

**The Limits of Blame
Rethinking Punishment and Responsibility**

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3 ***The Limits of Blame***, by Erin I. Kelly. Cambridge, MA: Harvard University Press, 2018. Pp.
4 221.
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7 To many people – a significant number of philosophers among them – it is a truism that
8 criminalisation and punishment are quintessentially in the business of blaming. This
9 proposition of course encompasses a range of issues. These include, most obviously, that of
10 just what counts as blame, blaming or blameworthiness, and whether each has a distinctive
11 meaning, purpose or upshot; that of who is appropriately the (potential) subject or object of
12 blame or of a finding of blameworthiness; that of the conditions under which blame indeed
13 attaches to such a subject, and conversely of the conditions under which blame is
14 undermined; that of who, or which institutions, have a right or standing to blame, and
15 whether it is optional or mandatory for such an agent to blame. But amid the inevitable
16 debate and variety which this multiplicity of issues throws up, it is undoubtedly true, as Erin
17 Kelly argues, that blame is widely thought to lie at the core of our ideas and practices of
18 punishment and the attribution of criminal responsibility.
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22 *The Limits of Blame* sets out to question this conventional wisdom, and to persuade
23 its readers that criminal justice should in fact not be ‘in the blame game’ at all: should not
24 attribute blame understood as ‘the moral condemnation of wrongdoers’ (p. 5). Its main
25 argument rests on a number of propositions, all of them focused on the difference between
26 law and morality as normative systems, and on the view that the analogy between moral
27 and legal responsibility has been exaggerated in much of the relevant literature. First and
28 foremost, Kelly argues, legal criteria of responsibility attribution are different from those for
29 the attribution of moral blame, which she understands (variously) as relational, as inhering
30 in dispositions, emotions and intentions, and as an evaluation of an agent’s failure to
31 negotiate cognitive or motivational obstacles to acting well (p. 108). The difference
32 between legal responsibility attribution and moral blame inheres in her view most
33 particularly in the fact that the former does not relate principally to agents’ reasons for
34 action, motives, qualities of (ill) will – as distinct from psychological states such as intention
35 or awareness - and hence does not attach fundamentally to the agent as distinct from her
36 action.
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41 Related to these differences, second, legal excuses focus on a relatively limited
42 number of conditions which undermine standard volitional and cognitive capacities, and
43 which fall far short of what a proper conception of moral excuse would be expected to
44 cover in relation to both mental health and social circumstances that bear on moral
45 competence more broadly, including in a legal context. Third, moreover, this is only to be
46 expected, because courts are not appropriate institutions fully to investigate moral
47 competence. This is in Kelly’s view more than simply a contingent question of institutional
48 design: legal interpretations of culpability inevitably abstract from the individual’s moral
49 situation via general rules and presumptions, and hence ‘can never equate to moral
50 blameworthiness’ (p. 44). Furthermore, fourth, legal and moral attributions of responsibility
51 differ in terms of their scope. While the attribution of legal responsibility is mandatory and
52 universal, those with standing to blame morally have a choice as to whether to do so, or
53 whether instead to respond to moral wrongdoing with regret, reconciliation, renegotiation,
54 withdrawal, forgiveness (p. 107). Here Kelly (pp. 93–4) disagrees with Strawson’s claim
55 (Strawson 1962) that to withhold blame is in some sense dehumanising, a denial of agency.
56 In her view, legal systems should hold offenders criminally responsible without blaming
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3 them, and should structure punishment on the basis of the aspiration of fairly imposed and
4 distributed harm reduction rather than desert or retribution. Kelly further argues – in a
5 move which might be seen as reinscribing her assessment of law with concerns flowing from
6 morality – that criteria of criminal responsibility and practices of law enforcement should be
7 tempered by an appreciation of the way in which social injustice bears on crime and the
8 capacities and opportunities of those who commit crime, with a view to civilising and
9 humanising our criminal justice systems.
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13 The political and moral urgency of Kelly’s argument is thrown into sharp relief by the
14 facts of crime and punishment in the contemporary United States. In a welcome
15 engagement with some of these facts, Kelly emphasises two baleful aspects of American
16 criminal justice. The first is the hugely unequal impact of crime, criminalisation and
17 punishment, with both criminal punishment and the enforcement of criminal law falling
18 particularly heavily on the poor and on certain minority racial groups (Western 2006). The
19 second is the inexorable trend towards punitiveness, which since the 1970s has transformed
20 the American penal system into an outlier in all the wrong ways, with the most extensive
21 and arguably the harshest and most stigmatising penal system among the advanced
22 democracies (Reitz (ed.) 2018). This involves not only prison sentences whose length and
23 quality degrade those subject to them (Whitman 2003), but also extensive practices of penal
24 surveillance and enduring post-sentence disqualifications which undermine dignity,
25 citizenship, civic, economic and political capacity. Each of these features of American
26 criminal justice, Kelly believes, has been either prompted or aggravated by its inclination to
27 think of criminal responsibility in terms of blame which attaches to the offender rather than
28 of responsibility for a forbidden act. Rather, she argues, we should step back from the
29 assumption that the state has the moral authority to inflict deserved suffering (p. 12) and
30 think of punishment not as an expression of justified blame but rather as simply directed
31 against a wrong, harmful or forbidden act, with the overall institution of punishment trained
32 on the good of just harm reduction.
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39 Kelly’s book has many strengths, not least its ringing case for greater humanity in
40 criminal justice and its clear view of the many ways in which contemporary criminal justice
41 engages in stigmatising blame with serious adverse consequences. It also has much of value
42 to say in its exploration of differences between law and morality as action-guiding and
43 evaluative systems; and in its focus on the social goods which criminalisation and
44 punishment may be able to promote balanced with a concern for the demands of justice
45 and of respect for individual agency. Its conception of moral blame, which is informed by
46 Scanlon’s philosophy (Scanlon 2008), yet also bears some of the marks of a Strawsonian
47 reactive attitude, will not be to all philosophical tastes, and those like the late John Gardner
48 (Gardner 1998) who see judgments of wrongdoing as evaluations of the quality of an
49 agent’s character as constituted by their actions will reject the notion of a bright conceptual
50 line between blaming the agent and holding that an act is wrongful. But these positions are
51 energetically deployed as Kelly works through the various issues relating to criminal
52 responsibility, sentencing, punishment and law enforcement. Her argument that legal
53 excuses fail to capture not merely the nuance but the substance of moral excuses, and that
54 fine tuning legal judgments through the exercise of discretionary mitigation at the
55 sentencing stage is an inadequate way to ensure and alignment between legal judgments of
56 wrongdoing and moral judgements of blameworthiness, are well taken. And while there is
57 reason to doubt how much her, in effect, mixed theory of punishment adds to what is
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3 already a densely populated field, it reflects some of the most progressive thinking in
4 contemporary penal philosophy.
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7 In a number of ways, though, the book is a missed opportunity; and in the spirit of
8 sympathy with the overall direction of Kelly's argument, I would like to discuss several of
9 challenges which it confronts, with a view to taking this important debate forward. These
10 relate to three issues: first, the conceptual thoroughness with which she is able to articulate
11 her argument that criminal justice should eschew judgments of blame; second, her
12 characterisation of the field of legal, moral and political philosophy in its treatment of blame
13 in criminal justice contexts; and third, her handling of the upshot of the facts of American
14 criminal injustice for her normative argument.
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20 **1. When blame isn't blame...**

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22 How thoroughly is Kelly able to articulate her vision of what criminal justice would look like
23 without blame? Several aspects of her argument give pause here. First, in the chapter on
24 'Criminal Justice without Blame', Kelly does a great deal to explain why criminal law and
25 criminal courts should not engage in stigmatising blame or be 'in the business of
26 condemning evil as such' (itself a somewhat different view of blame to the one set out
27 earlier in the chapter), but gives less detail on the distinctive nature and function of a
28 finding of criminal responsibility, beyond mentioning its public role and asserting the
29 possibility of a finding that a criminally proscribed as wrongful or harmful has been
30 committed by an agent meeting the criteria of criminal responsibility. She does little to
31 build on the work of Chiao (2016, 2018), Thorburn (2010, 2017), Farmer (2015; 2016) or
32 others who have worked to carve out a distinctive picture of criminal law's normative role
33 as distinct from that of morality. In the following chapter, 'Rethinking Punishment', we get
34 the further argument that legal standards are a 'subset of morally justifiable norms' (p. 130),
35 with criminal liability founded not in blameworthiness but in a failure in the duty to respect
36 others' rights as reflected in criminal law's action-guiding rules' (p. 130). Concomitantly,
37 punishment is seen as a reinforcement of reasons to comply justified by its harm-reducing
38 effects as constrained by (strongly Hartian in flavour: Hart 2008) criteria of basic fairness of
39 opportunity to comply and generalised assessments of deterrence. Yet punishment is also
40 described as having an expressive dimension: as 'an expression of a moral judgment of
41 wrong yet not a judgment of blameworthiness' (p. 145). And even as Kelly denies that it
42 needs to be expressed via hard treatment, she speaks of the appropriate public response to
43 crime in terms of 'moral condemnation' (p. 204). Even leaving aside the objection which
44 advocates of criminal blame will surely make – that to see criminal judgment as expressing a
45 moral judgment of wrong but not of blameworthiness looks awfully like a distinction
46 without a difference – in the absence of much more robust criteria than Kelly offers to
47 anchor the penalty scale, the expressive quality of her envisaged form of criminal judgment
48 seems just as vulnerable as desert-based judgments to upward punitive pressure, with her
49 worthy call for greater moderation an expression of hope rather than a powerful argument.
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57 Second, in the final full chapter of the book, 'Law Enforcement in an Unjust Society',
58 notwithstanding her earlier articulation and defence of 'desert skepticism' (Chapter 2) and
59 rejection of the proposition that criminal judgment should involve blame, Kelly
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3 unaccountably reverts to a background desert theory of punishment. She holds – as earlier
4 argued by Jeffrie Murphy – that where conditions of radical distributive injustice exist, the
5 case for retributive desert and punishment fail (Murphy 1973). In Kelly’s view – and echoing
6 though not discussing the extensive criminal law theory literature on the so-called ‘rotten
7 social background’ defence (Bazelon 1976; Delgado 1985; cf. Moore 1985, 1997; Morse
8 2000, 2011; Robinson 2011) – the state has not only no moral standing to blame (pp. 155–6)
9 but even bears its own responsibility – indeed ‘blame’ – for crime (pp. 164; 168), rendering
10 it a ‘moral distortion for a person to be held *fully morally responsible* for his criminal act by
11 the state and its supporters’ (p. 168, emphasis added). The comments in this chapter on the
12 role of democratic authority in legitimising state punishment, and of the ways in which
13 social injustice corrodes that authority and legitimacy, leaving the authority of criminal law
14 to be justified piecemeal on moral grounds, introduce a welcome element of political
15 philosophy to the argument. And Kelly’s deployment of Sampson’s and Wilson’s work on the
16 impact of concentrated social deprivation and ‘contextual causation’ (Sampson 2013;
17 Sampson and Wilson 1995) is telling. Yet her argument about ‘rotten social background’
18 undermining the state criminal justice system’s standing to blame seems to imply precisely
19 what she denies in the rest of the book: viz. that the state otherwise has such standing.
20 What is more, the relevant question for her enterprise would surely have been that of the
21 upshot of such structural injustice for the legitimacy of punishment conceived not in terms
22 of retributive desert, but rather in terms of her own, consequence-sensitive yet fairness-
23 respecting account. The puzzles thrown up by this chapter include Kelly’s insistence that
24 retributive theory invariably calls for not just blame of the person but also the infliction of
25 penal harms – a claim denied by von Hirsch (von Hirsch 1993), who has long argued that
26 penal censure need not involve hard treatment, and one dropped in Duff’s most recent
27 book (Duff 2018, cf. Duff 2001). I agree with Kelly that the assertion of the propriety of hard
28 penal treatment has been an unhelpful counter in the public debate on crime and
29 punishment in recent years. But it is important not to confuse this with the necessary
30 contours of desert theory. It is surely the most progressive incarnations of retributivism that
31 are the most important targets for those such as Kelly and myself who believe that
32 criminalisation and punishment should not engage in blaming, and one cannot help but wish
33 that she had situated her own argument more precisely in relation to them.
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44 2. De-centring or recentring blame?

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46 A different problem with Kelly’s account has to do with the way in which it risks re-centring
47 blame by offering us a somewhat simplified view of the field: a view in which blame is
48 presented as the virtually unquestioned pivot on which the justification for criminalisation
49 and punishment turn. Certainly, blame retains a central place in much philosophical
50 scholarship on criminal justice, as in much public and policy debate. But it has been far from
51 unchallenged, at both philosophical and policy levels, in recent years. Leaving aside the
52 lively and very relevant recent debates about the aptness or otherwise of attitudes and
53 emotions such as anger in our moral lives (Nussbaum 2016; Srinivasan 2018), there is a
54 substantial and consequential philosophical literature which specifically argues either for
55 the decentring of blame in our criminal justice practices or for a renewed recognition of the
56 need to shape our interpersonal practices and design our institutions so as to temper blame
57 to morally and practically desirable ends and to keep its destructive potential at bay.
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3 I will take just three examples. For many years, Jeffrie Murphy has explored the
4 place of both forgiveness and mercy within our moral lives and within penal philosophy
5 (Murphy 2012; Murphy and Hampton 1988). And while Murphy has always been careful to
6 confront and examine what he sees as the limits of forgiveness, his work is sensitive to the
7 dangers of blame in criminal justice, as well as focused on the good of reconciliation as a
8 core component of our moral thinking about how to respond to crime. A second, different
9 body of work acknowledges many of the dangers of blame identified by Kelly, but argues for
10 a forward-looking practice of blaming which aims, in Victoria McGeer's phrase, to 'civilise'
11 blame to morally and practically valuable ends (McGeer 2013), using it, in Miranda Fricker's
12 terms, to inspire remorse and thereby to effect 'an increases alignment of the blamer of the
13 wrongdoer's moral understanding with that of the blamer.' (Fricker 2016: 167) These
14 philosophers, unlike Kelly, see a place for blame in criminal justice, but aspire to situate it
15 within an institutional and conceptual framework in which the dangers which concern Kelly
16 are minimised. A key example, and one which features in McGeer's and Pettit's work
17 (2015), would be a practice such as restorative justice: an increasing focus in both
18 theoretical debate and criminal justice practice in many jurisdictions, and a very surprising
19 omission from Kelly's book. Third – most radically, and perhaps closest to Kelly's position –
20 Hanna Pickard has delineated and defended a conception of 'responsibility without blame'
21 (Pickard 2011, 2013): one which distinguishes between 'affective blame' – the blaming
22 emotions and attitudes which attach to offenders – and 'detached blame' – the judgment of
23 harmful or otherwise wrongful behaviour. Originally deriving from her reflection on her
24 work in clinical contexts oriented to working with people engaging in behaviours harmful to
25 others and themselves to achieve behavioural and personal change, Pickard's key insight is
26 that while this sort of therapeutic work depends on a strong assumption of the patient's
27 agency and responsibility for her acts, the infiltration of the affects associated with blame –
28 resentment, anger, disgust – are inimical to an agent's capacity to create what Maruna
29 (2001) has called a 'redemption script' and hence to effect real change in her life. Pickard
30 and I have worked together to explore the relevance of the idea of responsibility without
31 blame in criminal justice, arguing that the criminal conviction and the consequences which
32 may follow can and should avoid affective blame – indeed should ideally be designed so as
33 to aspire to facilitate an institutional equivalent of interpersonal forgiveness (Lacey and
34 Pickard 2013; 2015a). But, unlike Kelly, we are content to think in terms of a criminal
35 conviction as reflecting a judgment of detached blame or blameworthiness.
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45 Needless to say, each of these approaches – the acceptance or recognition of
46 blame's attitudinal or affective aspect alongside the effort to temper its dangers to the ends
47 of reconciliation and justice, or the denial that affective blame should have a place in
48 criminal justice – itself confronts many questions and objections, of both philosophical and
49 practical kinds. But the presence of these – as well as many examples in penal philosophy
50 and normative criminology, including John Braithwaite's work on restorative justice (1989;
51 2002) and Braithwaite and Philip Pettit's republican theory of punishment (1990) – in the
52 field does suggest that Kelly's picture of the seamless embrace of blame is an exaggeration.
53 Some of them are touched on or lightly referenced in endnotes, but given that these are not
54 indexed, it is hard to keep track of the broader philosophical landscape, leaving Kelly's
55 picture of the field as the one which most readers will take away.
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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*

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3 Kelly, rising crime. This is according to not only influential scholars such as David Garland
4 (Garland 2017) and Peter Enns (Enns 2016) and but also the National Research Council's
5 2014 report on the causes and consequences of the growth of imprisonment, whose expert
6 team included Marie Gottschalk, the scholar whose earlier work Kelly cites as questioning
7 such a link. Second, Kelly's consequence-sensitive, hybrid justification of punishment puts
8 its faith in the potential of punishment to effect just harm reduction via both special and
9 general deterrence. Yet the vast empirical literature which tries to assess the prospects for
10 deterrence, and which indeed casts doubt on those prospects, is barely acknowledged, let
11 alone discussed.
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15 These may seem quibbling points when set against the moral force of Kelly's humane
16 vision of a criminal justice system freed from the moral distortions and harmful
17 consequences of an uncritical attachment to blame. I salute the values and goals which
18 underlie that vision. But we can only make real progress towards them if we squarely
19 confront both the philosophical and the practical challenges involved. And this means going
20 further into those complex facts bearing on the feasibility of the vision; and giving careful
21 consideration to the relative merits of the full range of broadly sympathetic philosophical
22 arguments bearing upon it.
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28 NICOLA LACEY

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30 London School of Economics

31 N.M.Lacey@lse.ac.uk
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