
To many people – a significant number of philosophers among them – it is a truism that criminalisation and punishment are quintessentially in the business of blaming. This proposition of course encompasses a range of issues. These include, most obviously, that of just what counts as blame, blaming or blameworthiness, and whether each has a distinctive meaning, purpose or upshot; that of who is appropriately the (potential) subject or object of blame or of a finding of blameworthiness; that of the conditions under which blame indeed attaches to such a subject, and conversely of the conditions under which blame is undermined; that of who, or which institutions, have a right or standing to blame, and whether it is optional or mandatory for such an agent to blame. But amid the inevitable debate and variety which this multiplicity of issues throws up, it is undoubtedly true, as Erin Kelly argues, that blame is widely thought to lie at the core of our ideas and practices of punishment and the attribution of criminal responsibility.

The Limits of Blame sets out to question this conventional wisdom, and to persuade its readers that criminal justice should in fact not be ‘in the blame game’ at all: should not attribute blame understood as ‘the moral condemnation of wrongdoers’ (p. 5). Its main argument rests on a number of propositions, all of them focused on the difference between law and morality as normative systems, and on the view that the analogy between moral and legal responsibility has been exaggerated in much of the relevant literature. First and foremost, Kelly argues, legal criteria of responsibility attribution are different from those for the attribution of moral blame, which she understands (variously) as relational, as inhering in dispositions, emotions and intentions, and as an evaluation of an agent’s failure to negotiate cognitive or motivational obstacles to acting well (p. 108). The difference between legal responsibility attribution and moral blame inheres in her view most particularly in the fact that the former does not relate principally to agents’ reasons for action, motives, qualities of (ill) will – as distinct from psychological states such as intention or awareness - and hence does not attach fundamentally to the agent as distinct from her action.

Related to these differences, second, legal excuses focus on a relatively limited number of conditions which undermine standard volitional and cognitive capacities, and which fall far short of what a proper conception of moral excuse would be expected to cover in relation to both mental health and social circumstances that bear on moral competence more broadly, including in a legal context. Third, moreover, this is only to be expected, because courts are not appropriate institutions fully to investigate moral competence. This is in Kelly’s view more than simply a contingent question of institutional design: legal interpretations of culpability inevitably abstract from the individual’s moral situation via general rules and presumptions, and hence ‘can never equate to moral blameworthiness’ (p. 44). Furthermore, fourth, legal and moral attributions of responsibility differ in terms of their scope. While the attribution of legal responsibility is mandatory and universal, those with standing to blame morally have a choice as to whether to do so, or whether instead to respond to moral wrongdoing with regret, reconciliation, renegotiation, withdrawal, forgiveness (p. 107). Here Kelly (pp. 93–4) disagrees with Strawson’s claim (Strawson 1962) that to withhold blame is in some sense dehumanising, a denial of agency. In her view, legal systems should hold offenders criminally responsible without blaming
them, and should structure punishment on the basis of the aspiration of fairly imposed and distributed harm reduction rather than desert or retribution. Kelly further argues – in a move which might be seen as reinscribing her assessment of law with concerns flowing from morality – that criteria of criminal responsibility and practices of law enforcement should be tempered by an appreciation of the way in which social injustice bears on crime and the capacities and opportunities of those who commit crime, with a view to civilising and humanising our criminal justice systems.

The political and moral urgency of Kelly’s argument is thrown into sharp relief by the facts of crime and punishment in the contemporary United States. In a welcome engagement with some of these facts, Kelly emphasises two baleful aspects of American criminal justice. The first is the hugely unequal impact of crime, criminalisation and punishment, with both criminal punishment and the enforcement of criminal law falling particularly heavily on the poor and on certain minority racial groups (Western 2006). The second is the inexorable trend towards punitiveness, which since the 1970s has transformed the American penal system into an outlier in all the wrong ways, with the most extensive and arguably the harshest and most stigmatising penal system among the advanced democracies (Reitz (ed.) 2018). This involves not only prison sentences whose length and quality degrade those subject to them (Whitman 2003), but also extensive practices of penal surveillance and enduring post-sentence disqualifications which undermine dignity, citizenship, civic, economic and political capacity. Each of these features of American criminal justice, Kelly believes, has been either prompted or aggravated by its inclination to think of criminal responsibility in terms of blame which attaches to the offender rather than of responsibility for a forbidden act. Rather, she argues, we should step back from the assumption that the state has the moral authority to inflict deserved suffering (p. 12) and think of punishment not as an expression of justified blame but rather as simply directed against a wrong, harmful or forbidden act, with the overall institution of punishment trained on the good of just harm reduction.

Kelly’s book has many strengths, not least its ringing case for greater humanity in criminal justice and its clear view of the many ways in which contemporary criminal justice engages in stigmatising blame with serious adverse consequences. It also has much of value to say in its exploration of differences between law and morality as action-guiding and evaluative systems; and in its focus on the social goods which criminalisation and punishment may be able to promote balanced with a concern for the demands of justice and of respect for individual agency. Its conception of moral blame, which is informed by Scanlon’s philosophy (Scanlon 2008), yet also bears some of the marks of a Strawsonian reactive attitude, will not be to all philosophical tastes, and those like the late John Gardner (Gardner 1998) who see judgments of wrongdoing as evaluations of the quality of an agent’s character as constituted by their actions will reject the notion of a bright conceptual line between blaming the agent and holding that an act is wrongful. But these positions are energetically deployed as Kelly works through the various issues relating to criminal responsibility, sentencing, punishment and law enforcement. Her argument that legal excuses fail to capture not merely the nuance but the substance of moral excuses, and that fine tuning legal judgments through the exercise of discretionary mitigation at the sentencing stage is an inadequate way to ensure and alignment between legal judgments of wrongdoing and moral judgements of blameworthiness, are well taken. And while there is reason to doubt how much her, in effect, mixed theory of punishment adds to what is
already a densely populated field, it reflects some of the most progressive thinking in contemporary penal philosophy.

In a number of ways, though, the book is a missed opportunity; and in the spirit of sympathy with the overall direction of Kelly’s argument, I would like to discuss several of challenges which it confronts, with a view to taking this important debate forward. These relate to three issues: first, the conceptual thoroughness with which she is able to articulate her argument that criminal justice should eschew judgments of blame; second, her characterisation of the field of legal, moral and political philosophy in its treatment of blame in criminal justice contexts; and third, her handling of the upshot of the facts of American criminal injustice for her normative argument.

1. When blame isn’t blame…

How thoroughly is Kelly able to articulate her vision of what criminal justice would look like without blame? Several aspects of her argument give pause here. First, in the chapter on ‘Criminal Justice without Blame’, Kelly does a great deal to explain why criminal law and criminal courts should not engage in stigmatising blame or be ‘in the business of condemning evil as such’ (itself a somewhat different view of blame to the one set out earlier in the chapter), but gives less detail on the distinctive nature and function of a finding of criminal responsibility, beyond mentioning its public role and asserting the possibility of a finding that a criminally proscribed as wrongful or harmful has been committed by an agent meeting the criteria of criminal responsibility. She does little to build on the work of Chiao (2016, 2018), Thorburn (2010, 2017), Farmer (2015; 2016) or others who have worked to carve out a distinctive picture of criminal law’s normative role as distinct from that of morality. In the following chapter, ‘Rethinking Punishment’, we get the further argument that legal standards are a ‘subset of morally justifiable norms’ (p. 130), with criminal liability founded not in blameworthiness but in a failure in the duty to respect others’ rights as reflected in criminal law’s action-guiding rules’ (p. 130). Concomitantly, punishment is seen as a reinforcement of reasons to comply justified by its harm-reducing effects as constrained by (strongly Hartian in flavour: Hart 2008) criteria of basic fairness of opportunity to comply and generalised assessments of deterrence. Yet punishment is also described as having an expressive dimension: as ‘an expression of a moral judgment of wrong yet not a judgment of blameworthiness’ (p. 145). And even as Kelly denies that it needs to be expressed via hard treatment, she speaks of the appropriate public response to crime in terms of ‘moral condemnation’ (p. 204). Even leaving aside the objection which advocates of criminal blame will surely make – that to see criminal judgment as expressing a moral judgment of wrong but not of blameworthiness looks awfully like a distinction without a difference – in the absence of much more robust criteria than Kelly offers to anchor the penalty scale, the expressive quality of her envisaged form of criminal judgment seems just as vulnerable as desert-based judgments to upward punitive pressure, with her worthy call for greater moderation an expression of hope rather than a powerful argument.

Second, in the final full chapter of the book, ‘Law Enforcement in an Unjust Society’, notwithstanding her earlier articulation and defence of ‘desert skepticism’ (Chapter 2) and rejection of the proposition that criminal judgment should involve blame, Kelly
unaccountably reverts to a background desert theory of punishment. She holds – as earlier argued by Jeffrie Murphy – that where conditions of radical distributive injustice exist, the case for retributive desert and punishment fail (Murphy 1973). In Kelly’s view – and echoing though not discussing the extensive criminal law theory literature on the so-called ‘rotten social background’ defence (Bazelon 1976; Delgado 1985; cf. Moore 1985, 1997; Morse 2000, 2011; Robinson 2011) – the state has not only no moral standing to blame (pp. 155–6) but even bears its own responsibility – indeed ‘blame’ – for crime (pp. 164; 168), rendering it a ‘moral distortion for a person to be held fully morally responsible for his criminal act by the state and its supporters’ (p. 168, emphasis added). The comments in this chapter on the role of democratic authority in legitimising state punishment, and of the ways in which social injustice corrodes that authority and legitimacy, leaving the authority of criminal law to be justified piecemeal on moral grounds, introduce a welcome element of political philosophy to the argument. And Kelly’s deployment of Sampson’s and Wilson’s work on the impact of concentrated social deprivation and ‘contextual causation’ (Sampson 2013; Sampson and Wilson 1995) is telling. Yet her argument about ‘rotten social background’ undermining the state criminal justice system’s standing to blame seems to imply precisely what she denies in the rest of the book: viz. that the state otherwise has such standing. What is more, the relevant question for her enterprise would surely have been that of the upshot of such structural injustice for the legitimacy of punishment conceived not in terms of retributive desert, but rather in terms of her own, consequence-sensitive yet fairness-respecting account. The puzzles thrown up by this chapter include Kelly’s insistence that retributive theory invariably calls for not just blame of the person but also the infliction of penal harms – a claim denied by von Hirsch (von Hirsch 1993), who has long argued that penal censure need not involve hard treatment, and one dropped in Duff’s most recent book (Duff 2018, cf. Duff 2001). I agree with Kelly that the assertion of the propriety of hard penal treatment has been an unhelpful counter in the public debate on crime and punishment in recent years. But it is important not to confuse this with the necessary contours of desert theory. It is surely the most progressive incarnations of retributivism that are the most important targets for those such Kelly and myself who believe that criminalisation and punishment should not engage in blaming, and one cannot help but wish that she had situated her own argument more precisely in relation to them.

2. De-centring or recentring blame?

A different problem with Kelly’s account has to do with the way in which it risks re-centring blame by offering us a somewhat simplified view of the field: a view in which blame is presented as the virtually unquestioned pivot on which the justification for criminalisation and punishment turn. Certainly, blame retains a central place in much philosophical scholarship on criminal justice, as in much public and policy debate. But it has been far from unchallenged, at both philosophical and policy levels, in recent years. Leaving aside the lively and very relevant recent debates about the aptness or otherwise of attitudes and emotions such as anger in our moral lives (Nussbaum 2016; Srinivasan 2018), there is a substantial and consequential philosophical literature which specifically argues either for the de-centring of blame in our criminal justice practices or for a renewed recognition of the need to shape our interpersonal practices and design our institutions so as to temper blame to morally and practically desirable ends and to keep its destructive potential at bay.
I will take just three examples. For many years, Jeffrie Murphy has explored the place of both forgiveness and mercy within our moral lives and within penal philosophy (Murphy 2012; Murphy and Hampton 1988). And while Murphy has always been careful to confront and examine what he sees as the limits of forgiveness, his work is sensitive to the dangers of blame in criminal justice, as well as focused on the good of reconciliation as a core component of our moral thinking about how to respond to crime. A second, different body of work acknowledges many of the dangers of blame identified by Kelly, but argues for a forward-looking practice of blaming which aims, in Victoria McGeer’s phrase, to ‘civilise’ blame to morally and practically valuable ends (McGeer 2013), using it, in Miranda Fricker’s terms, to inspire remorse and thereby to effect ‘an increase alignment of the blamer of the wrongdoer’s moral understanding with that of the blamer.’ (Fricker 2016: 167) These philosophers, unlike Kelly, see a place for blame in criminal justice, but aspire to situate it within an institutional and conceptual framework in which the dangers which concern Kelly are minimised. A key example, and one which features in McGeer’s and Pettit’s work (2015), would be a practice such as restorative justice: an increasing focus in both theoretical debate and criminal justice practice in many jurisdictions, and a very surprising omission from Kelly’s book. Third – most radically, and perhaps closest to Kelly’s position – Hanna Pickard has delineated and defended a conception of ‘responsibility without blame’ (Pickard 2011, 2013): one which distinguishes between ‘affective blame’ – the blaming emotions and attitudes which attach to offenders – and ‘detached blame’ – the judgment of harmful or otherwise wrongful behaviour. Originally deriving from her reflection on her work in clinical contexts oriented to working with people engaging in behaviours harmful to others and themselves to achieve behavioural and personal change, Pickard’s key insight is that while this sort of therapeutic work depends on a strong assumption of the patient’s agency and responsibility for her acts, the infiltration of the affects associated with blame – resentment, anger, disgust – are inimical to an agent’s capacity to create what Maruna (2001) has called a ‘redemption script’ and hence to effect real change in her life. Pickard and I have worked together to explore the relevance of the idea of responsibility without blame in criminal justice, arguing that the criminal conviction and the consequences which may follow can and should avoid affective blame – indeed should ideally be designed so as to aspire to facilitate an institutional equivalent of interpersonal forgiveness (Lacey and Pickard 2013; 2015a). But, unlike Kelly, we are content to think in terms of a criminal conviction as reflecting a judgment of detached blame or blameworthiness.

Needless to say, each of these approaches – the acceptance or recognition of blame’s attitudinal or affective aspect alongside the effort to temper its dangers to the ends of reconciliation and justice, or the denial that affective blame should have a place in criminal justice – itself confronts many questions and objections, of both philosophical and practical kinds. But the presence of these – as well as many examples in penal philosophy and normative criminology, including John Braithwaite’s work on restorative justice (1989; 2002) and Braithwaite and Philip Pettit’s republican theory of punishment (1990) – in the field does suggest that Kelly’s picture of the seamless embrace of blame is an exaggeration. Some of them are touched on or lightly referenced in endnotes, but given that these are not indexed, it is hard to keep track of the broader philosophical landscape, leaving Kelly’s picture of the field as the one which most readers will take away.
3. Philosophy and facts

I have already celebrated the fact that Kelly makes a real effort to set her argument against a social, political and institutional background which throws its moral urgency into stark relief: that of American criminal justice. The facts of inequality in the impact of criminal justice, and the evidence of the damaging human and social effects of stigmatising blame and the secondary victimisation which radiate from it are eloquent witnesses in the normative case against blame in criminal justice. This sort of moral and communicative impact, and the relevance of facts to the conclusions which we draw from philosophical arguments, are just two among several reasons why philosophers often have strong reason to attend to facts. Another hugely important nexus between prescriptive moral and political philosophy and facts turns on the feasibility of our normative arguments, which typically depend on things like human psychology, the capabilities and reasons- or incentives-responsiveness of human beings, the institutional capacities of political systems, the alignment of interests in particular social contexts. Of course, there is a space for ideal theory; but certainly in the philosophical literature on criminal justice, many of the most powerful voices – the more progressive retributivists among them – make a distinction between ideal and non-ideal theory, and temper their conceptions of the latter to what they take to be real world constraints and conditions.

Philosophers, on the other hand, have distinctive questions and expertise, and do not usually think of themselves as social scientists. And this makes handling the nexus between philosophy and facts a tricky business for all of us who attempt it, from either direction.

No one can – as it were – blame Kelly for being able to touch on only a very small portion of the enormous relevant literature on blaming, penal harshness and their effects: the literature which she does discuss is illuminating, and she brings its moral impact to bear effectively on her argument. Perhaps inevitably, however, she skates across some difficult issues in an effort to keep her picture clear. I will mention just two. First, a key part of the moral impact of her invocation of contemporary American criminal justice is what she presents as its evidential power in establishing a nexus between blame as a component of criminal responsibility attribution and a trend to punitiveness. (Her philosophical argument about the conceptual differences between moral blame and criminal responsibility, of course, does not depend on the establishment of this nexus. But it is nonetheless presented as part of the case for pressing the limits of blame.) It is a position with which Pickard and I have also associated ourselves (Lacey and Pickard 2015b). But it is, of course, both fiendishly hard to establish empirically; and strongly contingent on a range of features of institutional and cultural context. The re-emergence of neo-retributive desert theory from the mid 1970s gradually reshaped the political culture and sentencing policies of many countries, but none of them has seen an explosion of penal control and penal harshness of the scale and quality which has taken place in the United States; and many, like Sweden or Germany, have instead seen continued stability and penal moderation. Broader economic, political and cultural arrangements conducive to high expectations of associational value widely distributed across the population provide, in Pickard’s and my view (Lacey and Pickard 2015b), some protection here, and certainly far more than any appeal to the abstract notion of proportionality. Moreover, the current situation in the United States has been shaped by many factors beyond an attachment to stigmatising blame – including, pace
Kelly, rising crime. This is according to not only influential scholars such as David Garland (Garland 2017) and Peter Enns (Enns 2016) and but also the National Research Council’s 2014 report on the causes and consequences of the growth of imprisonment, whose expert team included Marie Gottschalk, the scholar whose earlier work Kelly cites as questioning such a link. Second, Kelly’s consequence-sensitive, hybrid justification of punishment puts its faith in the potential of punishment to effect just harm reduction via both special and general deterrence. Yet the vast empirical literature which tries to assess the prospects for deterrence, and which indeed casts doubt on those prospects, is barely acknowledged, let alone discussed.

These may seem quibbling points when set against the moral force of Kelly’s humane vision of a criminal justice system freed from the moral distortions and harmful consequences of an uncritical attachment to blame. I salute the values and goals which underlie that vision. But we can only make real progress towards them if we squarely confront both the philosophical and the practical challenges involved. And this means going further into those complex facts bearing on the feasibility of the vision; and giving careful consideration to the relative merits of the full range of broadly sympathetic philosophical arguments bearing upon it.

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References


