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THE MORAL EMOTIONS OF THE CRIMINAL LAW

By Stephen P. Garvey*

I. INTRODUCTION

Imagine you have committed a crime. You might experience any number of emotional responses to what you've done, ranging from self-satisfaction to self-disgust. But however you *do* feel, how *should* you feel? The question seems especially appropriate for a conference honoring Professor Herbert Morris and celebrating his work, for no one has shed light more on the moral emotions of the criminal law.¹ The line of thought that follows owes Professor Morris a large and obvious debt.

So, once again, how should you feel when you have committed a criminal wrong? "Guilty" comes immediately to mind. After all, juries return verdicts of guilty or not guilty, and guilt is indeed often the right emotional response. But guilt is not the only emotion that plays a part in the criminal law. For even though guilt is the right moral emotion for

* Professor of Law, Cornell Law School. I thank Steven Clymer, Carolyn Lee, Steven Shiffrin, all the participants at the conference celebrating the work of Professor Morris, and especially Professor Morris himself, for helpful comments and criticisms. I would also like to extend a special word of thanks to Professor Linda Ross Meyer for organizing such a wonderful conference and for inviting me to participate.

1. See, e.g., Herbert Morris, *Guilt*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 820 (Sanford H. Kadish ed., 1983) [hereinafter Morris, *Guilt*]; Herbert Morris, *Nonmoral Guilt*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 220 (Ferdinand Shoeman ed., 1987) [hereinafter Morris, *Nonmoral Guilt*]; Herbert Morris, *Shared Guilt*, in WISDOM: TWELVE ESSAYS 249 (Renford Bambrough ed., 1974) [hereinafter Morris, *Shared Guilt*]; Herbert Morris, *Concluding Remarks: The Future of Punishment*, 46 UCLA L. REV. 1927 (1999); Herbert Morris, *Guilt and Punishment*, 52 THE PERSONALIST 305 (1971) [hereinafter Morris, *Punishment*]; Herbert Morris, *Guilt and Suffering*, 21 PHIL. EAST & WEST 419 (1971); Herbert Morris, *Professor Murphy on Liberalism and Retributivism*, 37 ARIZ. L. REV. 95 (1995); Herbert Morris, *Reflections on Feeling Guilty*, 40 PHIL. STUD. 187 (1981); Herbert Morris, *Some Further Reflections on Crime and Punishment*, 18 LAW & PHIL. 363 (1999) [hereinafter Morris, *Further Reflections*]; Herbert Morris, *The Decline of Guilt*, 99 ETHICS 62 (1988) [hereinafter Morris, *Decline*]. Many of Professor Morris's earlier essays are reprinted in HERBERT MORRIS, ON GUILT AND INNOCENCE (1976).

some wrongdoers to experience, guilt can be either moral or nonmoral. Moreover, some wrongdoers should experience not guilt, but shame. “Guilty” is the right verdict in some cases, but in others the right verdict is “shameful.” Part II describes the circumstances under which criminal wrongdoers should experience guilt—moral, nonmoral, or both. Part III describes the circumstances under which criminal wrongdoers should experience shame.

But what difference does all this make? Why should we care about the moral emotions a wrongdoer experiences in the wake of his wrongdoing? The full answer comes in Part IV, but briefly the answer is this: Each of these emotions tells a wrongdoer that as a result of his wrongdoing something is not right with the world, and if he wants to make it right again he must do something to make amends. Yet *how* a wrongdoer should make amends depends on the moral emotion—moral guilt, nonmoral guilt, shame, or some combination thereof—he properly experiences as a result of what he’s done or failed to do.

II. GUILT

Guilt, as Professor Morris has taught, comes in two distinct forms: moral and nonmoral.² I discuss each in turn.

A. Moral Guilt

Moral guilt arises when we violate a rule or norm to which we subscribe or whose authority we otherwise recognize.³ These rules or

2. Professor Morris explains the difference between moral and nonmoral guilt in Morris, *Nonmoral Guilt*, supra note 1.

3. John Deigh characterizes this as the “prevailing view in moral philosophy.” John Deigh, *All Kinds of Guilt*, 18 *LAW & PHIL.* 313, 315 (1999). As Deigh explains more fully:

[Moral practices] consist . . . in the regulation of human conduct and human relations by requirements, rules, dictates, judgments, and other verbal expressions of a governing moral authority. Guilt is the appropriate feeling one experiences in response to one’s having ignored these requirements, broken these rules, disobeyed these dictates, etc., provided that one recognizes their authority and the authority of whoever stands behind or delivers them.

Id. at 314. *But cf.* Jeffrie G. Murphy, *Shame Creeps Through Guilt and Feels Like Retribution*, 18 *LAW & PHIL.* 327, 330, 335 (1999) (arguing that an overemphasis on

norms can derive from morality, law, social convention, or personal conviction. We subscribe to moral rules and legal rules; we internalize social norms; we heed the voice of conscience.⁴ Guilt can result when we violate rules or norms originating from any of these sources. The “drama of guilt,” as Professor Morris has noted, “is enacted upon a wide[] stage.”⁵ My focus here is on the guilt a wrongdoer feels when he violates a rule of the criminal law.

As Professor Morris has explained, a person acquires moral guilt, no matter what the source of the rule he violates, only if he is “culpably responsible”⁶ for violating it. A person therefore acquires moral guilt for violating a rule of the criminal law only if he is culpably responsible for violating that rule. Guilt, in short, depends on culpability. But what does it mean to be “culpable” in the eyes of the criminal law?

Culpability in the criminal law is typically understood as the presence of mens rea and the absence of excuse.⁷ A person is said to be criminally culpable if and when he commits a statutorily-proscribed act (or fails to perform a legally-imposed duty) with the requisite statutory mens rea (e.g., purpose, knowledge, recklessness) and without a valid excuse, such as duress. Of course, the criminal law sometimes imposes liability on those who lack culpability. Strict liability and vicarious liability are the obvious examples, but I would include liability based

“disobedience to authoritative rules” in the analysis of guilt distorts “[w]hat is central in many cases of guilt[,] [which is] . . . not just wrong[,] but *wrongful injury to others*”) (emphasis added).

4. Professor Morris has suggested an additional distinction between guilt and bad conscience. Guilt governs our relationships with others; conscience governs our relationship with ourselves. Guilt is triggered when we violate a rule we accept should govern our interactions with others; conscience is triggered when we violate a rule we have internalized. See Morris, *Further Reflections*, *supra* note 1, at 370. “Of course, quite commonly our conscience incorporates norms governing our conduct with others [such that] both our sense of guilt and our conscience may be activated” together. *Id.* at 371. Moreover, when one violates one’s conscience—when one betrays oneself—one usually experiences shame too, provided one’s seeing of oneself as deficient “comes as a [sudden] revelation [such that] we appear naked before ourselves.” *Id.* at 372.

5. Morris, *Guilt*, *supra* note 1, at 820.

6. Morris, *Nonmoral Guilt*, *supra* note 1, at 225.

7. Cf. Morris, *Guilt*, *supra* note 1, at 822 (“[I]t is normally a prerequisite for legal guilt that there be conscious fault or culpability with respect to wrongdoing, that is, there must be a ‘guilty mind’ (mens rea). Whatever defects one’s fair opportunity to behave otherwise than he did—typically some reasonable ignorance of facts or limitations on his freedom of action—may excuse him.”).

upon negligence as well.⁸ The criminal law is therefore overinclusive with respect to moral guilt. It imposes liability on some defendants who lack culpability and can thus incur no moral guilt.

Indeed, the criminal law suffers from a more profound form of overinclusiveness. The criminal law sometimes imposes liability when the usual requirements of criminal culpability are not satisfied. But even when those requirements are satisfied, the requirements of moral guilt need not be. The problem is that moral guilt requires knowledge of the law,⁹ whereas the usual requirements of criminal culpability do not. A person acquires moral guilt only if he acts in *defiance* of the law,¹⁰ but he can defy the law only if he knows what it demands and then acts contrary to, or at least in reckless disregard of, its demands. Nonetheless, the criminal law insists that ignorance of the law is no excuse.¹¹ *Ignorantia legis neminem excusat*.

Of course, if I commit a *malum in se* crime, chances are good, at least if I know what I'm doing, that I know what I'm doing is wrong and that the criminal law forbids my doing it. It's pretty safe to assume that someone who takes your car or your money at gunpoint, or who hits you for no reason, or who burns down your house for the fun of it, realizes he's committing a crime. That, of course, is precisely what the criminal law presumes.¹² But the criminal law makes that presumption conclusive, and it does so not only for *malum in se* crimes, but for *all* crimes.

8. I suggest below that criminally negligent conduct reflects an unreasonable mistake of fact. Defendants held liable on the basis of criminal negligence should, if anything, feel shame, not guilt. See *infra* Part III.

9. See, e.g., Morris, *Decline*, *supra* note 1, at 67 (“[I]gnorance of law . . . certainly bears upon culpability as I have defined it.”); *id.* at 72 (noting that the unavailability of “reasonable ignorance or mistake of law” as a defense to liability is an “exception[] to the model of guilt within law”); cf. Morris, *Guilt*, *supra* note 1, at 823 (“Guilt is a human sentiment that manifests itself . . . in our feeling guilty when we do *what we believe* to be wrong.” (emphasis added)); *id.* (“Guilt is the feeling most closely connected with wrongdoing, taking as its object belief in wrongdoing.”).

10. Jean Hampton develops this idea of culpability as defiance in Jean Hampton, *Mens Rea*, 7 SOC. PHIL. & POL’Y 1 (1990), and Jean Hampton, *The Nature of Immorality*, 7 SOC. PHIL. & POL’Y 22 (1989).

11. But cf. Dan Kahan, *Ignorance of the Law Is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127, 153 (1997) (arguing that mistake of law doctrine “generally excuses individuals for mistakes of law that even a virtuous person would make”).

12. A standard citation is 4 WILLIAM BLACKSTONE, COMMENTARIES *27 (“For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defense.”).

Yet, as Professor Morris has said, this presumption tacitly concedes the point. Ignorance of the law is no excuse, not because ignorance of the law is *irrelevant* to criminal culpability and moral guilt, but because the law presumes that no one ever suffers from such ignorance.¹³ When the domain of the criminal law was limited to *malum in se* crimes, that presumption made sense. But it makes far less sense today when the criminal law has expanded well beyond that domain.¹⁴ An honest mistake of law is a valid defense to moral guilt, and the criminal law should withhold liability in the face of such a mistake, provided that mistake is an honest and reasonable one.¹⁵

B. Nonmoral Guilt

Moral guilt is not the only form of guilt with a role in criminal law. People often feel guilty even when they aren't culpable; consequently, their guilt cannot be moral guilt. For example, if a man sells adulterated milk, but he neither knows nor should know that it's adulterated, he might tell himself that he has no reason to feel guilty when a buyer eventually gets sick.¹⁶ He's not culpable. Nonetheless, he might still *feel* guilty no matter how much he tells himself he shouldn't. Why?

You might say that his guilt is misplaced. He really shouldn't feel guilty even though he says he does. Moral guilt, you might say, is the

13. See Morris, *Decline*, *supra* note 2, at 68 (“[A] number of conditions for being morally guilty . . . must be presuppositions of legal guilt as well Scattered exceptions to this might exist, and where they do, it deserves noting; we deploy justifications that commonly invoke ‘presumptions’ that a person must, say, know the law or in fact be culpable. By doing this, we reveal our attachment to one’s being guilty as a basis for one’s being legally guilty.”).

14. For an insightful account of the forces behind this expansion, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

15. More specifically, I would suggest that a defendant who makes an honest and reasonable mistake of law should be entitled to an excuse and bears neither moral guilt nor shame. However, a defendant who makes an honest but unreasonable mistake of law, and who should therefore not be excused, bears the burden of shame, but not of moral guilt. See *infra* Part III (discussing shame).

Professor Morris argues that reasonable ignorance or mistake of law should be recognized as an excuse within a paternalistic theory of punishment. Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 270 (1981). The case on retributivist grounds for recognizing mistake of law as a defense is well made in Douglas Husak & Andrew von Hirsch, *Culpability and Mistake of Law*, in ACTION AND VALUE IN CRIMINAL LAW 157 (Stephen Shute et al. eds., 1993).

16. Cf. *Commonwealth v. Farren*, 91 Mass. (9 Allen) 489 (1864).

only real kind of guilt, and the milk seller has nothing to feel morally guilty about because he didn't act culpably. The better answer is that his guilt is genuine. He *is* guilty. But his guilt is not moral guilt. It's a different form of guilt altogether, which we might call nonmoral guilt because it arises in the absence of culpability.¹⁷ According to Professor Morris, nonmoral guilt is the guilt I experience when I find myself wishing harm on another but do nothing whatsoever to realize that wish; or when luck saves me from death in a flood, but the rest of my family perishes; or when I, as an American citizen, feel guilty for the internment of Japanese-Americans during the Second World War.¹⁸

The distinction between moral and nonmoral guilt is perhaps most helpful in the criminal law for the light it can shed on the problem of attempted crimes and on the significance of resulting harm for criminal liability more generally. Consider the following two cases: *A* intends to kill *V*. He loads his pistol, takes aim at *V*, and fires. The gun goes off, and *V* is hit and killed. *B* intends to kill *V*, too. He loads his pistol, takes aim at *V*, and pulls the trigger. But the gun misfires. *A* is guilty of murder—he actually succeeded in causing *V*'s death. *B*, on the other hand, is guilty only of attempted murder—he tried his best to kill *V*, but failed.

Now to the question: Should it matter that *A* succeeded and *B* didn't? Is *A* more culpable than *B*? Should he feel more guilty? If so, should *A* be punished more severely than *B*?

Most jurisdictions would in fact punish *A* more than *B* for the simple reason that *A* succeeded in causing the harm he intended, whereas *B* did not.¹⁹ In contrast, the Model Penal Code generally treats attempts and completed crimes on a par.²⁰ Commentators likewise disagree. Subjectivists argue that attempts and completed crimes should

17. See Morris, *Nonmoral Guilt*, *supra* note 1, at 226. Jeffrie Murphy and John Deigh have suggested, however, that what Professor Morris calls nonmoral guilt is better understood as a different kind of moral guilt. See Deigh, *supra* note 3, at 325; Murphy, *supra* note 3, at 331.

18. See Morris, *Nonmoral Guilt*, *supra* note 1, at 226-40 (discussing these three forms of nonmoral guilt under the headings "guilt for states of mind alone," "guilt over unjust enrichment," and "vicarious guilt").

19. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.02[C], at 349 (2d ed. 1995).

20. See MODEL PENAL CODE § 5.05(1). Even the Model Penal Code would, however, treat murder and attempted murder differently: it would treat murder as a first degree felony, *see id.* § 212.2(2), and attempted murder as a second degree felony. *See id.* at § 5.05(1).

be punished alike.²¹ Why, they ask, should punishment depend on luck? Objectivists insist that completed crimes should be punished more severely than mere attempts, even complete attempts.²² Actual harm, they say, matters, even if it depends on luck.²³

In my view, the distinction between moral and nonmoral guilt helps us see that each side has a point. Moral guilt depends on the harm a person intends to cause or risks causing, whether or not he succeeds in actually causing it. Consequently, moral guilt is about culpability, not actual results. In contrast, nonmoral guilt of the sort at issue here depends on the harm for which a person is the but-for and proximate cause. Nonmoral guilt is about actual results and therefore about causation. If so, then the *moral* guilt of *A* and *B* is the same; each did his best to bring about the harm to *V*, although only *A* succeeded. *A*'s guilt is nonetheless greater than *B*'s because *A*, not *B*, must live with an additional burden of *nonmoral* guilt for the harm he actually caused.

In sum, subjectivists and objectivists are both right. Subjectivists are right insofar as they claim that *A* and *B* bear the same degree of moral guilt; objectivists are right insofar as they claim that *A* and *B* bear different degrees of guilt overall, with *A*'s burden being heavier than *B*'s. Actually causing a proscribed result does matter, but it matters in a particular way. It increases *A*'s guilt overall, though only because it adds nonmoral guilt, from which *A* alone suffers, on top of the moral guilt to which *A* is liable to the same degree as *B*.²⁴

Return now to the milk seller who sells adulterated milk but neither knows nor should know that it's adulterated. How should we understand the guilt he feels? In the attempt hypothetical with *A* and *B*,

21. See, e.g., Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 7-17 (1994) (arguing for the "irrelevance of harm to culpability"); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 119 (1995) (arguing that "completed crimes and unsuccessful attempts [are] essentially the same"). At least with respect to completed attempts, Professor Morris appears to align himself with the subjectivists. See Herbert Morris, *Punishment for Thoughts*, 49 THE MONIST 342, 358 (1965) ("Those who take the last step are, in general, as blameworthy as those who succeed.").

22. See, e.g., Michael Moore, *The Independent Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 240 (1994).

23. For empirical evidence supporting the claim that this intuition is widespread, see PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 206 (Richard E. Nisbett, ed. 1995).

24. See Alexander, *supra* note 21, at 8 n.28 (suggesting this explanation). Alexander argues for the elimination of criminal liability for incomplete attempts in Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1168-74 (1997).

B intended to cause harm but actually ended up causing none. *B* should thus experience moral guilt without nonmoral guilt. Our milk seller, in contrast, intended to cause no harm. Indeed, we assumed he was completely free from fault, including negligence, with respect to the harm he actually caused because we assumed that he neither knew nor should have known that the milk was adulterated. Yet, he ended up causing harm all the same. The milk seller should thus experience nonmoral guilt without moral guilt.

III. SHAME

Guilt and shame focus on different objects. Guilt focuses on one's acts (or omissions), either on the harm one intends to cause or recklessly risks causing through one's acts (moral guilt), or on the harm one actually and proximately does cause through one's acts (nonmoral guilt). Shame, in contrast, focuses on the self and on some shortcoming in the self's character.²⁵ The criminal law's flagship emotion is guilt,²⁶ and especially moral guilt, but what about shame? Does it too have a role to play in the criminal law?²⁷

25. See, e.g., Morris, *Punishment*, *supra* note 1, at 318-19 (With guilt what is crucial is "disobeying an order or violating a rule With shame what is crucial is a failing to correspond with a model identity."); *id.* ("The critical concept associated with shame is failure, shortcoming, not violation."); see also SIMON BLACKBURN, *RULING PASSIONS: A THEORY OF PRACTICAL REASONING* 17 (1998) ("We feel ashamed in situations in which we are not up to scratch, even when no question of guilt arises"); JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* 151 (1999) ("[S]hame is 'characterological' or 'global[,]'" and "[i]n shame one thinks of oneself as a bad person, not simply as someone who did a bad thing."); ALLAN GIBBARD, *WISE CHOICES, APT FEELING: A THEORY OF NORMATIVE JUDGMENT* 137 (1990) ("Guilt . . . normally involves a consciousness of having done wrong, and shame a consciousness of some personal inadequacy."); WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 34 (1997) ("Shame . . . involve[s] us in complex judgments about our standing relative to others and the quality of our characters."); JOHN RAWLS, *A THEORY OF JUSTICE* 446 (1971) (concluding that in moral guilt "we focus on the infringement of the just claims of others and the injury we have done them" whereas in moral shame "we sense the diminishment of self . . . from our disappointment with ourselves for failing to live up to our ideals"); GABRIELE TAYLOR, *PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT* 89 (1987) ("[F]eelings of guilt are localized in a way in which feelings of shame are not localized; they concern themselves with the wrong done, not with the kind of person one thinks one is.").

26. Cf. Morris, *Decline*, *supra* note 1, at 62 ("In law, guilt clearly assumes its most systematic, its most recurrently public deployment.").

27. I should note that shame, like guilt, can be moral or nonmoral. Moral shame is the shame one feels when one realizes one's character is not what it ought to be; nonmoral shame is the shame one feels when one realizes one's character is not what it

I begin my answer with this caveat: so-called “shaming penalties” have received a good deal of attention lately in the popular press as well as in academic literature. These penalties, which are usually imposed as a condition of probation, broadcast or publicize an offender’s wrongdoing and thereby expose the wrongdoer to the public’s gaze, either directly (as when an offender stands on the courthouse steps carrying a sign telling of his crime) or indirectly (as when he takes out a newspaper ad describing his crime and apologizing for it). These penalties have both able supporters and able detractors.²⁸ I don’t mean to enter that debate here.²⁹ Instead, I want simply to ask whether shame is the proper moral response to some forms of wrongdoing, not whether we should establish punishments expressly intended to evoke such a response, nor, if we should establish such punishments, whether they should take forms like those of the shaming penalties we see today.

So, should criminal wrongdoers ever feel ashamed? One answer would be an emphatic *no*. The reasoning behind this answer goes something like this: guilt attaches to one’s actions; shame attaches to one’s character. In a liberal political order like ours, the criminal law is and should be concerned only with a person’s actions, not with his character.³⁰ Therefore, the criminal law is and should be concerned only with guilt, not shame.

I want to suggest, however, that shame is indeed the emotion some

ought to be; nonmoral shame is the shame one feels when, for example, one feels shame about one’s physical appearance. See Murphy, *supra* note 3, at 337-38 (discussing the distinction between moral and nonmoral shame). The shame to which I refer in the text is meant to include only moral shame.

28. Compare Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (defending shaming penalties), with Toni M. Massaro, *The Meanings of Shame—Implications for Legal Reform*, 3 PSYCHOL., PUB. POL’Y & L. 645 (1997) (criticizing shaming penalties), and James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions*, 107 YALE L.J. 1055 (1998) (same).

29. Some of my own thoughts on the debate can be found in Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998).

30. See, e.g., MICHAEL MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 53 (1993) (“[W]e do not deserve punishment for violation of morality’s ideals of virtuous character.”); George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687, 699 (2000) (“We praise and condemn people for the kinds of character they have developed, but this perspective is not compatible with the deliberate limitation, [which is characteristic of liberal regimes,] of criminal punishment to the condemnation of actions.”); Heidi M. Hurd, *Why Liberals Should Hate “Hate Crime Legislation”* 20 LAW & PHIL. 215, 229 (2001) (“[A] theory that takes the proper goals of criminal law to be the punishment of vice and the cultivation of virtue . . . [pursues] distinctively *non-liberal* goals.”).

criminal wrongdoers should feel. Criminal liability does of course require an act. The *actus reus* requirement sees to it that no one is punished unless he has acted or failed to act in the face of a legal duty to do so.³¹ Nonetheless, standards of character play an important backstage role in determining criminal liability, for while the criminal law punishes no one in the absence of an act, neither does it punish anyone who manages to live up to a particular—although ill-defined—standard of character, because defendants who live up to that standard will be excused.³² Assessments of character therefore go hand in hand with assessments of criminal liability. Let me explain.

An otherwise guilty defendant can avoid liability if he puts forward a valid excuse. So, for example, I will be partially excused for murder—and convicted of manslaughter instead—if I killed in the “heat of passion.” I will, however, get that break only if whatever angered me would also have angered a reasonable person, and only if a reasonable person would have lost control in the face of such anger, as did I.³³ So, too, will I be excused if in the middle of deer season I mistakenly shoot and kill someone believing the person I shot was a deer, but again, only if my mistake of fact was reasonable.³⁴ Likewise, if I rob a convenience store because a thug has threatened to beat me to a pulp if I don’t, I can ask for an excuse on the basis of duress, and I’ll get it, provided a reasonable person would have done the same thing under the circumstances.³⁵

A defendant who, due to mental disease or defect, cannot tell right from wrong and who is therefore insane will also avoid liability.³⁶ The

31. See, e.g., MOORE, *supra* note 30, at 59 (“There is and should be an act requirement, although it is and should be subject to an exception in the case of certain omissions.”).

32. See John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575, 578 (1998) (“The gist of an excuse . . . is precisely that the person with the excuse lived up to our expectations [regarding the applicable standard of character].”).

33. See, e.g., DRESSLER, *supra* note 19, § 31.07[B][2][b][i], at 492.

34. This is of course the rule only with respect to so-called general intent offenses at common law. See, e.g., *id.* § 12.06[A], at 138. The modern approach would treat such a mistake as a failure of proof “defense,” not as an excuse.

35. See, e.g., *id.* § 23.08[A], at 289 (describing Model Penal Code § 2.09(1), according to which a defendant can claim duress if he was coerced to commit the offense “by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness would have been unable to resist”).

36. This assumes that a valid claim of insanity is based on cognitive limitations that undermine an actor’s ability to tell right from wrong. See M’Naghten’s Case, 8 Eng. Rep. 718 (1843). Professor Morris’s published thoughts on criminal insanity can be found in Herbert Morris, *Criminal Insanity*, 17 INQUIRY 345 (1974) (reviewing HERBERT FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* (1972)).

criminal law says such a defendant is to be excused, because insanity is typically considered an excuse.³⁷ I would prefer, however, to say that insane defendants, insofar as they lack the capacity to tell right from wrong, are outside our moral and legal blaming practices altogether. They are not moral agents, and as such they are not even candidates for guilt. Consequently, it would be more apt to say they are *exempt* from criminal liability, not that they are *excused*.³⁸ Excuses are reserved for moral agents, which the insane are not.

Setting insanity to one side, the excuses of the criminal law arguably reflect a more general principle: a defendant will be excused for committing an otherwise criminal act if he or she lacked a *fair opportunity* to choose not to commit that act.³⁹ If so, the critical question becomes: when is the defendant's opportunity to choose the non-criminal course of action *unfair* and thus his choice to commit the crime excusable?

The answer is that it depends, and it depends in particular on what a *reasonable person* in the defendant's situation would have done. If the reasonable person would have done as the defendant did, then the opportunity facing the defendant was unfair, and the defendant will be excused. Conversely, if the reasonable person would not have committed the crime, then the opportunity facing the defendant was not unfair, and the defendant will not be excused. Thus, as far as the law of excuse is concerned, the reasonable person is the role model for us all.

The reasonable person also plays the central role in the law of criminal negligence. Under the Model Penal Code, for example, I can be held liable for negligent homicide if, having created a substantial and unjustifiable risk of causing, I actually cause another's death, even

37. See, e.g., Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 242-43 tbl.1 (1982) (classifying insanity as an excuse).

38. See, e.g., R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 167-68 (1996).

39. This principle reflects the so-called choice theory of excuse, the classic statement of which can be found in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 152 (2d ed. 1970) ("What is crucial is that those whom we punish should have, when they acted, the normal capacities, physical and mental, for doing what the law requires and from abstaining from what it forbids, and a fair opportunity to exercise those capacities."). The theory is ably defended in Michael Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29 (1990), and Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME AND JUSTICE: A REVIEW OF RESEARCH 329 (Michael Tonry ed., 1998). Professor Morris appears also to have endorsed the choice theory. See, e.g., Morris, *Nonmoral Guilt*, *supra* note 1, at 63 ("The absence of a requisite culpability state or one's fair opportunity to behave otherwise than one did, precludes [legal] guilt.").

though I'm unaware of the risk I've created, provided a reasonable person would have been aware of it. In other words, the criminally-negligent defendant makes an unreasonable mistake of fact. He fails to see the fact that his conduct creates a substantial and unjustifiable risk of causing a proscribed harm,⁴⁰ a fact which would not have been lost on the reasonable person.

But who *is* the reasonable person? What does he or she look like? The law itself sometimes provides a glimpse of the reasonable person. So, for example, the common law held as a matter of law that the sight of one's lover *in flagranti delicto* would never provoke a reasonable person to lethal violence, although the sight of one's wife similarly situated would. In fact, the reasonable person of the common law generally followed fairly well-defined rules of conduct. The reasonable person of today's criminal law, in contrast, is generally more sensitive to context. Today's criminal law thus tends to let juries decide who the reasonable person is, how he would have acted in the defendant's situation, and consequently, how the defendant should have acted.

For their part, academics disagree about the character of the reasonable person. One theory says that the reasonable person should be understood as the average or ordinary person.⁴¹ The reasonable person is your average Joe. Another theory says that the reasonable person should be understood as one who acts in accordance with the social norms that define the relevant social role he or she occupies.⁴² The reasonable person is, one might say, the dutiful person. Still another theory says that the reasonable person should be understood as the person who acts as a good person would act, no matter how the average or ordinary person would have acted, and no matter what

40. Cf. Michael Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 326 (1996) ("Culpably inadvertent risk-taking involves a kind of epistemic failure. One who acts unreasonably is one who *believes* unreasonably."); *id.* at 328 (Negligence is culpable because it involves "not seeing the world more clearly."); A.P. Simester, *Can Negligence be Culpable?*, in OXFORD ESSAYS IN JURISPRUDENCE 85, 95 (A.P. Simester ed., 4th Series 2000) ("The most important factor in any explanation of negligence is defective beliefs. In the troubling cases, the defendant cares about the harm she causes, and would not have chosen to cause it. Unfortunately, she did not see the risk.").

41. See, e.g., Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798, 800 (1991) (identifying and criticizing this position); cf. HART, *supra* note 39, at 153, 155 (using the terms "ordinary" and "average" interchangeably with the term "reasonable").

42. See, e.g., Dan Kahan & Martha Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 366 (1996) (arguing that reasonableness is and should be assessed "in accordance with prevailing norms").

prevailing social norms prescribe.⁴³ The reasonable person is the good person.

Yet despite the controversy and uncertainty surrounding who the reasonable person is, or who he should be, this much is clear: the reasonable person represents a *normative* standard. The reasonable person acts in a particular way, and the criminal law requires us all to act as the reasonable person would have acted. The reasonable person therefore reflects a standard of character—one might even say virtue—to which we must all conform. Consequently, when a criminal defendant interposes a plea of excuse, the criminal law ultimately requires us to ask how a reasonable person would have acted under the circumstances, and did the defendant measure up?

If the answer is yes, then the criminal law will grant an excuse: no one should be blamed for having acted as a reasonable person would have acted. But if the answer is no, then the criminal law will refuse an excuse. The defendant, however reasonably he usually acts, has here and now fallen below what the criminal law requires. He has failed to measure up to the ideal of character the criminal law demands. Moreover—and returning now to the main point—when a person realizes that he has failed to live up to an ideal of character he believes he *should* live up to, the proper emotional response is not guilt, but shame.

Now, the fact that a defendant has on the present occasion fallen short of the standard of the reasonable person does not necessarily mean that he characteristically falls short of that standard, or that his present shortfall necessarily manifests or expresses some deeper or more abiding defect of character.⁴⁴ One shameful act alone does not a

43. See, e.g., Jody Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 789–90 n.32 (1994) (arguing that “reasonableness” should be determined “from the standpoint . . . of ‘social morality,’” where “social morality” is understood as being “rooted in *aspirations* for the community as a whole” (emphasis added)); Gardner, *supra* note 32, at 579 (“The character standards which are relevant to . . . excuses are not the standards of our own characters, nor even the standards of most people’s characters, but the standards to which our characters should, minimally, conform.”); Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1401 (1997) (arguing that “judges [should] . . . shape the jury’s inquiry [into the reasonableness of a defendant’s claim of adequate provocation] by excluding reasons that are obviously improper.”).

44. Cf. Moore, *supra* note 40, at 57 (“Judgments of negligence don’t depend on any general traits of carelessness; an isolated act of negligence suffices for responsibility for the harm that act causes.”); *But cf.* R.A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345, 379 (1993) (“[A] criminal action is . . . logically

shameful character make. The psychology of shame is not, however, so careful to distinguish between shame—a condemnation of self—and a single shameful act. The “paradox of shame is that it ‘involves taking a single unworthy action or characteristic to be the whole of a person’s identity.’”⁴⁵ Shame tends to overgeneralize.

Nonetheless, insofar as shame reflects a judgment about a person’s character, and not just his one-time failure to live up to an ideal of character, a defendant should not feel ashamed simply because he has this one time failed to act as the reasonable person would have acted. He should not feel ashamed unless, in addition to having fallen short here and now, he characteristically falls short, such that his present shortfall does indeed manifest or express a defect of character.⁴⁶ If you do something that falls below a standard of character to which you do and should adhere, you have performed a shameful act, but you should only feel ashamed of yourself if your shameful act truly reflects a shameful character.

In sum: when a defendant makes a good-faith plea of excuse, but finds his plea rejected because he failed to live up to the standard of character of the reasonable person, the emotional reaction he should experience will depend on the content of his character. On the one hand, if his present shortfall accurately reflects a deficiency of character, then he should feel ashamed. He should also feel guilt (of the nonmoral form) for any harm his shortfall actually and proximately caused. On the other hand, if his character is such that he normally hits the expected mark, and if his shortfall doesn’t manifest any defect of character, then he really has nothing to feel ashamed about. His failure on the present occasion reveals no deeper or more enduring problem with who he is. Nor should he feel moral guilt, since he has not chosen

sufficient for liability: a single act of unjustified theft committed by one who is neither mentally disordered nor acting under the kind of pressure which would excuse the action, *suffices to define* him as a criminally dishonest thief.” (emphasis added)).

45. ELSTER, *supra* note 25, at 152 (quoting Janice Linsay-Hartz, Joseph de Rivera & Michael F. Mascolo, *Differentiating Guilt and Shame and Their Effects on Motivation*, in SELF-CONSCIOUS EMOTIONS 274, 297 (June Price Tangey & Kurt W. Fischer eds., 1995)).

46. Insofar as a finding of criminal liability reflects the criminal law’s judgment that a defendant who unsuccessfully pleads an excuse should be ashamed, then the criminal law is *overinclusive* with respect to shame, because it calls upon a defendant to feel ashamed when shame is sometimes inappropriate. Conversely, the criminal law is also *underinclusive* with respect to shame, because even the most shameful of characters will in deference to the principle of legality remain free from criminal liability as long as his shameful character never manifests itself in action that violates a criminal prohibition. *Cf.* GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* § 10.3, at 800 (1978).

to defy the law. Such an offender has caused harm, but nothing more. As such, the only emotional burden he rightly bears is that of nonmoral guilt.⁴⁷

IV. MAKING AMENDS

Most philosophers of the criminal law are lucky if their name comes to be associated with one theory of punishment. Professor Morris has two, each of which defends a counterintuitive thesis. The first, set out in *Persons and Punishment*,⁴⁸ explains why a wrongdoer has a *right* to be punished. The second, set out in *A Paternalistic Theory of Punishment*,⁴⁹ explains why punishment is *good* for a wrongdoer. But how can punishment be understood as something that's good, let alone something to which anyone in their right mind would claim to be entitled?

In *Persons and Punishment*, Professor Morris portrays the criminal law as a system of mutual self-restraint. I won't steal your TV if you won't steal mine, and if neither of us steals from the other, we're both better off. What makes a criminal a criminal is his choice not to play by the rules. Instead, he chooses to free ride on the collective self-restraint of the rest of us, and in so doing arrogates to himself a measure of moral freedom to which he is not entitled.⁵⁰ Punishment is a burden that corresponds to and offsets this ill-gotten gain, setting the balance right once again.⁵¹ Moreover, punishment is also the way we must respond to a wrongdoer if we want to respond to him as a *person*.⁵² Thus, because

47. Cf. Murphy, *supra* note 3, at 340 n.24 ("Not all moral failures raise this worry about the self. Moral wrongs that are out of character, for example, may be occasions for guilt (and desires to make restitution, etc.) but not moral shame.").

48. Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968). Other statements of this theory, or of theories akin to it, can be found in MICHAEL DAVIS, TO MAKE THE PUNISHMENT FIT THE CRIME (1992), WOJCIECH SADURSKI, GIVING DESERT ITS DUE (1985), and GEORGE SHER, DESERT (1987).

49. See Morris, *A Paternalistic Theory*, *supra* note 15.

50. See Morris, *supra* note 48, at 477 ("If a person fails to exercise self-restraint even though he might have and gives into such inclinations, he renounces a burden which others have voluntarily assumed and thus gains an advantage which others, who have restrained themselves, do not possess.").

51. See *id.* at 478 ("Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.").

52. See *id.* at 490 ("The primary reason for preferring the system of punishment as against the system of therapy might have been expressed in terms of the one system treating one as a person and the other not.").

a criminal wrongdoer, like anyone else, has a right to be treated as a person, he also has—as odd as it might sound—a *right* to be punished.⁵³

If *Persons and Punishment* explains how punishment can be seen as a right of the person punished, *A Paternalistic Theory of Punishment* explains how punishment can be seen as good for him.⁵⁴ According to this theory, punishment should prompt the wrongdoer to become, or to enable him to realize his status as, “a morally autonomous person attached to the good,”⁵⁵ by which Professor Morris means in general a person who lives a life “freely attached” to “those relationships with others that sustain and give meaning to life.”⁵⁶ When a person commits a criminal wrong, he not only causes material damage, but he also damages the relationships that define “the good.” His wrongdoing “dissolves [his] union with others”⁵⁷ and produces an “inevitable separation from those with whom [he] was joined.”⁵⁸ Punishment enables the wrongdoer to “mend[] what has been torn.”⁵⁹ Punishment is thus good for the wrongdoer because it repairs a relationship which is itself good.

What, though, do these justifications for punishment have to do with the moral emotions? The answer begins from the realization that punishment, as Professor Morris has said, is “a rite of passage back to union and restoration of the whole,”⁶⁰ and as such is a good to which all offenders have a right. At the same time, however, punishment is also the means by which a wrongdoer rids or expiates himself of the emotional burden of his wrongdoing. Moreover, different moral emotions call for different expiatory responses and therefore punishments with different meanings. Moral guilt calls for one type of response, nonmoral guilt for another, and shame for yet another.

A. Expiating Guilt, Moral and Nonmoral

The way to expiate nonmoral guilt is straightforward. When I am the but-for and proximate cause of material injury to another, the right

53. See *id.* at 490. (“[A] man has a right to be punished if he is guilty of some offense.”).

54. I hasten to add that promoting the offender’s good is for Professor Morris *a* justification for punishment, but not the only one. See Morris, *supra* note 15, at 264.

55. *Id.* at 265.

56. *Id.*

57. Morris, *Punishment*, *supra* note 1, at 311.

58. *Id.* at 310.

59. *Id.*

60. *Id.*

response, beyond a simple and sincere apology, is to make compensation or reparations for the harm I've caused. The victim's property must be returned, the medical bills paid, the pain and suffering compensated.

Moral guilt is different. Material reparations won't work to remove its stain. Moral guilt arises from culpable wrongdoing, and culpable wrongdoing means that I have, without excuse or justification, violated a rule or norm to which I am and should be committed. Under these circumstances, the wrong I commit goes well beyond simply causing my victim material injury. It also produces moral injury, which consists in the symbolic message I express or communicate through my actions.

When I violate a rule or norm to which I am committed and to which I expect everyone else to be committed, my knowing violation of the rule sends a message, whether I intend it to or not. I say through my actions: "*You* may have to follow the rules, but *I* don't. I set myself over and above the rules I expect everyone else to obey. Only the little people follow the rules." I say, in short: "I'm better than you." But this message is of course morally false; I'm *not* better than you. My conduct therefore also displays pride, or more precisely, arrogance—an overweening and inflated sense of self.

If I expiate nonmoral guilt through reparations and compensation, how do I expiate moral guilt? How do I make amends for the moral injury my wrongdoing has caused? How do I take back the false message of moral superiority my wrongdoing has broadcast?

The answer, as I have argued elsewhere in more detail,⁶¹ is that I submit to punishment. The hardship and suffering I endure through punishment (and which are therefore experienced as a form of penance) express my humility, which is the antidote to the arrogance expressed through my wrongdoing. I thereby take back as best I can—indeed, the only way I can—the false message of moral superiority I proclaimed through my wrongdoing. "I am *not*," I now say, "any better than my victim. I, too, am subject to the same moral limits." "We are," I affirm, "moral equals."

61. See Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999) [hereinafter Garvey, *Atonement*]; see also Stephen P. Garvey, *Two Kinds of Criminal Wrongs*, 5 PUNISHMENT & SOC'Y 279 (2003).

B. Expiating Shame

Shame and guilt focus their critical self-scrutiny on different objects. Guilt focuses on my particular acts and omissions. Shame focuses on me and my character, or at least some aspect of it. Guilt asks: how could I have *done* that? Shame, in contrast, asks: how could *I* have done that?⁶²

Insofar as it focuses on the self as a whole, and not simply on the self's acts, shame is reputed to be a dangerous emotion. Shame cuts deep, for while I can disassociate me from my acts and any guilt attending them, I cannot so easily separate me from myself. Moreover, insofar as we feel shame when we see ourselves naked, exposed to the gaze of others (real or imagined), a natural response is to escape from sight. Maybe we run or hide. Maybe we just "zone out" altogether. Or if escape is impossible, maybe we lash out in an effort to destroy the source of our shame. Yet inasmuch as the source of shame is ultimately the self itself, shame can in the extreme result in self-destruction and suicide. Shame's reputation as a dangerous emotion is therefore not entirely undeserved.

But shame will not go away. For all its attendant dangers, shame is the emotion a wrongdoer should feel when he characteristically falls short of the standard of character to which the criminal law holds us all to account.⁶³ Moreover, a wrongdoer's response to shame need not assume a pathological form. On the contrary, as Professor Morris has written, a healthy response to "shame leads to creativity."⁶⁴ In particular he writes, "feeling shame because of what we have done, we naturally see ourselves as shameful persons and the steps that are appropriate to relieve shame are becoming a person that is not shameful."⁶⁵ Jeffrie Murphy echoes this idea: "[A]ttention to the

62. Cf. Murphy, *supra* note 3, at 340–42 ("[T]he difference between 'I am sorry I did that' and 'I am sorry that I was the kind of person who (for those motives) could have done that' is subtle but important.").

63. My endorsement of shame here represents a retreat from the position I expressed in Garvey, *Atonement*, *supra* note 61, at 1812, and Garvey, *supra* note 29, at 766–67.

64. Morris, *Punishment*, *supra* note 1, at 318.

65. *Id.* at 319. See also PAUL WOODRUFF, REVERENCE: RENEWING A FORGOTTEN VIRTUE 73 (2001) ("Shame is different from guilt . . . [F]eelings of shame, and the fear of shame, push us to live better and be better people."); Jennifer C. Manion, *The Moral Relevance of Shame*, 39 AM. PHIL. Q. 73, 73 (2002) ("locat[ing] the value of shame as a moral emotion in both the self-reflection it entails and the way in which it can motivate an agent to seek a (re)considered moral identity and a closer approximation to an

shamed self can be a sign of health and a stimulus to moral improvement—the attempt to mold a better character—through the painful prod that such shame provides.”⁶⁶

Thus if nonmoral guilt is expiated through the hardship of making of reparations, and if moral guilt is expiated through hardship that symbolizes one’s humility, then shame is expiated through hardship symbolizing one’s commitment to a process of self-reform aimed at learning to live up to the standards of character the criminal law rightly demands.⁶⁷

V. CONCLUSION

Guilt and shame are, as Professor Morris has said, emotions built on different moralities.⁶⁸ Guilt is built on a morality of choice: we are responsible for what we do because and insofar as we choose to do it. Shame is built on a morality of character: we are responsible for our characters simply because we are our characters. I close with the question that brings these two moralities and their respective grounds of responsibility together: Is a person responsible—in the sense of responsibility that attaches to choice—for who they are? Do we choose our characters? Or, in other words, should a person feel guilty whenever he feels ashamed?

The criminal law generally steers clear of this question. It doesn’t care how a wrongdoer got the shameful character he has, or whether that’s the character he chose for himself. But it should care, at least

improved and improving moral ideal”).

66. Murphy, *supra* note 3, at 341.

67. Professor Morris might well disagree with this claim, having written that “[p]unishment [for a shameful act] is inappropriate and cannot serve as it does with some types of guilt to restore relationships.” Morris, *Shared Guilt*, *supra* note 1, at 270. On this point, however, I am inclined to agree with much of what Jeffrie Murphy says when he writes:

I am not . . . sure that Morris is correct when he says that receiving punishment is inappropriate as a way of alleviating shame. This may depend on the *purpose* of the punishment. If the purpose is purely retributive—to administer the suffering that is properly proportional to one’s desert—then Morris is probably right in claiming its inappropriateness to shame. But what if its purpose is reformative—designed, say, to mortify the flesh and humble the will in the hope that a new and better self may emerge from the punitive process? This could, I think, be appropriate as a means of alleviating shame.

Murphy, *supra* note 3, at 343 n.30.

68. See Morris, *Punishment*, *supra* note 1, at 320.

when time comes to pass sentence. It should care, not so much, or at least not only, for the wrongdoer's sake, but also for the sake of those in whose name he is punished. Why? Because caring about how a person got to be the way he is fosters compassion—a moral emotion no system of criminal punishment should exclude.

Compassion involves “a certain imaginative reconstruction of someone's condition and . . . a concern for his good.”⁶⁹ Compassion doesn't insist that we excuse wrongdoers who are entitled to no excuse. It does, however, serve as a constant reminder of the simple but profound fact that we share with wrongdoers a common humanity and vulnerability to fate.⁷⁰ Compassion can therefore lead to humility,⁷¹ a virtue that guards against cruelty and malice in the hearts of those who authorize, impose, and do the punishing. It can also lead to mercy, an act of compassion that's never out of order when the criminal law punishes a wrongdoer for conduct reflecting a character not truly of his own making.⁷²

69. See Lawrence Blum, *Compassion*, in *EXPLAINING EMOTIONS* 507, 513 (Amélie Oksenberg Rorty ed., 1980).

70. See *id.* at 512. Indeed, Martha Nussbaum has characterized compassion as *the* basic social emotion. Martha Nussbaum, *Compassion: The Basic Social Emotion*, in *THE COMMUNITARIAN CHALLENGE TO LIBERALISM* 27 (Ellen Frankel Paul et al. eds., 1996).

71. For helpful analyses of the virtue of humility, see NORVIN RICHARDS, *HUMILITY* 188 (1992) (“[T]o be humble is to understand yourself and your moral entitlements sufficiently clearly that you are disposed not to exaggerate about these.”), and Robert C. Roberts, *Emotions Among the Virtues of the Christian Life*, 20 *J. RELIG. ETHICS* 37, 60 (1992) (“Humility is the disposition not to feel envy upon noticing that a significant other person is superior to oneself, and not to feel invidious pride upon noticing that a significant other person is inferior.”).

Jeffrie Murphy makes a particularly compelling case for the virtue of humility in the criminal law in Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the “Clumsy Moral Philosophy” of Jesus Christ*, in *THE PASSIONS OF LAW* 149 (Susan A. Bandes ed., 1999). See also Jeffrie G. Murphy, *Cognitive and Moral Obstacles to Imputation*, in *JEFFRIE G. MURPHY, CHARACTER, LIBERTY, AND LAW* 43 (1998).

72. See Robert Merrihew Adams, *Involuntary Sins*, 94 *PHIL. REV.* 3, 19 (1985); Kahan & Nussbaum, *supra* note 42, at 366–72.