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THE ROUTLEDGE COMPANION TO FREE WILL

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Meghan Griffith, 
and Neil Levy

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FREE WILL AND CRIMINAL LAW

Erin Kelly

Introduction

If someone has been treated fairly, we can infer something important about her position with respect to other people in her society: her legitimate claims have been acknowledged and balanced appropriately with theirs. Whatever exactly a person’s legitimate claims might be, fairness requires that they take the rights and interests of everyone into consideration. In this chapter, I sketch the tension that arises when we attempt to reconcile the interest each person has in avoiding criminal sanctions with the claims each person has for the protection of their basic rights against criminal violation by other people. The criminal law’s resolution of this tension points to its criteria of ‘free will’—criteria that are more about morality or justice than metaphysics. I submit that in criminal law, the concept of ‘free will’ is best understood as expressing the judgment that the accused offender had a reasonable opportunity to avoid criminal sanctions. In turn, ‘reasonable opportunity’ is determined by reference to considerations such as the defendant’s liberty interests, her subjective limitations, and the rights of other people not to be harmed by her. This notion of reasonable opportunity expresses criminal law’s operative conception of institutional fairness: the fairness that obtains when the principles of criminal justice, which comprise general standards, have adequately taken all ethically relevant factors into consideration.

Turning critically to criminal law theory, I argue that standard criminal law conceptions of free will will create serious problems for any effort to explain or to justify our current doctrine and practices on the basis of a retributive theory of punishment. In short, retributive justice grounds punishment in blameworthiness and desert, yet the criminal law’s criteria of free will call for the punishment of actors who may be neither blameworthy nor deserving of punishment. An authentically retributivist criminal law would have to be much more demanding than ours is about what counts as free will. If we are to salvage the prospects for justifying anything resembling contemporary Anglo-American criminal law doctrine, we must look away from retributive theory. This is true even were we to set aside the excesses of overpunishment, excesses that are rampant in the United States and which would be rejected by any reasonable retributivist theory. Apart from excessive sentences for many crimes, including violent crimes, as well as the questionable practice of incarcerating people convicted of a range of nonviolent and even trivial offenses, the criteria of legal guilt and punishment are not well calibrated to
judgments of blameworthiness and desert. This does not necessarily mean that less blameworthy and less deserving criminal offenders should be thought to have lacked a reasonable opportunity to have avoided their offenses. But it does prompt us to understand the basis for their punishment, when it can be justified, in nonretributive terms. This should have significant consequences both for how we regard criminal offenders and how we ought to understand the ‘expressive function’ of punishment.

Agency and Liability in Criminal Law

I begin by describing operative criteria of liability to criminal sanctions, which I have suggested can be understood to represent the criminal law’s interpretation of ‘free will.’

Liability to criminal sanctions almost always requires a voluntary act (actus reus) and a culpable state of mind (mens rea). A voluntary act involves a doing by an agent. The Model Penal Code (MPC)—a highly influential effort by academics and judges working under the auspices of the American Law Institute to provide a systematic criminal code—characterizes a voluntary act by reference to bodily movements that are “the product of the effort or determination of the actor, either conscious or habitual,” in contrast to non-voluntary acts such as convulsions, movements during sleep, and conduct resulting from hypnotic suggestion. A famous teaching example is provided by Martin v. State (1944), in which the court found that an intoxicated man who had been carried to a highway by police was not guilty of “being drunk on a public highway,” since he did not voluntarily appear there. His appearance on the highway was not the product of his effort or determination. Of course, an act can be voluntary without being intentional with respect to its harmful outcome, as is the case in reckless and negligent behavior that results in injury. Acts are voluntary if they require some effort or determination on the part of the agent, even if the agent lacks knowledge of the moral quality of the act because he is (legally) insane, lacks control over the impulse that prompted the act, or lacks awareness of its possible consequences (as in negligent behavior). Insanity and other excuses, such as mistake or duress, apply inside the broad domain of voluntary action. They do not negate the actus reus of a criminal offense.

Whether a voluntary act (or omission) was committed is treated as an ‘objective’ or observable matter of fact. While there is a sense in which voluntariness goes to mental state, it is understood as something that can be inferred from the observable qualities of action. A person who is not in the grip of a seizure, sleepwalking, hypnotized, or physically forced by another person to behave as she does, is acting voluntarily. By contrast with the ‘objective’ elements of an offense, the mens rea element must be proved on the basis of evidence that the defendant ‘subjectively’ possessed a certain mental state at the time the crime was committed. A mens rea element typically specifies the agent’s level of intention or awareness in acting. In most cases, evidence must be presented to show that the defendant had a certain intention, some particular knowledge, or that she was reckless. Regarding mistakes of fact, many states have adopted the Model Penal Code’s proposals. The MPC §2.04 holds that if the defendant labors under a mistaken factual belief that negates the required mental state element, he cannot be found guilty of that offense, even when the mistake is not reasonable.

Because different crimes are defined by reference to different mental states, among other factors, a defendant’s incapacity to form a certain kind of intention might establish his innocence of the particular offense charged. For example, assault with intent to commit murder requires that the defendant act with an intention to cause the
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ions, which I have ation of ‘free will.’ ict (actus reus) and 7 by an agent. The nd judges working ystematic criminal ents that are “the as or habitual,” in ng sleep, and con ple is provided by nan who had been lic highway,” since as not the product thou being intenless and negligent oard domain of f effort or determi f the moral quality ise that prompted gilient behavior). e mens rea for a specific intent crime is proved by reliance on the general pre- sumption that a person intends the natural and probable consequences of his acts. The Court holds that this presumption is permissible provided that it is not introduced as a mandatory presumption that shifts to the defendant a burden of persuasion on the intent element of the offense (Sandstrom v. Montana [1979]; Francis v. Franklin [1985]). Thus, the prosecution is permitted to argue that a defendant who aims a gun at someone and shoots at close range can be presumed to intend to kill the victim. Presumptions also operate to establish recklessness. According to the MPC, a reckless person “consciously disregards a substantial and unjustifiable risk.” A judgment of recklessness is typically made on the basis of an inference from observed behavior. Reliance on presumptions to establish mens rea threatens to erode the purportedly subjective character of the relevant mental state, because it means that the mental state of a particular defendant can be established on the basis of a conclusion about the typical mental state of most defendants in circumstances similar to the defendant’s circumstances. In this way, the scope of a particular person’s liability is a function of what it is reasonable to expect of most people. Moreover, in other cases, no evidence of subjective mental state, whether direct or indirect, is required. For example, in cases of criminal negligence, the mens rea is established by direct appeal to a reasonable person standard. The Model Penal Code §2.02 (d.) defines a negligent actor as someone who “should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.” A defendant can be held to have acted with criminal negligence if a reasonable person in the defendant’s circumstances would have been aware of the risk involved and refrained from so acting. Although this criterion leaves open the question of what counts as the defendant’s circumstances, and whether those circumstances might include psychological abnormalities or diminished mental capacities, courts have been reluctant to consider psychological characteristics to belong to the defendant’s circumstances. By contrast, physical limitations and injuries do count among the circumstances that bear on which expectations count as reasonable. Blindness or

victim’s death. It thus presupposes that the defendant had the capacity to foresee and intend that consequence. The ability to form an intention to attack another is insufficien. In People v. Ireland (1969), a California appeals court reversed a felony-murder conviction on the ground that the jury should have been instructed to consider whether the defendant, who had been suffering under emotional pressure and had consumed prescribed medications and alcohol, was capable of ‘malice aforethought’ at the time he shot and killed his wife. The lower court had instructed the jury to find the defendant guilty of second degree felony-murder if it found that the homicide was the direct causal result of an assault with a dangerous weapon. The court of appeals ruled that this was a mistake and that the jury should have been instructed to consider the defendant’s ability, at the time, to form the intent to kill.

In the absence of excusing factors, such as diminished capacity or insanity, the law often allows mens rea to be established on the basis of a presumption. This means that the mens rea element of the crime can be inferred on the basis of some other facts. For example, if some item is found together with the defendant in his car, the defendant can be presumed to possess the item, that is, to have knowledge of its possession. The U.S. Supreme Court has held that a presumption is constitutionally acceptable when its truth is “more likely than not” and provided that the jury is instructed that it may choose to accept or reject it. (County Court v. Allen [1979]) The role of presumptions means that mens rea might be established on the basis of circumstantial evidence. Sometimes the mens rea for a specific intent crime is proved by reliance on the general pre- sumption that a person intends the natural and probable consequences of his acts. The Court holds that this presumption is permissible provided that it is not introduced as a mandatory presumption that shifts to the defendant a burden of persuasion on the intent element of the offense (Sandstrom v. Montana [1979]; Francis v. Franklin [1985]). Thus, the prosecution is permitted to argue that a defendant who aims a gun at someone and shoots at close range can be presumed to intend to kill the victim. Presumptions also operate to establish recklessness. According to the MPC, a reckless person “consciously disregards a substantial and unjustifiable risk.” A judgment of recklessness is typically made on the basis of an inference from observed behavior.
serious physical injury might well undermine a judgment of criminal negligence when those physical limitations bear on the defendant's ability to perceive and avoid a risk that persons of ordinary physical ability would perceive. Courts have not treated a defendant's psychological limitations in an analogous way. They have resisted individualizing the negligence standard to fit an individual defendant's psychological limitations. Low intelligence, temperament, and mental illness have not been included as factors that can be used to limit a defendant's liability for criminal negligence.

In *State v Patterson* (2011), a Connecticut appellate court upheld a conviction of criminally negligent homicide although the defendant had an IQ of 61 which, according to the court, places her within the bottom one-half of 1 percent of the population. The defendant withheld water from a two-year-old boy in order to prevent him from wetting his bed and after four days the boy died of dehydration. The defense argued that the defendant was not capable of perceiving the risk to the boy, but the court ruled that, "[e]ven if . . . the defendant was incapable of perceiving the risk of death . . . we cannot consider the defendant's diminished mental capacity in the context of criminally negligent homicide because we employ an objective standard." The court is claiming that the defendant's inability to perceive the risk of death was irrelevant to her guilt because a reasonable person would have perceived the risk; in judging whether negligent homicide has been committed, the law holds all defendants to the same standard of reasonable conduct.

While in negligence cases *mens rea* is established by direct reference to a reasonable person standard, strict liability crimes require no proof of *mens rea* at all. Statutory rape, at least in some states, and also some prevalent narcotics and firearms statutes, do not require that the prosecution prove that the defendant acted with negligence, much less recklessness, knowledge, or purpose. The accused is guilty of rape if the victim was under the age specified by statute (e.g., 16), even if the accused had good reason to believe that the victim was older.

In short, the criminal law maintains that when it can be established that an offender satisfies the act and mens rea requirements of an offense, and has no justification or excuse for the behavior in question, the offender is liable to criminal sanctions. These broad criteria set the legal standard of avoidability: they define the sense in which a person could have complied with the law and with morality. Or, to put the point another way, the law holds that it was possible for that person to have avoided his crime, and reasonable to have required it of him. The law regards his will and action as relevantly free. As indicated, particularly with respect to crimes that hinge on negligence, but even with respect to crimes requiring certain forms of intentionality, the conception of "reasonable opportunity to avoid" that is built into the twin requirements of *mens rea* and *acus reus* is thin. Some and perhaps many actors who are accurately deemed offenders will have not had a realistic chance to avoid committing the offense under the circumstances in which they committed it.

At the outset I claimed that the law's conception of reasonable opportunity to avoid criminal sanctions is a function of how it treats a defendant's liberty interests, subjective limitations, and the rights of other people not to be harmed. I have begun to examine the role of an individual's subjective limitations in determining fair treatment of her. This is important for assessing the retributive view, since a person's subjective limitations would seem relevant to morally reasonable judgments of blameworthiness and desert. The court's limited sensitivity to these considerations thus raises doubts about the retributivist theory of punishment, if that theory is meant to rationalize anything like current criminal law doctrine. I will now push this point further.
Excuses in Criminal Law

Even granted that the requirements of mens rea and actus reus set only a thin requirement of reasonable opportunity to avoid, one may ask whether the requirement is made thicker through the recognition of excuses that defeat liability notwithstanding proof that the defendant committed the crime charged. A survey of the nature of legal excuses confirms the reluctance of courts to individualize criteria of criminal liability to a defendant’s psychological capacities and limitations. In considering how excuses function in criminal law, I will be especially concerned with law’s regard for a defendant’s moral capacity: her capacity to recognize and to be guided by moral reasons. Legally recognized justifications and excuses typically rely on a reasonable person standard in a way that does not permit as relevant a consideration of a defendant’s moral incapacity or diminished moral capacity.

For example, the application of an objective standard of reasonable conduct is found in the court’s understanding of the scope of the ‘provocation’ defense. Provocation is a defense that reduces a charge of murder to the lesser offense of manslaughter. The Model Penal Code defines two principle components to the defense. First, the defendant must have acted under the influence of extreme emotional disturbance and, second, there must have been a “reasonable explanation or excuse” for the emotional disturbance.

People v. Cassasa (1980) is a murder case in which the defendant tried and failed to use the provocation defense. The defense argued that Cassasa acted under the influence of extreme emotional disturbance because he was obsessed with the victim, in whom he had a romantic interest. After she broke off their relationship he was “devastated,” and began behaving bizarrely. He broke into the apartment below hers in order to eavesdrop on her. He also broke into her apartment when she was not there and lay in her bed armed with a knife. On his final visit to her apartment, he stabbed her to death when she refused his offer of a gift. The trial court found Cassasa guilty of second-degree murder. The court of appeals affirmed his conviction. The appeals court found that the defendant had acted under the influence of extreme emotional disturbance, but that the defendant’s emotional reaction at the time of the commission of the crime was “so peculiar to him” that it could not be considered reasonable so as to reduce the conviction to manslaughter. Since a reasonable person would not have been provoked by the circumstances that in fact provoked the defendant, Cassasa’s emotional disturbance did not mitigate the charge against him from murder to manslaughter. Interestingly, the court also argued that Cassasa’s disturbed state was not the product of external factors but was rather “a stress he created within himself, dealing mostly with a fantasy, a refusal to accept the reality of the situation.” In other words, the court suggests that Cassasa at some level chose to feel disturbed rather than face reality. In this way, the court emphasizes its finding that the cause of the stress was inside the agent rather than in the agent’s situation, removing it from the set of emotional disturbances for which there could be a reasonable explanation or excuse. But the court also seems to imply that Cassasa’s emotional disturbance was under his control and that, in that sense, he could have acted otherwise. Perhaps the court was, in this case, uncomfortable with the legal criteria for responsibility and in search of a metaphysical rationale, since whether or not the disturbance was under his control seems irrelevant to the legal notion of provocation. The defense of provocation fails when it is demonstrated that a reasonable person would not have been provoked by the circumstances that provoked the defendant, whether or not the defendant could have avoided the provocation.
Duress as a legal defense resembles the defense of provocation. The Model Penal Code §2.09 defines duress by reference to what “a person of reasonable firmness in [the defendant's] situation would have been unable to resist.” The courts have found that a person’s size, strength, and physical health can be accounted for as aspects of the actor’s situation, but not matters of temperament or mental health, with the exception of “battered women’s syndrome.” Some courts have ruled that battered women’s syndrome is irrelevant to the “purely objective” reasonableness standard, while others have found that a history of domestic abuse is relevant to whether the defendant “reasonably believed that her life was in danger” for the purposes of determining whether she acted under duress (Dando v. Yukins [2006]). While courts are divided on the relevance of battered women’s syndrome to duress as a defense to crimes other than homicide, they are now mostly in agreement that battered women’s syndrome can support a defendant’s self-defense argument that she reasonably perceived a threat of imminent danger from her abuser when she killed him (Rogers v. State [1993]). Juries are instructed to consider not whether a reasonable person per se would have formed the belief that her life was in danger, but whether a reasonable person who has endured domestic abuse would have.

Courts are divided on age and intellectual disability. In State v. Heinemann (2007), the court rejected a 16-year-old defendant’s duress defense, claiming that although her immaturity made her more vulnerable to duress, her defense was precluded in view of, “[t]he legislature’s determination to treat sixteen year olds as adults for purposes of [eligibility for trial in juvenile court].” In United States v. Johnson (2005), the court considered the relevance of intellectual disability to a duress defense and claimed,

Unlike ... non-mental physical disabilities, mental deficiency or retardation is difficult to identify, more difficult to quantify, and more easily feigned. For these reasons and others, it was the common law rule going back to at least 1616, and still is, that an adult suffering from a mental deficiency is nevertheless held to a reasonable person standard.

By contrast, in Commonwealth v. DeMarco (2002), the court found that “the fact that a defendant suffers from ‘a gross and verifiable’ mental disability ... is a relevant consideration” to the question whether an objective person of reasonable firmness would have been able to resist the threat.

The reasoning I have highlighted in discussing provocation and duress is representative of legal reasoning about excuses in general. The backbone of legal excuses are circumstances that would render expectations of a reasonable person’s compliance with law unreasonable, and the circumstances that constitute an unreasonable obstacle to law-abidingness for a reasonable person are mostly limited to factors other than temperament, personality, or mental health. Relevant constraints on free will are understood situationally in a way that is not individualized to subjective moral capacity. With few exceptions, the criminal law sets and holds everyone to the same set of expectations, expectations that it deems reasonable despite the fact that it is harder and perhaps much harder for some people to meet those expectations. But since the difficulty some people have complying with the law might well be relevant to whether or how much we should blame them, we should avoid inferring moral blameworthiness from criminal guilt.
The Model Penal Code's firmness in requiring a defendant to establish whether she acted under a relevant condition has been challenged. Some have found that a defendant's conduct is influenced by the condition under which she acted. Others have argued that a defendant's condition is not a relevant consideration in determining her guilt.

This formulation fixes on a defendant's cognitive impairments, which must be so severe that the defendant either had no idea what she was doing, or that it was not. Mentally ill defendants whose impairments are motivational or volitional do not benefit from this definition of insanity and are subject to normal prosecution.

By contrast with the M'Naghten formulation, the drafters of the Model Penal Code favored a broader conception of insanity. The MPC §4.01 maintains that:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

Thus, the MPC definition allows, while the M'Naghten definition does not, that motivational impairments, potentially encompassing sociopathy, could support an insanity acquittal. The MPC Commentaries §4.01 emphasize this difference:

One shortcoming of the [M'Naghten] criterion is that it authorizes a finding of responsibility in a case in which the actor is not seriously deluded concerning his conduct or its consequences, but in which the actor's appreciation of the wrongfulness of his conduct is a largely detached or abstract awareness that does not penetrate to the affective level. Insofar as a formulation centering on 'knowledge' does not readily lend itself to application to emotional abnormalities, the M'Naghten test appears less than optimal as a standard of responsibility in cases involving affective disorder.

In the 1960s and 1970s, some courts embraced versions of this broader conception, but the trend since the 1980s has been to narrow the definition—a trend fueled in part by the jury's acquittal by reason of insanity of President Reagan's would-be assassin John Hinckley, which in turn prompted Congress to legislate a narrow definition of insanity applicable to defendants accused of federal crimes.
In practice, the difference between these formulations may be inconsequential. It is estimated that "no more than [0].25 percent of terminated felony prosecutions" involve insanity acquittals, and both experimental and historical studies indicate very little difference in the willingness of juries to acquit on the basis of insanity on any of the formulations of its criteria (Kadish et al. 2012: 961, 982). Politics aside, the MPC formulation raises difficult evidentiary issues, as the court emphasizes in United States v. Lyons (1984) when it rejects the 'volitional prong' of the MPC formulation. The court asserted that, "a majority of psychiatrists now believe that they do not possess sufficient accurate scientific bases for measuring a person's capacity for self-control or for calibrating the impairment of that capacity ...." The court concludes, "[W]e see no prudent course for the law to follow but to treat all criminal impulses—including those not resisted—as resistible." In other words, prudence dictates that volitional impairments are not excusing.

On either formulation, but especially the M'Naghten formulation, the legal category of insanity is much narrower than the medical category of mental illness. Mental illness spans a wide range of abnormalities, including many impairments that are severe yet fall short on either the cognitive or the volitional prong of the MPC definition. Mentally ill individuals might be seriously disturbed, confused, or irrational while retaining some understanding of the moral difference between right and wrong and some capacity to control their own behavior. Importantly, they might lack anything close to normal responsiveness to moral concerns without being insane. This is true of many people who commit terrible crimes.

In moral terms, notions of responsibility and accountability are typically understood to presuppose rational and moral competence, in particular, as I have suggested, the capacity to understand and to be guided by—that is, to care about—moral reasons. Sensitivity to moral reasons is critical to the relevance of at least two primary functions of morality. First of all, it is critical to the action-guiding function of morality. Morality is directed to those who can grasp and apply its principles and who are, at least in ordinary circumstances, motivated to do so. This supposes a moral subject's rational capacity for understanding and deliberation as well as her moral concern for the needs and interests of other people. A subject with these competencies can and often does act for moral reasons.

Like morality, the law also aspires to direct behavior. Yet the criminal law's reliance on sanctions to secure compliance permits it to maintain an action-guiding function without presuming that its subjects are morally motivated. The law's directives are relevant even to people who care little about the moral interests of other people, provided they possess some rational ability to protect their own interest in avoiding criminal sanctions. Thus, restricting the insanity defense to cases of cognitive (vs. volitional) dysfunction is consistent with understanding the law as a set of action-guiding norms. But a result of this definition of insanity is the possible conviction of individuals whose capacity to be motivated by moral reasons is diminished, even very significantly.

A second function of morality concerns how to evaluate people in view of their actions. Here, the question is whether a person is a suitable subject for familiar aspects of moral evaluation, including blame. A familiar position is that only a person who is capable of being guided by moral reasons is a suitable subject of our 'reactive attitudes' and other blaming responses, including punishment. This moral condition has enjoyed some legal recognition. In Morissette v. United States (1952), the court asserts, "Historically, our substantive criminal law is based on a theory of punishing the vicious will."
It postulates a free agent confronted with a choice between doing right and wrong, and choosing freely to do wrong" (quoting Pound 1927). Indeed, blaming responses typically reflect not only our understanding of a wrongdoer's moral qualities, but also our sense of her capacity to modify her behavior in view of the requirements of morality. A wrongdoer's moral capacity to have made a better choice is important. In particular, an agent's capacity to be sensitive to the needs and interests of other people when she has failed to act well is a familiar condition for the appropriateness of blame. The point of blame is partly to indicate that a person has rejected reasons she had—reasons that were reasons for her to have acted differently—and that her capacity to have done better makes our dissatisfaction with her appropriate.

Focusing the legal definition of insanity on a person's cognitive impairments risks refusing the insanity defense to persons who are motivationally impaired enough to compromise their moral blameworthiness. While they may be deemed guilty of their crimes, it might be the case that it is inappropriate or misguided to blame them morally for their wrongdoing. When a person's capacity to appreciate morality is compromised, this casts doubt on a relevant counterfactual. A morally capable wrongdoer is somebody who was capable of acting for moral reasons that she failed to take seriously but could have. I have suggested that when we have good reason to doubt a person's capacity, or full capacity, for moral responsiveness, this may have consequences for our moral attitudes and behavior toward her. Although we may be frustrated or disappointed by her behavior, our considered response lacks the moralistic edge characteristic of blame. It seems morally inappropriate to blame someone for acting badly when that person was not capable of understanding and being moved by the requirements of morality. Because her action does not represent her rejection of a morally better course of action that was available to her, it seems misguided or even pointless to admonish her in moral terms for her choice.

Skepticism about moral capacity is especially likely to come up in the arena of criminal justice. A retributive rationale for criminal punishment purports to gain its foothold in a person's moral blameworthiness for a particular instance of wrongdoing. But the relevant judgment of the offender's capacity to have acted better can be hard confidently to make, especially when that person is mentally ill. There might be good precautionary reasons to tailor the insanity defense narrowly. Permitting mental illness, more broadly, to excuse would pose a serious problem, since many violent criminals are disturbed and we need to protect ourselves from them. A consequence of tailoring the insanity defense narrowly, however, is that we use the criminal justice system to incapacitate some wrongdoers who are not blameworthy for their wrongdoing. This poses a serious problem for the retributive theory of punishment.

Moral Blameworthiness and Criminal Sentencing

A retributivist might attempt to rescue the view by emphasizing that the phase of a criminal trial in which guilt is determined is separate from the sentencing phase. It might be argued that appraisals of blameworthiness are properly made only in the sentencing phase. While it might be true that guilt does not imply blameworthiness, considerations that may be introduced at sentencing provide a broader basis upon which to render and calibrate a judgment of blameworthiness, or so the retributivist might argue.

The Supreme Court has expressed concern about the moral competence of defendants in a limited range of cases involving the harshest sentences and, in particular,
regarding the death penalty. It is worth examining those cases with an eye to whether they indicate, more broadly, that the court thinks the severity of punishment should be influenced by an assessment of the offender's moral competence. In Atkins v. Virginia (2002), the U.S. Supreme Court accepted that intellectually disabled individuals have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand other people's reactions to their behavior. The Court found these impairments relevant to the permissibility of the death penalty, on several grounds. First, it held that intellectually disabled individuals who have committed murder are less culpable than the average murderer, and hence, do not deserve the death penalty, which is reserved for maximally culpable killings. Second, the Court reasoned that the cognitive impairments from which intellectually disabled people suffer make them less responsive to sanctions, and hence, undermine attempts to threaten them with the death penalty in order to deter them from committing capital offenses. Finally, the Court concluded that these defendants' impairments render them more apt to be wrongfully convicted: intellectually disabled defendants are susceptible to wrongful conviction through false confessions and a diminished ability to assist their lawyers, and they face diminished prospects for mitigation in sentencing since "their demeanor may create an unwarranted impression of lack of remorse for their crimes."

The courts have also expressed concern about the rational and moral capacity of juveniles, applying to juveniles concerns voiced about the intellectually disabled in death penalty cases. In Roper v. Simmons (2005), the U.S. Supreme Court held that it is unconstitutional to apply the death penalty to juveniles. The court argued that immaturity diminishes culpability, as does the susceptibility of juveniles to peer pressure, and that neither retribution nor deterrence provide adequate justification for imposing the death penalty on juveniles.1 In Ford v. Wainwright (1986), the Court prohibited the execution of the insane, invoking what the Justices took to be a national consensus "that such an execution simply offends humanity ...." As a matter of federal constitutional law, insanity thus operates as a mitigating factor in punishment when it comes to the death penalty.

These considerations the court invoked raise general concerns about the justifiability of punishing the young or intellectually disabled, yet the court's acknowledgement of these concerns only in relation to the death penalty is used to limit their reach (Gottschalk 2015: 172–6). The court emphasizes that the death penalty is a unique and rare form of punishment, implying that considerations that limit its application might not upset the justification of other punishments, including many cases of life without parole (LWOP), namely, 'the other death penalty,' death in prison. Of course we might wonder why, if diminished responsibility is unsettling when we consider the harshest penalty, it should not also be unsettling to us when we consider other sentences, some of which are also extremely harsh. Worries about the moral accountability of the mentally ill and juveniles are especially pressing for retributive accounts, according to which punishment should be applied in proportion to desert.

In fact, regarding juveniles the Court has extended its reasoning somewhat. In Miller v. Alabama (2012), the court claimed that adolescence is "marked by rashness, proclivity for risk, and inability to assess consequences," and that these factors should be treated as mitigating factors when it comes to sentencing juveniles to life without parole. The court concluded that mandatory life sentences for juveniles constitute cruel and unusual
punishment in violation of the Eighth Amendment. Similar reasoning in *Jackson v. Hobbs* (2011), suggest that criminal liability should track both moral culpability and ‘capacity for change’ as well as developed skills in reasoning about costs and benefits that give the threat of legal sanctions possible deterrent effect. But again, the fact that LWOP is rarely imposed on juveniles in the U.S. (and in other countries) figures centrally in the court’s reasoning and is treated as a basis for limiting the reach of these decisions.

Apart from the court’s reluctance to impose the very harshest punitive measures on the intellectually disabled or juveniles, individualized attention to moral capacity is mostly at odds with how the law governs sentencing. While mitigating considerations can indeed be introduced into the sentencing phase after guilt has been established, typically mental illness short of the stringent legal notion of ‘insanity’ does not mitigate sentences, and neither does youth. As a result, U.S. jails and prisons have a large population of inmates who are mentally ill, intellectually disabled, and immature. A 2005 study conducted by the U.S. Government’s Bureau of Justice Statistics found that over half of all prison and jail inmates suffer from a serious mental illness (http://www.bjs.gov/content/pub/pdf/mhppji.pdf). Juvenile cases are commonly referred to adult criminal court, particularly (but not always) for serious crimes. A ‘direct file’ statute passed in the state of Florida, for example, permits prosecutors wide discretion to refer juveniles to adult court, including any 16- or 17-year-old who is accused of a felony, violent or not. In three states—Pennsylvania, Wisconsin, and Nevada—children as young as 10 years old can be tried as adults for murder. As discussed above, although the Supreme Court has decided that a *mandatory* sentence of life without parole cannot be imposed on juveniles, 37 states still allow it as a sentencing option, leaving room for judges to impose a life sentence, at their discretion. Many states have responded by resentencing juveniles to what are de facto life sentences. Studies show that, in general, juveniles in criminal court do not normally receive lighter sentences than their adult counterparts, and there is some evidence indicating that they are actually treated more punitively.4

The criminal law is of two minds. As we have seen, when it comes to the harshest penalties, the law is somewhat sensitive to questions of moral capacity. It places some limits on the punishment of the intellectually disabled, juveniles, and the mentally ill. Conversely, expressing concern about public safety, the courts permit juveniles to be tried as adults, and even the severely mentally ill and disabled can be convicted and punished harshly for criminal behavior. In *United States v. Lyons* (1984), a case I mentioned earlier, a majority of the court explicitly argued that as a society we cannot afford to consider the potential moral relevance of most mental incapacities. In particular, the court asserts that is not practical to consider a person’s diminished capacity for self-control, because, “[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than between twilight and dusk” (quoting American Psychiatric Association 1982). This suggests a broad skepticism about the relevance of assessments of moral incapacity to criminal justice. Furthermore, in *Penry v. Lynaugh* (1989) the court notes that introducing a defendant’s intellectual disability as a mitigating factor may be a double-edged sword that enhances the likelihood that the jury will treat it instead as an aggravating factor of future dangerousness. Whether or not moral blameworthiness is relevant, in theory, how we ought to treat criminal wrongdoers, the court is wary of attempts to bring it to bear on criminal sentencing.
Legal Culpability vs. Moral Blameworthiness

I have argued that in view of the law's resistance to the relevance of moral capacity to criminal liability, a popular rationale for criminal sanctions cannot reasonably be maintained. The misfit between criminal liability and moral competence entails that criminal sanctions cannot be justified as expressions of moral blame. This causes a problem for the retributive ideal as well as, more broadly, for accounts of the 'expressive meaning' of punishment, if that meaning involves moral blame in the ordinary sense. If there are legally liable defendants who are not morally blameworthy enough to deserve the punishment they get, expressive views cannot justify punishing them. Criminal culpability does not entail moral blameworthiness. Despite the fact that legal culpability is popularly identified as a form of moral blame, legal guilt must be distinguished from moral blameworthiness. If the imposition of criminal sanctions on people with diminished moral capacity can be justified, it should be in terms that do not depend on blameworthiness and desert.

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Notes

1 An exception is *State v. Everhart* (1977) in which the court reversed an involuntary homicide conviction of a girl with an IQ of 72. The girl had given birth in her bedroom and inadvertently suffocated to death the baby she believed was already dead.
3 See also *Thompson v. Oklahoma* (1988), where the Court affirms the diminished culpability of offenders under the age of 16.
4 For a helpful review of the empirical literature on the ‘juvenile penalty,’ see Jordan (2014).

References

*County Court v. Allen* (1979) 442 U.S. 140.
FREE WILL AND CRIMINAL LAW


Morissette v. United States (1952) 342 U.S. 246, 250 n.4.
People v. Ireland (1969) 70 Cal.2d 522.
State v Patterson (2011) 131 Conn. App. 65.

Further Reading

Green, T.A. (2014) Freedom and Criminal Responsibility in American Legal Thought. New York: Cambridge University Press. (Historical survey of the relevance of the free will debate to legal theory and notions of criminal responsibility.)


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