglecting its primary function. This results in a number of problems: gross inefficiencies, wasteful spending, a diversion of resources from serious crime, an overburdened criminal justice system, the emergence of black markets for popular but prohibited goods, injustice, an increase in crime, contempt for the law, and discriminatory enforcement, along with other forms of police abuse. Against this background, Morris and Hawkins argue for the abolition of several offences that they see as both unnecessary and positively harmful to the criminal law.

In Chapter 9, 'The Collapse of the Harm Principle', Bernard E. Harcourt traces the history of the harm principle, focusing particularly on the implications of its triumph over legal moralism. This victory, he notes, has dramatically changed the landscape of the criminalization debate. In earlier years, when criminalization was often urged entirely on moral grounds, the harm principle served a clear and important limiting function. Now, in an era where nearly everyone is persuaded by the need for harm, the harm principle has in a sense become obsolete. Yes, harmfulness remains a prerequisite for the criminalization of most conduct. But few are seriously disputing this. Indeed, nearly all arguments today – whether for or against criminalization, whether conservative or progressive – are couched in the language of harm. This is true even where the conduct in question has traditionally been categorized as a 'moral offence'. Thus, the live issue now is not *whether* conduct will cause harm, but rather *how much* it will cause, what type, and how to balance this harm against other competing interests. On these questions, the harm principle has little to say. Accordingly, says Harcourt, a new set of principles is needed to structure the modern criminalization debate.

In 'Rethinking the Offence Principle' (Chapter 10), Andrew P. Simester and Andrew von Hirsch argue that the offence principle, as defined by Joel Feinberg, is incomplete. In particular, they argue that, even after accounting for Feinberg's mediating principles, conduct should not be criminalized simply because it causes affront – even serious affront – in others. Instead, to be consistent with ordinary morality, to warrant the censure of criminal punishment and to overcome the many reasons militating against criminalization, conduct must cause affront *and* be both wrongful and harmful. Generally speaking, an act is wrongful if it manifests a lack of consideration or respect for other persons. On the other hand, an act is harmful if it involves the impairment of a person's opportunities or the frustration of his or her goals.

Even though this reconstruction of the offence principle would result in substantial overlap with the harm principle, Simester and von Hirsch would nevertheless keep the two separate. This is for two main reasons. First, each principle is structured differently, reflecting different

emphases and differences in the balance of work done by the concepts of harm and wrong. Second, while both principles require wrongdoing, the wrong required by the offence principle takes a distinctly communicative form: it generally expresses a lack of respect and consideration towards persons. This communicative element warrants special attention because it implicates a number of powerful interests associated with free expression. We should be particularly cautious about criminalizing these communicative acts because doing so tends not only to censure and preclude the particular act that is proscribed and the way of life to which that act gives expression, but also to undermine the actor's participation in society itself.

The Limits of Criminal Law: Offender Culpability

As the essays in Part II make clear, criminal liability should require that conduct be harmful – even if only in some intangible and broad societal sense – and, some will argue, that the conduct is also seen as condemnable by society. The essays in Part III take up the remaining minimum requirements issue: What culpability, if any, must an offender have at the time of the offence conduct to be criminally liable for it? Again, the essays are arranged in chronological order to give a sense of the development of the larger debate, but we shall consider them here in the order in which they come up in our analytic discussion.

The term 'culpability' has both a narrow and a broad meaning. In its narrow meaning, it refers to the culpability requirements of an offence definition – was the defendant purposeful, knowing, reckless or negligent (to use the common Model Penal Code terms) as to the objective elements of the offence? But its broader meaning – the meaning used above where we frame the topic of this Part – includes more than offence culpability requirements. It refers to the ultimate issue of a defendant's overall blameworthiness, which requires additional inquiries, beyond offence culpability requirements, including, for example, issues of the general excuse. The defendant might well have acted intentionally, knowing all the facts that make his or her conduct criminal, yet nonetheless be blameless for the offence because, for example, he or she acted under duress, or under the compulsion of mental illness or involuntary intoxication, or is too young to appreciate sufficiently the criminality or wrongfulness of the conduct. Perhaps it is best for us to use the term 'blameworthiness' to refer to culpability in this broad sense and the term 'culpability' only when we mean to refer to the culpability requirements of the offence definition. In the essays below, however, writers will follow no such convention and the reader will need to judge which meaning is intended by looking at its context.

For some of the writers here, the narrow–broad culpability distinction is critical. For example, while there is no indication that he would ever do away with general excuse defences, Richard A. Wasserstrom does think that, under some circumstances, there is at least a case for abandoning culpability requirements. Retaining a concern for blameworthiness, he argues only that strict liability is not as clearly in conflict with blameworthiness as people think, and that tolerating any conflict that does exist may well promote other interests. Norval Morris, in contrast, takes something of a reverse view. He would abolish the general insanity excuse, but continue to let mental illness negate an offence culpability requirement. (He too sees useful interests advanced by adopting this compromise position.)

But most of the writers here support, or reject, culpability in both the narrow and the broad sense. Lady Wootton (whose work is reviewed in H.L.A. Hart's piece) and Jay Campbell are happy to do away with a blameworthiness requirement altogether. They are interested strictly

in using the criminal law to restrain (or rehabilitate) dangerous offenders. Blameworthiness plays no role in their behavioural control system, which is essentially a form of preventive detention.

Hart, Fletcher and Kadish, on the other hand, are entirely committed to both culpability and blameworthiness – they would demand offence culpability requirements and a full set of excuse defences as well as other blameworthiness doctrines. (Fletcher's essay seeks in part to demonstrate how negligent culpability, properly formulated, is really a sound basis for concluding that the offender is blameworthy.) It is not that these writers are unconcerned about future crime, but they are simply not willing to allow the *criminal justice system* to be the mechanism used to avoid future crime by imposing the condemnation of criminal liability and punishment in the absence of blameworthiness. (They might well permit a civil commitment system to preventively detain the dangerously mentally ill offender, for example.)

Their commitment to blameworthiness is in large part deontological, derived from philosophical principles, with practical arguments sometimes added for support. Robinson and Darley, in contrast, offer an entirely consequentialist-based theory for requiring blameworthiness – at least blameworthiness in the 'empirical desert' sense of what is condemnable under principles derived from the community's shared judgments of justice. They argue that legal rules that track community views give the criminal law greater moral credibility, which translates into greater crime-control effectiveness. Rules that conflict with community views, as with the systems that Wootton and Campbell support, would undermine the criminal law's moral credibility, and thereby its crime-control effectiveness.

In the final essay in Part III, Robinson takes up the interesting problem of an excuse for an offender's 'rotten social background', which presents something of a special challenge for those supporting the blameworthiness requirement. Morris argues against the insanity defence, in part, because he thinks insanity cannot be meaningfully distinguished from cases of 'gross social adversity', but nearly all agree that such cases of social deprivation ought to be beyond the reach of an excuse defence. As Kadish points out, such cases have not the breakdown of rationality that other excusing conditions have. Nor do they have the breakdown of control. While even those supporting a blameworthiness requirement would draw the line at an excuse for social background, Robinson uses his utilitarian arguments for blameworthiness to step over that line and provide an excuse for at least a subset of these cases.

The debate over blameworthiness as a minimum requirement for criminal liability has been largely resolved in favour of the requirement, and more. There is much support for using blameworthiness not only as a minimum requirement but also as the dominant distributive principle. That is, many argue not only that a lack of blameworthiness should bar criminal liability, but also that the extent of an offender's criminal liability and punishment ought to depend upon the extent of that offender's blameworthiness. In 2007, the American Law Institute's Model Penal Code, which is the model upon which three-quarters of US states base their criminal codes in part, was amended for the first time since its enactment in 1962 to set an offender's blameworthiness as an inviolable distributive principle. Under the new code provision, judges may look to the classic coercive crime-control mechanisms of incapacitation, rehabilitation and general deterrence, among others, only within the constraint of the offender's blameworthiness. A sentence may never conflict with what the offender deserves.

It is unclear whether the Model Code's commitment to blameworthiness will bring change to those states that do not already take this view. And there is not the same level of commitment

to the principle of desert in Europe. On the other hand, while it may not be accepted that desert should control the amount of liability and punishment, it is probably now the prevailing view in both the United States and Europe that, at a minimum, some blameworthiness is required before criminal liability and punishment may be imposed.

We again summarize the essays in this section to help readers get started in their analysis.

In Chapter 11, 'Strict Liability in the Criminal Law', Richard A. Wasserstrom offers a tentative defence of strict liability. At the very least, he says, it is not as clearly evil as many suggest. This is so for two main reasons. First, strict liability offers significant deterrent value. People have reason to be particularly careful when they know that any mistake, however accidental, may result in criminal liability. Indeed, where people have reason to doubt their capacity to avoid a prohibited harm, strict liability may deter them from engaging in certain dangerous activities at all. To the extent this results in both socially useful deterrence and socially harmful over-deterrence, we need simply conduct a cost-benefit calculation. Sometimes this calculation will call for the rejection of strict liability. But sometimes it will not. Second, strict liability is not clearly inconsistent with community standards and, indeed, there is a sense in which many strict liability offences do involve some fault. Elected officials continue to enact strict liability statutes without significant public outcry, and strict liability seems to have much in common with negligence, which is a common standard of criminal culpability.

We also include a review, by H.L.A. Hart, of Lady Wootton's famous book *Crime and the Criminal Law* (Chapter 12). Wootton had argued for the total abolition of the *mens rea* requirement. In her view, the need for *mens rea* is inconsistent with the (sole) preventive purpose of the criminal law, since it forces us to ignore a whole range of obviously harmful acts. Moreover, blameworthiness assessments are ultimately out of reach, since it is simply not possible to know whether a harm-doer *could* have done other than he or she did. Thus, under Wootton's system, liability would follow simply upon proof that the defendant engaged in prohibited conduct. The defendant's mental state might well be relevant at sentencing, but only insofar as it casts light on the best way to prevent him or her from committing future harms.

Hart criticizes Wootton's proposal on several grounds. First, even assuming that prevention is the dominant purpose of the criminal law, we may nevertheless pursue that purpose subject to appropriate constraints. Considerations of justice and fairness to the defendant represent one such constraint, and these considerations are captured well by the *mens rea* requirement. Second, abolition of the *mens rea* requirement would dramatically undermine individual freedom and the predictability of ordinary life, since potential governmental interference would lurk around every corner. Life is full of accidental harmful acts that, under Wootton's system, would always be subject to investigation and preventive action. Third, elimination of the *mens rea* requirement would undermine the stigma of criminal conviction. Convictions would come to say nothing about a person's blameworthiness. And this would significantly damage the normative crime-control power of the criminal law. Fourth, some socially harmful acts (like criminal attempts) seem, as a matter of definition, to require a mental element.

In 'A Strict Accountability Approach to Criminal Responsibility' (Chapter 13), Jay Campbell also argues for a criminal justice system based entirely on incapacitation and rehabilitation of the dangerous. This approach, like Wootton's, would do away with the *mens rea* requirement; only a (materially) harmful act would be required for the imposition of criminal liability. Campbell takes this approach because *mens rea* gets in the way of social

protection and because the fault-finding function of *mens rea* is really a sham – most criminals are simply sick or lack the freedom of choice required to warrant moral condemnation.

Sanford H. Kadish argues, in Chapter 14, ‘The Decline of Innocence’, that the criminal law ought to retain both the insanity defence and the *mens rea* requirement. As to the former, he concedes that administrative difficulties have often bedevilled the defence, but thinks improvement – not abolition – is the answer. This is true for several reasons, but most importantly because the defence is necessary to protect the morally innocent from conviction. The *mens rea* requirement should be retained, says Kadish, for the same reason but also because abolition would run counter to deeply entrenched notions of responsibility and morality, because blame and punishment help reinforce law-abidingness, and because the *mens rea* requirement protects individuals from excessive and unfair government interference.

In Chapter 15, ‘The Theory of Criminal Negligence: A Comparative Analysis’, George P. Fletcher argues that negligence is a proper basis for criminal culpability. He makes several points along the way. First, *mens rea* refers not to a specific subjective mental state but to the actor’s moral blameworthiness. This follows from the *purpose* of the *mens rea* requirement, which is to ensure that only the blameworthy are subject to condemnation and punishment. Second, those who argue that negligence is not culpable because culpability requires a *choice* to do harm must explain why a choice to violate the law is not required in addition to a choice to cause harm. Fletcher is doubtful that they can do this. If they cannot, this undermines the primacy of choice and renders negligence at least potentially culpable. Third, negligence is in fact culpable because, when circumstances give the actor reason to think his conduct risks harm to another, his failure to apprise himself of such risks is blameworthy. Fourth, the legality–culpability distinction in German and Soviet law casts much light on the proper conceptual structure of negligence. In particular, it suggests that defendants must be negligent with respect to both the risk of harm *and* the risk of illegality attendant on their conduct, that negligence is not an unusually vague standard of liability, and that the negligence standard can accommodate only certain characteristics of the defendant in assessing culpability.

In ‘The Abolition of the Special Defense of Insanity’ (Chapter 16), Norval Morris argues for the abolition of the insanity defence on at least three grounds. First, the insanity defence requires us to make determinations that are simply beyond our current capacity. Second, the defence’s rationale is overbroad. It purports to exculpate those who lacked substantial capacity to avoid committing the crime. But, taken to its logical conclusion, this reasoning would surely demand the availability of other defences like ‘gross social adversity’. The latter condition is likely more criminogenic than mental illness, and yet we do not (and should not) allow it as a defence. Third, while exculpation might well be appropriate where there is a *total* absence of free choice, this is not the typical insanity case and, indeed, will arise only exceptionally, if at all. The best way to proceed, says Morris, is to admit evidence of mental illness only on the issues of *actus reus* and *mens rea* (excluding negligence), and at sentencing.

Sanford H. Kadish, in Chapter 17, ‘Excusing Crime’, explores the structure and proper scope of excuses. As to structure, he suggests that all currently recognized excuses fit into one of three categories: involuntariness, reasonable deficiency or non-responsibility. He further suggests that the unifying element of these categories is a lack of genuine voluntarism that shields the actor from moral blame. Kadish concedes that legal departures from ordinary morality might sometimes be justified in the face of compelling competing interests. But, he says, if the law were true to everyday blaming practices, it would retain the defence of insanity

and, indeed, recognize additional excuses based on reasonable mistake of fact or law. It would also recognize a broader defence of duress. On the other hand, for both moral and practical reasons, it would likely reject a defence based on the general incapacity to avoid committing the crime. Nor would it recognize excuses based on social deprivation or addiction, since the former does not involve a breakdown in rationality and judgment incompatible with moral agency, and the latter typically involves fault on the part of the actor in causing his or her addiction and, in any event, is inconsistent with the person-of-reasonable-firmness standard.

In 'The Utility of Desert' (Chapter 18), Paul H. Robinson and John M. Darley argue that criminal liability and punishment should be distributed in accordance with societal notions of justice. This promises to optimize the crime-control effectiveness of the criminal law because by maximizing its moral credibility with the community, the criminal law is able to (1) facilitate and communicate societal consensus on what is condemnable, and (2) gain compliance in morally ambiguous cases through deference to its moral authority. All other distributive principles are riddled with difficulties and, on balance, offer fewer crime-control gains than a distribution based on the community's perception of desert. This is largely because deviations from empirical desert are likely to undercut the moral credibility of the criminal law and therefore its crime-control effectiveness.

Finally, in Chapter 19, 'Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background"', Paul H. Robinson asks whether the criminal law should adopt excuses based on coercive indoctrination and rotten social background. His answer: under an empirical desert distribution of criminal liability and punishment, we should not grant an excuse based simply on rotten social background, but we should grant a limited defence of coercive indoctrination which might encompass some extreme cases of rotten social background. This follows from a consideration of the (un)willingness of lay people to assign blame in various real-life cases. The coercive crime-control distributive principles would not grant the defences because their recognition would undermine deterrence and incapacitation goals. The same is true of deontological desert and its traditional excuse theory, since the indoctrinated or socially disadvantaged defendant lacks the requisite cognitive or control dysfunction at the time of the offence.

Taken together, these essays offer a guide to the hugely important debate over the structure and limits of criminal law. Both issues – how the criminal law should be conceptually structured, and what limits it should operate within – represent significant challenges for criminal law theory, and deserve serious attention. While, to date, the 'limits' question has received more focus, we hope the 'structure' issue will be considered more seriously by future scholars.

Paul H. ROBINSON and Joshua Samuel BARTON

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