

## Accountability in Criminal Justice

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Despite philosophical efforts to model criminal justice as a practice of moral accountability, justice and moral accountability are odd bedfellows. Justice is a virtue of political society, while holding individuals morally to account for their wrongs is personal. As a virtue of political society, justice is a collective achievement. Yet the state is drawn into the realm of individual moral accountability when it comes to criminal justice.

This is not going well. The United States is currently experiencing an era of extreme punitiveness, as indicated by the high number of incarcerated people and the severity of many criminal sentences.<sup>1</sup> I will not attempt fully to diagnose or discuss the causes of this predicament, but I will address a difficulty surrounding the notion of moral accountability in criminal justice, which I believe to be an aggravating factor.

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<sup>1</sup> In 2022, approximately 2 million people are behind bars in the United States, a five-fold increase since 1980. See “Criminal Justice Facts,” The Sentencing Project. <https://www.sentencingproject.org/criminal-justice-facts/>. As summarized by Marc Mauer, “the National Research Council’s analysis of the rise in the state prison population between 1980 and 2010 attributed the increase entirely to changes in sentencing policy. Half of this growth was due to an increased number of admissions to prison and half was a function of greater time served in prison.” Marc Mauer, “Long Term Sentences: Time to Reconsider the Scale of Punishment,” *UMKC Law Review*, Vol. 87:1 (Summer 2018). <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/>. Mauer summarizes findings by Jeremy Travis, Bruce Western, and Steven Redburn, Editors. “The Growth of Incarceration in the United States: Exploring Causes and Consequences. Committee on Causes and Consequences of High Rates of Incarceration,” Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. National Academies of Sciences, Engineering, and Medicine. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/18613>.

The difficulty stems from the political sensitivity of standards of accountability in criminal law to the rights of victims and potential victims. This victim-responsiveness desensitizes the law to ethical considerations that mitigate the accountability of many criminal lawbreakers. Ethically mitigating factors include background injustice—which represents a collective failure.<sup>2</sup> Background injustice mitigates individual accountability for criminal wrongdoing because it is plausibly understood as a cause of crime. The law does not acknowledge this.

It is not surprising that a robust individual responsibility paradigm is fundamental to criminal law, even under unjust conditions. A practice of individual liability for criminal wrongdoing supports the rights and interests—of victims and potential victims—which criminal law aims to protect. But it also leads to confusion about the aims of punishment. Philosophers of punishment have equated the state's role in upholding rights-protecting rules, using criminal law, with a retributive practice of individual accountability. This is a mistake. The permissibility of applying criminal justice sanctions, when allowed by justice, should not be confused with giving criminal wrongdoers morally deserved punishment.<sup>3</sup> The political function of law—to uphold the rights of equal citizens to be free from criminal violation—should not be confused with a moral practice of retributive justice.

Failing to appreciate the gap between the political function of criminal law and a moral practice of personal accountability decreases empathy for criminal lawbreakers. While this is not the sole or even a primary driver of excessive punishment, it is my contention that decreased

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<sup>2</sup> The demographic profile of the American prison population is overwhelmingly poor and disproportionately Black and Brown. I will assume that this demographic profile indicates serious background injustice. See...

<sup>3</sup> I will proceed on the assumption that all retributive theories are committed to some version of the idea that criminal wrongdoers morally deserve punishment. I will set aside more formal concepts of retribution, including the idea that criminal guilt is a condition of eligibility for legal punishment, which does not sort relevant differences between retributive and nonretributive theories of the aims of a punishment system.

empathy for criminal lawbreakers, on the theory that they deserve punishment, serves to normalize the practice of punishment, even when it is extreme.

Guiding my discussion will be some lessons from John Rawls about how to think about the political nature of justice and legitimate law. The practice of individual accountability is often grounded in claims about what individuals deserve, but, as Rawls argued, desert is not a plausible foundation for justice. Turning away from desert and its companion notion of retribution leads us to non-desert based practices of accountability. Appealing among them is restorative justice. I conclude with a plea for retracting the punitive role of the state in the service of restorative justice. A restorative practice of accountability could help to alleviate tensions between the political and moral aspects of criminal law.

### *1. Justice as Reciprocity*

The role of criminal law in achieving or interfering with democratic justice makes it political. Legitimate law is underwritten by important political values and adequately if not perfectly meets their demands. I will start with Rawls's instructive theory of democratic justice and how the rule of law, including criminal law, fits into it. This will help us to understand how background injustice could threaten the moral accountability of criminal lawbreakers, namely, by restricting their law-abiding life prospects.

Rawls argued that democratic justice is not a matter of conferring deserved benefits and burdens. Justice cannot be a matter of moral desert, he thought, because distributive outcomes depend on many factors we cannot possibly be said to deserve. We do not deserve our birthplace in the social order and the advantages or disadvantages it inevitably confers upon us, nor do we deserve our place in what Rawls referred to as "the natural lottery." We do not deserve our

natural talents, psychological dispositions, or aptitude for mental and physical health, just as we do not deserve the good or bad luck that befalls us.<sup>4</sup> Yet these factors influence a person's life chances. They make a real difference to how well a person can expect to do in society.<sup>5</sup>

The differences social position and natural characteristics make to a person's life-chances are most striking in an unjust society, where there are few bounds to the rewards advantaged members leverage for themselves, and where poverty and subordination curtail even the most hard-working and talented person's opportunities. For example, in United States, in 2016, the median family wealth in the U.S. for whites was \$171,000 and only \$17,600 for blacks. The poverty rate for black children was 30.8 percent.<sup>6</sup> Both poverty and racial subordination represent significant obstacles to a person's opportunities and life experience.

Yet even in a just society, attributes like intelligence, creativity, beauty, family support, and health, which are at least partly undeserved, will influence the choices a person makes and how well a person can expect to do during his or her life. From this Rawls concluded, and I agree, that the distribution of rewards for social and natural advantages should not be thought of as a matter of allocating shares according to desert—if that notion even makes sense. Instead, a

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<sup>4</sup> At least, we do not deserve the background conditions that influence the cultivation of our dispositions, talents, and health, which makes it difficult—perhaps impossible—to sort out what we are and are not responsible for.

<sup>5</sup> John Rawls, *A Theory of Justice*, revised edition (Cambridge, MA: 1999), p. 89.

<sup>6</sup> See, e.g., Trymaine Lee, "A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions and Exclusion Separates Black and White America," *The New York Times Magazine* (August 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html>. On currently poverty rates by race, see Deja Thomas and Richard Fry, "Prior to COVID-19, Child Poverty Rates had Reached Record Lows in the United States," Pew Research Center. November 30, 2020. <https://www.pewresearch.org/fact-tank/2020/11/30/prior-to-covid-19-child-poverty-rates-had-reached-record-lows-in-u-s/>. I note that the poverty rate among black children has dropped since 2016, but as of 2019, it was still 26.4%.

distributive scheme should be to the mutual advantage of all members of society, including the least well off.

This idea of *justice as reciprocity* prescribes a role for the criminal justice system that is at odds with theories of retributive justice. Retributivists argue that reciprocity is established by giving blameworthy wrongdoers the punishment they morally deserve. Rawls rejects this idea because he rejects desert as the basis of justice. In fact, he finds it hard to believe that even a retributivist commits to justifying the practice of punishment in this way. He writes, “Does a person who advocates the retributive view necessarily advocate, as an *institution*, legal machinery whose essential purpose is to set up and preserve a correspondence between moral turpitude and suffering? Surely not.”<sup>7</sup> Rawls suspects that moral retributivism as a theory of the institution of punishment confuses justifying an act (punishing the criminally guilty) under the rules of a practice with justifying the practice itself. Punishing the criminally guilty under the rules of the system is justifiable, if the rules are justified, but does not tell us what justifies the rules. Punishing a person because she is criminally guilty does not establish retribution as the point of the practice. Apparently, Rawls underestimated the legal moralism of contemporary retributivists.

Rawls’s own view is that the rules of criminal law are best understood, when they are justified, as a set of public rights-protecting norms serving some of the most basic interests of persons as equal members of society.<sup>8</sup> The criminal justice system would express the authority and responsibility of the state to serve those interests by validating and enforcing compliance with rights-protecting norms. Violations of these norms are wrongful and serious enough as to

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<sup>7</sup> John Rawls, “Two Concepts of Rules,” *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard Univ. Press, 1999), p. 24

<sup>8</sup> Rawls, *A Theory of Justice*, pp. 211-12, 214-220, 504-5.

permit the use of criminal sanctions to persuade a person who disregards the criminal law and violates other people's rights that complying with just law is required by justice and in his or her interests (at least, in view of possible criminal punishment). Punishment would serve the aims of mutual assurance, deterrence and, in extreme cases, incapacitation. In this way, the use of criminal sanctions would be outcome sensitive. The state's use of coercive measures would not express the intrinsic value of giving a bad person the suffering he or she morally deserves. Instead, a criminal justice system would be designed to contribute to a mutually beneficial, liberty-protecting social order, one that involves, fundamentally, acknowledging and addressing the basic needs and potentialities of all members of society, including the lawbreaker.

This standard of public justification expresses the equal democratic standing of all members of society. The welfare of society overall is not enough to justify the deprivation of individual liberty or other serious burdens to criminal lawbreakers. Those who are subjected to punishment for criminal lawbreaking must also have interests the protection of which provides them with reasons to subscribe to a set of social rules that permit punishment of similar lawbreakers.

Now a question for any account of criminal justice that is sensitive to equality, in the sense just outlined, concerns the permissibility and fairness of imposing punishment on the individuals who are subjected to it, especially those persons for whom law-abiding behavior is especially difficult. What ensures that their punishment is not excessive? This question is especially urgent when we leave the domain of ideal theory. What ensures that criminal lawbreakers, especially those who are unjustly disadvantaged or impaired through no fault of their own, are not excessively burdened?

Rawls responds to this worry in a highly abstract way. He writes, “liberty can be restricted only for the sake of liberty itself.” He then outlines two sorts of cases. “The basic liberties may either be less extensive though still equal, or they may be unequal. If liberty is less extensive, the representative citizen must find this a gain for his freedom on balance; and if liberty is unequal, the freedom of those with the lesser liberty must be better secured.”<sup>9</sup> We can illustrate the first type of case by thinking of criminal sanctions as a threat to the liberty of the representative citizen, designed to enhance compliance with the law. In other words, punishment is justified by the role it plays in stabilizing the system of social cooperation. It is rational for the representative citizen to accept the risk of punishment for the sake of living under the protection of law.<sup>10</sup> That some will be punished for lawbreaking is simply a consequence of institutionalizing the practice of punishment, so understood.

On the other hand, we might acknowledge that consulting the viewpoint of the representative citizen is of limited value, because the risk of incurring punishment is not equally distributed. Some people—say, the more impulsive—are more likely to run afoul of the law. Their criminal acts reveal their wrongful tendency to disrespect the rights of other people. Rawls suggests this view when he says, “the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end. They are not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way to guide men’s conduct for mutual advantage. It would be far better if the acts proscribed by penal statutes

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<sup>9</sup> Rawls, *A Theory of Justice*, pp. 214-215.

<sup>10</sup> See Sharon Dolovich, “Legitimate Punishment in Liberal Democracy,” *Buffalo Criminal Law Review* 7 (2004): 307-442.

were never done. Thus a propensity to commit such acts is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults.”<sup>11</sup>

Here Rawls suggests that people whose “bad character” poses a criminal threat to the rights of other people may rightfully be corrected by the state. But how should we understand the moralism of this passage? Since character itself is at least partly the product of undeserved circumstances, how could character-focused punishment be fair? Does justice require sensitivity to blameworthiness and desert, after all, including mitigating considerations, such as mental illness and social disadvantage? At this juncture, we might experience the appeal of “negative retributivism,” namely, the view that punishment should not be imposed on a person who does not deserve it. Did Rawls too readily dismiss the relevance of desert?

It would be surprising and ironic for a theory of justice fundamentally concerned with how fairly to manage the influence of natural and social contingencies on a cooperative social scheme to endorse an allocative desert principle when it comes to criminal justice. If desert plays no fundamental role in the distribution of the benefits of social cooperation, it is hard to see why it should be central to the justice of responding to the breakdown of that order. The natural and social contingencies that contribute to social inequality also figure centrally into plausible accounts of criminal behavior. Thus desert, even construed negatively—as a condition but not the determinate of punishment—seems poorly constituted as the basis of the state’s response to criminal behavior.

These doubts direct us to Rawls’s second kind of case, where restrictions on freedom are justifiable provided that “the freedom of those with the lesser liberty [are] better secured.” We are reminded of Rawls’s assertion that the practice of punishment should not be set up “to

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<sup>11</sup> Rawls, *A Theory of Justice*, pp. 276-77.



preserve a correspondence between moral turpitude and suffering.” All must benefit from the role of the practice of criminal justice in stabilizing a cooperative system, including those whose liberty is most restricted. This implies the urgency of a radical reorganization of the practice of punishment, at least the practice familiar in the United States. Criminal justice, and its notions of accountability, should be designed to acknowledge and remedy the causes of criminal wrongdoing and to promote the social reintegration and democratic equality of victims and responsible parties alike. This Rawlsian argument, and the values it expresses, can be viewed as placing democratic political constraints on the practice of individual criminal accountability. The criminal law, like other political institutions, belongs to the basic structure of society, which can be justified only if it fairly distributes the benefits and burdens of social cooperation.

## 2. *Moral Accountability*

The idea that the practice of punishment is justified instrumentally—to protect equal rights and liberties—is resisted by those who insist that desert must play a critical role in criminal justice. The asymmetry between the rejection of desert as a basis of distributive entitlements and the suitability of desert as a basis of punishment can be explained, or so it is claimed. Moral desert tracks important moral truths that are not reducible to their role in fairly distributing the benefits and burdens of social cooperation. Unlike the production of wealth and opportunity, which should be viewed as the result of a cooperative enterprise—an economy—morality is irreducibly *personal*. More precisely, it is interpersonal or, as Stephen Darwall puts it, “second personal.” A wrongfully injured person has a special standing within the moral community, a second-personal moral authority to hold her injurer to account. The injured party

is morally entitled to demand that the responsible party answer to her for the wrongful injury.<sup>12</sup> What the wrongdoer deserves is to be held accountable, in this way, by the injured party.

An extension of this thought is that in a system of public law, an entitlement to hold a wrongdoer to account may be realized vicariously, through the agency of the state. The state calls an offender to account on behalf of the victim and, more generally, for the sake of potential victims and society at large.<sup>13</sup> But, importantly, the moral accountability of a person to the public takes place in a register of justice that is not reducible to the logic of distributive justice.<sup>14</sup> It is not a process intended to calibrate a criminal wrongdoer's "fair share" of the burdens of social cooperation, or to impose penalties only when they are to the benefit of all, including the lawbreaker. It is more directly interpersonal: accountability is something victims or their representatives are entitled to demand of a criminal wrongdoer, apart from any beneficial consequences to society of this accounting. This moral entitlement acknowledges the equal moral standing of victims in relation to the persons who have wronged them. Their moral equality as persons entitles them to demand an account of that wrong, whether or not doing so brings with it any further good.

So understood, moral accountability concerns how people treat one another apart from, within, and perhaps despite, larger social arrangements and structural influences. It tracks the duties we have to one another as persons, inside the contingencies of various possible

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<sup>12</sup> Stephen Darwall, *The Second Person Standpoint Morality, Respect, and Accountability* (Cambridge, MA: Harvard Univ. Press, 2006), and Stephen Darwall and Julian Darwall, "Civil Recourse as Mutual Accountability," *Florida State University Law Review* 39, no. 1 (Fall 2011), especially 19-27. See also R. Jay Wallace, *The Moral Nexus* (Princeton: Princeton Univ. Press, 2019).

<sup>13</sup> See, for example, R. A. Duff's analysis of the importance of the criminal trial. ...

<sup>14</sup> Elsewhere I have argued for the unfairness of imposing punishment on severely disadvantaged members of society by drawing on a basic threshold of distributive justice. See [...] *Philosophy*. Published online Feb. 23, 2021. <https://doi.org/10.1080/13698230.2021.1893253>. I do not pursue that line of thinking here, though the argument in this paper is compatible with it.

institutional arrangements, just or unjust.<sup>15</sup> It is grounded in the significance of choice, specifically, in the idea that, though institutional unfairness helps to explain crime rates, it does not determine individual wrongdoing. Institutional unfairness is compatible with individual moral agency. Justice demands accountability for wrongdoing, even under socially unjust conditions.

In connection with this moral notion of individual accountability, there are (at least) two further roles the concept of desert might play in the familiar practice of criminal justice, neither of which is endorsed by Darwall, for reasons I will explore. The first is expressive. Criminal behavior could be said to call for public moral condemnation. More exactly, the agent of such wrongful behavior could be said to deserve public repudiation for that behavior. Joel Feinberg advocates this idea, and so does Antony Duff. Feinberg emphasizes the role public reprobation plays in vindicating the law as well as the rights and moral status of victims.<sup>16</sup> Duff stresses its role in accomplishing the “three r’s” of punishment: repentance, reform, and reconciliation.<sup>17</sup> According to these thinkers, the practice of moral accountability through criminal justice involves public censure. The rules of a criminal justice system are organized around the repudiation of criminal behavior. Censure can be viewed as a kind of protest, on behalf of victims.<sup>18</sup>

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<sup>15</sup> Rawls, *A Theory of Justice*, 98-101, 293-301, and Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge, MA: Harvard Univ. Press, 2016), 213, 219-22.

<sup>16</sup> Feinberg, Joel. “The Expressive Function of Punishment,” *The Monist* 49 (1965): 397–423, reprinted in *Doing and Deserving: Essays in the Theory of Responsibility*. Princeton: Princeton Univ. Press, 1974. 404-8.

<sup>17</sup> R. A. Duff, *Punishment, Communication, and Community*, (Oxford: Oxford Univ. Press, 2001), p. 107.

<sup>18</sup> Pamela Hieronymi, “Articulating an Uncompromising Forgiveness,” *Philosophy and Phenomenological Research* vol. 62, no. 30 (May 2001), 30. See also Angela M. Smith, “Moral Blame and Moral Protest,” in *Blame: Its Nature and Norms*, eds. D. Justin Coates and Neal Tognazzini, (Oxford: Oxford University Press, 2013): 27-48.

A further step adds a more punitive element.<sup>19</sup> Criminal behavior calls for the imposition of harm on criminal wrongdoers. Feinberg and Duff are circumspect about this element. According to Feinberg, the imposition of hard treatment is symbolic and contingent on community norms.<sup>20</sup> Duff seems to agree.<sup>21</sup> But others take a stronger view. Jean Hampton advocates the importance of *defeating* a criminal wrongdoer's claim to moral superiority over his victim by imposing proportionate harm on the wrongdoer. Hampton thinks the practice of retributive harming is critical to restoring social recognition of a victim's moral equality.<sup>22</sup> Michael Moore argues, more metaphysically, that justice requires harming wrongdoers because and only because they deserve it. To make his point, he draws on a basic moral psychology of blame, guilt, and deserved suffering.<sup>23</sup>

Many criminal law theorists accept some version or other of this retributive idea. As we have seen, Rawls does not. Though he endorses a morality of natural duties, he rejects both denunciatory and retributive rationales for punishment. Instead, as we have seen, punishment is justified as a practice intended to stabilize a cooperative scheme. Our present concern is whether

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<sup>19</sup> I note that a retributive element seems to be implicit in the censure view.

<sup>20</sup> Feinberg, "The Expressive Function of Punishment," 400.

<sup>21</sup> Duff remains committed to the importance of retributive punishment, but to avoid strong claims about the value of imposed suffering, he avoids the language of "hard" (versus "burdensome") treatment. See, for example, R. A. Duff, "Responsibility, Restoration, and Retribution," in *Retributivism Has a Past: Has it a Future?* ed. Michael Tonry (Oxford: Oxford Univ. Press, 2011). Duff also argues that those who have been seriously and unjustly excluded or disadvantaged cannot justly be punished. See Duff, *Punishment, Communication, and Community*, pp. 188, 200.

<sup>22</sup> Jean Hampton, "The Retributive Idea," *Forgiveness and Mercy* (1998), pp. 124-143. See also Jean Hampton, "Correcting Harms vs. Righting Wrongs: The Goal of Retribution," *UCLA Law Review* 39 (1992): pp. 1659-1702.

<sup>23</sup> Michael S. Moore, "The Moral Worth of Retribution," *Responsibility, Character, and the Emotions: New Essays in Moral Psychology*. ed. Ferdinand Schoeman (Cambridge: Cambridge University Press), 1987.

a Rawlsian justification of the practice of punishment has missed the ethical importance of the practice of moral accountability, which seeks a home in the domain of criminal law.

Arguments for the moral basis of accountability in criminal justice, both retributive and nonretributive, depend on the idea that criminal punishment is organized around a rejection of behavior that violates a legal standard of conduct that is, if the law is just, also a moral standard. This moral position is the backbone of the quest for moral accountability through law, and the basic premise is plausible, as far as it goes. Legitimate criminal law authorizes the sanction of violations of its rules, rules that will satisfy a threshold of morality and distributive justice, if they are legitimate. Furthermore, a person is not (supposed to be) vulnerable to criminal sanctions for behavior that does not violate the criminal law. Thus, when a person is legitimately subject to sanctions, the imposition of sanctions expresses moral censure for behavior that is wrongful and illegal.

Retributive theories expand this moral truism about justifiable punishment into advocacy for a morally-blaming, harm-imposing practice of criminal accountability. Critical reflection reveals that this line of thinking is misguided. To emphasize the shortcomings of a condemnatory, harm-imposing practice of moral accountability, I will draw on principles of Anglo-American criminal law. Turning to legal doctrine represents a shift in our discussion from normative theory to institutional practice that might seem like changing the subject. But we will see that the way the law can be expected to operate places some constraints on relevant normative principles. A criminal justice system does not work well as a system of individualized moral accountability, and we should not expect it to. A well-designed criminal justice system will be less involved with the moral psychology of blame and interpersonal moral reckoning than

retributivists would like to believe. It will not deliver what they promise. Rawls's notion of the nature and limits of a political conception of justice can help us to understand why.

### 3. *The "Objectivity" of Criminal Law Standards*

One reason for thinking that a criminal justice system will not work well as a system of individualized moral accountability is that the institutional demands of political justice push in the direction of consolidating and simplifying legal standards of conduct and responsibility. For example, except for those suffering from extreme forms of mental illness deemed to meet the legal criteria of "insanity," all adults, and many juveniles, are held to the same legal standards. This is partly for epistemic reasons. For example, when considering possible expansions of the legal definition of insanity, courts have rejected as impractical and unrealistic the task of sorting the difference between irresistible and resistible impulses. "[T]he line between an irresistible impulse and an impulse not resisted is probably no sharper than between twilight and dusk," declares the court in *United States v Lyons*.<sup>24</sup> This declaration would seem to involve an understandable simplification, for practical reasons, of an epistemically and normatively difficult psychological question. Yet it creates a rift with the morality of responsibility and mitigation, which cannot avoid such distinctions. The line between an irresistible impulse and an impulse not resisted is morally important. It marks the threshold of accountability.

The state's reasons to resist individualized judgments of moral accountability, however, are not merely epistemic. The state also has a legitimate interest in codifying generalized standards of conduct through criminal law that stems from the law's *rights-based, victim-*

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<sup>24</sup> *United States v. Lyons*, United States Court of Appeals, 731 F.2d 243, 248 (5<sup>th</sup> Cir. 1984) (en banc) (quoting the American Psychiatric Association Statement on the Insanity Defense, 11 (1982)).

*sensitivity*. Victims are wronged, and potential victims entitled to protection, whether or not a responsible party is fully to blame for the wrongful criminal act. In this respect, there is an affinity between criminal and tort law.<sup>25</sup> A tort victim has reason to object to the harm a tortfeasor has wrongfully caused, apart from the tortfeasor's moral blameworthiness for the injury. Similarly, a crime victim can be wronged by a criminal act, even when the criminal agent's blameworthiness is mitigated. The analogy between criminal and tort law on this point is not complete, since a morally thicker measure of personal moral evaluation attaches to criminal agency by way of the criminal law's attention to a crime's act and mental state requirements. Still, agential appraisal is more limited than what is involved in morally evaluating a criminal actor's character or capacity to have acted better. Above a threshold of minimal rationality, character and capacity evaluations are not required to establish criminal guilt. This implies a meaningful distinction between wrongdoing and blameworthiness, which I am arguing is revealed through the criminal law's sensitivity to the rights of the victim.<sup>26</sup> Victim-responsiveness leads the practice of criminal justice in the direction of holding wrongdoers "accountable," whether or not their moral blameworthiness is fully established. The underlying, plausible moral idea is that we bear responsibility for the way our actions affect other people, even when we are not (fully) at fault for the wrong we do. As we will see, the counter-intuitive aspect of this claim can be rendered acceptable by rejecting moral retributivism.

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<sup>25</sup> On the idea that civil liability for injurious wrongs does not depend on or encompass sanctions directed at the *blameworthiness* of the wrongdoer, see John C. P. Goldberg and Benjamin C. Zipursky, *Recognizing Wrongs* (Cambridge, MA: Harvard Univ. Press, 2020), 172.

<sup>26</sup> Johann Frick draws a similar distinction, in moral evaluation, between the perspective of the agent and the patient. See his "Dilemmas, Luck, and the Two Faces of Morality," unpublished manuscript.

This victim-sensitivity makes sense when criminal law is viewed, as Rawls construes it, as a kind of rights-protecting social agreement. I will suppose, with Rawls, that reasonable members of a society would agree to some coercive enforcement of criminal law by the state as an important measure of protection for each person's basic rights from criminal violation by other persons. The acceptability of state intervention, even when the blameworthiness of some criminal wrongdoers for their crimes is diminished, is justified because the alternative—no intervention—would objectionably leave many criminal violations of basic rights and interests unchecked.<sup>27</sup> In this way, the rights-protecting role of criminal law is affirmed. Yet it stands in some tension with the accountability-seeking function, which retributivists and many nonretributivists associate with moral blameworthiness. This tension is uncomfortable.

Law attempts to alleviate this tension via what I will refer to as *the avoidance requirement*: a person who is eligible for criminal punishment must have committed a criminal act while enjoying a reasonable opportunity to comply with the law. This avoidance requirement is the focus of legally recognized excusing and mitigating considerations, and it is not well understood.<sup>28</sup> Sanford Kadish holds that legal excuses ensure that the criminally guilty are blameworthy for their criminal acts.<sup>29</sup> David Brink expresses a similar view, maintaining that excuses work in two ways. He points to factors, like insanity and immaturity, that undermine an agent's *normative competence*, and situational factors, such as manipulation or duress, that compromise an agent's *opportunity* to exercise her normative capacities free from wrongful

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<sup>27</sup> I set aside for now the limits and qualifications of necessity and proportionality, which I have argued can be calibrated to wrongfulness, rather than blameworthiness. See [...] See also Sharon Dolovich, "Legitimate Punishment in Liberal Democracy," *Buffalo Law Review*, Vol. 7 (2004), pp. 325-6, 386-90, 400-1, and John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Punishment* (1990), 87 (cited in Dolovitch).

<sup>28</sup> Thanks to David Sussman for this terminology.

<sup>29</sup> Sanford H. Kadish, "Excusing Crime," *California Law Review* 75, No. 1 (Jan 1987), 264-5.



interference. The relevant psychological and situational criteria together comprise a “fair opportunity” conception of responsibility that, according to Brink, “fits our considered judgments about when agents are responsible and when they should be excused both in moral assessment and in the criminal law.”<sup>30</sup>

Contrary to Brink’s optimism about fit, this promise is not realized, nor is it likely to be. The availability of legal excuses does not ensure that the criminally guilty are blameworthy for their criminal acts. It is more accurate to say that legal excuses are designed to establish that those who are criminally guilty are minimally rational and have enjoyed a reasonable opportunity to avoid breaking the law, by a legally “objective” measure. As I will now explain, enjoying a reasonable opportunity to avoid criminal sanctions does not establish that a criminal lawbreaker is moral blameworthy, because the relevant threshold is lower than what moral blameworthiness should be thought to require. This is as it should be. Public rejection of criminal behavior need not depend on a moral evaluation of the responsible party’s character or moral capacities. It has a thinner political point addressed to persons in their role as citizens.

Excuses in criminal law are designed such that people who meet a minimal standard of rationality—that is, people who are not legally “insane”—are subject to the requirements of law, except when compliance with law’s requirements involves difficulties that most reasonable persons could not manage successfully. The narrowness of duress, coercion, and provocation as legal excuses illustrates the law’s broad notion of reasonable expectations. Legally recognized excuses are calibrated by reference to an “objective” standard of reasonableness rather than a “subjective” one. Objective reasonableness ignores mental illness, even illness as severe as

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<sup>30</sup> David O. Brink, *Fair Opportunity and Responsibility*, (Oxford: Oxford Univ. Press, 2021), chapter one.

schizophrenia, and serious social disadvantage, including desperate poverty. This means that some minimally rational persons may have difficulty satisfying the operative conception of reasonableness and may even be incapable of meeting it. For example, the Model Penal Code defines duress as criminal conduct engaged in when the defendant is subjected to threats against his person or the person of another “that a person of reasonable firmness in his situation would have been unable to resist.”<sup>31</sup> The defendant’s “situation” includes deprivations of physical functioning but not mental health.

The legally objective standard set by reference to the fortitude of a person of reasonable firmness implies that the legal excuse of duress is not available to a person whose subjective perception of a threat is unreasonable, or who is more easily cajoled into action than others, perhaps on account of intellectual disability, mental illness, or immaturity. The law sets a similar standard when it comes to other legal excuses and justifications, and it abstracts from the influences of poverty and social disadvantage. In effect, the law calibrates the legally operative notion of accountability to a generalized set of expectations that is responsive to “normal” capacities and the interests of victims and potential victims. The result is that the availability of legal excuses does not ensure that the criminally guilty are morally blameworthy for their criminal acts. A defendant may lack an excuse recognized by criminal law despite the presence of morally significant mitigating factors. Legally recognized excuses and justifications do not track all the conditions that mitigate individual moral blameworthiness.

Still, the avoidance requirement marks an important requirement of justice. Though it is not a measure of subjective capability, it can be seen to represent what people owe to one another

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<sup>31</sup> American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes* (1962), §2.09.

as democratic citizens, namely, respect for one another's rights and a *reasonable* opportunity to comply with the law, calibrated with reference to the rational and moral capacities possessed by a normal, law-abiding citizen. This notion of democratic accountability is illuminated by a Rawlsian understanding of the political demands of justice. The demandingness of legal norms is set politically, as a rights-based function of what we "objectively" owe to one another other as equal citizens, rather than as a measure of the subjective capacities of individual defendants to respond to moral considerations, or of reasonable expectations about which difficulties they will handle successfully, despite unfavorable circumstances.

Rawls asserts that all forms of political liberalism will recognize a familiar list of basic rights and liberties as well as the basic means to make effective use of them. We owe each other the provision and protection of these rights, opportunities, and material means. When these reciprocal obligations are met—that is, when all citizens enjoy, to a minimally acceptable degree, the rights, liberties, opportunities, income, and wealth to which they are entitled by justice—we can say that they also enjoy a reasonable opportunity to comply with the law. This is true even though it is more difficult for some people to conform their behavior to the law. The threshold of democratic legitimacy abstracts from variation across individuals, above a threshold set by basic rationality and the entitlements of citizenship, including access to decent health care.

In this way, we can understand the threshold of law's legitimacy to involve a *politically liberal* interpretation of the avoidability requirement. The relevant demand tracks a generalized standard: what democratic citizens owe to one another. Still, it is not utterly insensitive to subjective capabilities. Insanity as a condition that excuses criminal liability requires a subjective psychological evaluation. Furthermore, there is room for democratic citizens to debate where the threshold of sanity should be set, with appropriate sensitivity to the qualities of will that enable a

basic responsiveness to law as an action-guiding system, as well as the mental health care people are entitled to.

We may understand legitimate criminal law to be responsive to subjective capabilities in a further way. Subjective failures to conform to law are relevantly appraised in a group-sensitive manner. Specifically, when members of historically disadvantaged groups are disproportionately subjected to the punishment system, we should suspect that the relevant avoidability threshold has not been met. An identifiable pattern suggests a troublesome causal explanation of crime and punishment rates, namely, that they are the result of social injustice. More generally, when incarceration rates are high, we should suspect that there is a systematic failure to maintain a decent avoidability threshold.<sup>32</sup> Just institutional support for morally responsible individual choices is lacking.

Rawls himself acknowledges the relationship between deviant conduct and institutional failures. He writes, “men’s propensity to injustice is not a permanent aspect of community life; it is greater or less depending in large part on social institutions, and in particular on whether these are just or unjust.”<sup>33</sup> For example, when unjust social disadvantage is a cause of higher crime and punishment rates for a disadvantaged group, there is reason to believe the liberty of disadvantaged group members is being compromised for the sake of the interests of other members of society in ways that exceed a reasonable standard of avoidability. The causal role of unjust social disadvantage is incompatible with a society’s commitment to a reasonable understanding of the avoidability condition. In other words, the disparate impact of the criminal punishment system on historically disadvantaged groups is an indication of continuing injustice

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<sup>32</sup> Thanks to Joshua Cohen for pressing this point.

<sup>33</sup> Rawls, *A Theory of Justice*, p. 215.

that challenges the system's legitimacy. Historically enduring injustice challenges the legitimacy of criminal punishment.

I am arguing that reasonable criteria of criminal accountability depend on wider conditions of distributive justice. The American criminal justice system is shaped by a political conception of what we owe to one another as democratic citizens. It is also deeply implicated in the contradictions between the aspirations of democracy and the unresolved wounds of serious longstanding socioeconomic injustice that is the legacy of American slavery. The political and remedial dimensions of justice require that state interventions be designed to enhance the capabilities and opportunities of those who have been unjustly treated. This underscores Rawls's position that neither condemnation nor retribution is an attractive basis for punishment in a society that aspires to democratic justice.

#### *4. The Politics of Liberalism*

The argument I have just presented has been described by Samuel Scheffler as a political problem for liberalism. Scheffler argues that liberals who focus on the social causes of crime appear to subscribe to a diminished conception of agency and responsibility and to underestimate the political importance of validating people's desert-focused moral attitudes.<sup>34</sup> The attitudes he has in mind include morally blaming forms of anger and retributive ideas about justice. The concern is that situating criminal wrongdoing in relation to social and institutional causes, as I have done, unsettles the appropriateness of these reactive attitudes by casting doubt on the deservingness of their targets. This creates a political problem for liberalism, thinks Scheffler,

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<sup>34</sup> Samuel Scheffler, "Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics," *Philosophy and Public Affairs* 21, No. 4 (Autumn 1992), 302.

since the public is invested in a mode of criminal accountability that distributes punishment according to moral desert. Thus, according to Scheffler, “[T]he more promising political strategy for liberals would be to present the policies they advocate as compatible with traditional notions of responsibility.”<sup>35</sup> In short, liberalism’s skepticism about desert is a threat to its efficacy as a public, political philosophy.

Of course, if there really is a tension between the social causes of criminality and judgments of individual desert, disregarding that tension for political purposes would be objectionable. It would be unfair to ascribe responsibility to individuals, in the register of moral desert, for the influence on their lives of unjust social structures. I will assume that Scheffler believes this worry is overblown. His diagnosis of liberalism’s wariness about desert suggests that this is his view. As Scheffler understands it, the source of liberal political philosophy’s resistance to moral desert as the basis of punishment is a commitment to an implausibly skeptical view of human agency as swamped by its causes.<sup>36</sup> I disagree and will propose a different diagnosis.

Let’s return to the troublesome epistemic challenge I raised earlier, namely, the epistemic difficulty of sorting the difference between compulsion and choice. I said that the desert view depends on our ability to sort this difference, which may be obscure. A similar challenge faces the desert theorist who aims to parse the difference between deserved and undeserved dispositions and abilities, both of which influence a person’s behavior by restricting what are perceived by her to be her reasons for action.

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<sup>35</sup> Scheffler, “Responsibility, Reactive Attitudes, and Liberalism,” 303.

<sup>36</sup> Scheffler, “Responsibility, Reactive Attitudes, and Liberalism,” p. 309.

To acknowledge this epistemic difficulty need not imply, as Scheffler worries it does, that human thought and action may turn out to be “wholly subsumable” within in a naturalistic worldview since, arguably, human beings think, deliberate, and choose in ethically relevant ways. Causal accounts of human behavior include an understanding of human beings as acting and forming beliefs in response to what they perceive as reasons. Conceiving of human agency as reasons-responsive is not at odds with a causal account of human behavior, because human agency is both guided and explained by practical reasoning. It has a rational structure. What an account of social causes adds to a rational understanding of human behavior is an analysis of the salience to human agents of particular reasons, and how the dynamics of salience vary across social context. For example, a lack of parental oversight and the absence of community organizations in a neighborhood with high rates of violence explains an increase in the appeal to boys and young men of membership in criminal gangs.<sup>37</sup>

What *is* threatened by the “contextual causation” of human behavior, is the autonomy of a person’s will from the forces that shape it.<sup>38</sup> A person’s agential efforts and accomplishments can be identified, have ethical significance, and may comprise distinguishing features of her personhood, but they are also undeniably shaped by social context, institutional norms, and personal history. Most notably, in this connection, a person’s capacity for rational and ethical

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<sup>37</sup> See Robert J. Sampson and William Julius Wilson. “Toward a Theory of Race, Crime, and Urban Inequality” in *Crime and Inequality*, edited by John Hagan and Ruth D Peterson (Stanford, CA: Stanford University Press, 1995), 37-56. See also Clifford Shaw and Henry McKay, *Juvenile Delinquency and Urban Areas* (Chicago: University of Chicago Press, 1942).

<sup>38</sup> On the “contextual causation” of criminal behavior, see Robert J. Sampson, “The Place of Context: A Theory and Strategy for Criminology’s Hard Problems,” Presidential Address to the American Society of Criminology, *Criminology* 51 (2013): 1-31. See also Robert J. Sampson, *Great American City: Chicago and the Enduring Neighborhood Effect* (2012), and Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (Cambridge, UK: Polity Press, 2008).

reflection and choice is itself produced and constrained by experience. For example, childhood exposure to violence may increase an individual's propensity to engage in violence by coloring her perception of acceptable options in response to interpersonal conflict.

This should be appreciated as we construct an ethically viable notion of personal accountability. We might think of "the will" as a description of the way a person's experientially conditioned sensitivities enable her to reason and to make commitments, as evidenced by her conduct. The embedded nature of this capacity—its connection to a person's *whole life*—means that it makes little sense to ask whether a person could have had a better will and thus could have acted better (in an ethical sense) than she did. We must be careful here. The position should not be overstated. There may, in fact, be a reasonable answer to the question whether a person could have acted better than she did, but this answer will be framed in relation to the dynamics of her will, as I have just defined it—the extent to which sensitivities that have been shaped by a person's life experience enable her to reason and choose well. This situated understanding of a person's will, together with our best grasp of the capacities of persons with similar life experience, is what we rely on to formulate reasonable counterfactual judgments of that person's capacity to have acted better. The basis of our judgement thus depends on our grasp of what we deem to be relevant patterns of thought and behavior, across persons, as well as what we observe about the subject's ability to shape those patterns, in her own case, through her intelligent choices.

There remains, however, an inevitable gap between the bases of these supporting generalizations and evidence that would establish the truth of a particular counterfactual assessment, since our generalizations abstract from aspects of the agent's situation in ways that could turn out, as it happens, to be relevant. One person caves into peer pressure and another



does not. Statistical generalizations based on a demographic profile or what we have identified as significant experiences in a person's life history may not explain this difference.

Here we confront some epistemic limitations. Understanding a person's behavior is an interpretive exercise. Our construction of her point of view relies on making sense of it, in view of everything we know about her. This means that our interpretation will, inevitably, be guided by *our own* sensitivities about what makes sense from her perspective, in view of our grasp of the totality of facts about her circumstances and history.<sup>39</sup> But our sensitivities may not be hers. To some extent, human agency remains opaque.

Let me return to the epistemic issue I raised earlier that troubles judgments of desert, namely, psychological questions about how to draw a line between choice and compulsion and, more generally, between choices for which a person is ethically accountable and those for which she is not. I submit that a restorative justice paradigm reveals that we might close the gap between what we do and do not have evidence for in a way it is hard for a desert theorist to fill.

What I mean is this. It is open to us to conclude a capacity assessment by invoking a prospective normative expectation about a person's potential for change rather than a metaphysical fact about her capacity to have acted better at the time of wrongdoing. We may have good reason to hold a person "accountable" by the ethical standard she has violated, on a presumption of her capacity to act better than she did, where the test of the validity of our judgment is forward-moving. As I will discuss in the next section, this forward-looking orientation recasts the meaning of accountability. The reasonableness of our normative expectations gains support from what we observe about a person's potential for change,

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<sup>39</sup> Analogously, our self-assessment at T2 of our behavior at T1, is conditioned by our sensitivities at T2.

including her capacity for change in response to social pressure. It may turn out that she is responsive to moral criticism. But when she is, that evidence is *not* evidence for the nature of her intervention-independent capacity to have done better. It describes the personal change she was able to achieve, in the aftermath of her wrongdoing and in response to the interventions of other people. In other words, our evaluation of her capacities emerges in an interpersonal accountability exchange.<sup>40</sup>

These are complicated matters, but I don't believe the political resistance to liberalism depends on contesting my version of them. Scheffler speculates that political resistance to liberalism resides in a rejection of naturalistic accounts of the will, including the sort of reflections I have engaged in. I disagree. I think political resistance comes from liberalism's strong commitment to equality and democratic inclusion. We may readily observe in American society that notions of personal desert and accountability are strategically deployed in the service of inegalitarian social structures and outcomes. For example, industriousness, entrepreneurship, and managerial skills are often regarded as deserving rewards, and it is noteworthy that these traits are connected with economic productivity, in a system that also substantially benefits employers and investors. Describing the rewards conferred on economically productive people as *deserved* diverts attention from the benefits accumulated by other people who are positioned to gain from their productivity. It also distracts from supporting economic structures, which include the productive activity of "less deserving" people.<sup>41</sup> Rawls's claim is that rewards for (collectively) productive activity should, instead, be democratically distributed.

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<sup>40</sup> My gratitude to Leonard Giarrano for urging me to draw a connection between prospective normative evaluation and second-personal moral negotiation.

<sup>41</sup> Samuel Scheffler has a compelling discussion of the holism of economic activity in "Justice and Desert in Liberal Theory," *California Law Review* 88, No. 3 (2000), section V.

The undeserved advantages conferred by inherited wealth and racial privilege do not attract a symmetrical kind of political discomfort and bitterness by those inclined to insist on the idea of basic desert. The inequalities such undeserved and unfair advantages confer are, practically speaking and evidently, an accepted part of the social order, even if they are condemned by social critics and resisted by activists.

Of course, the most glaring deployment of the concept of desert comes in the distribution of punishment, which we have seen tracks socioeconomic and racial disadvantage.

I submit that we need an alternative paradigm for thinking about personal accountability—one that is not oriented by judgments of blame and desert but rather appeals directly to a person's potential for change, growth, and ethical responsiveness in the aftermath of wrongdoing. A person who exemplifies that potential is rightly held to account, but not in retributive terms. We should draw on an understanding of personal accountability that is not in tension with either the significance of contextual causes of criminal behavior or the possibility that socially coordinated interventions could be causes of positive change. We need concepts of agency and accountability that are oriented to restorative rather than to retributive justice.

##### *5. A Plea for Restorative Justice*

The moral quest for accountability is not limited to compliance with criminal law as a collective scheme for the protection of basic rights. As discussed earlier, its focus is interpersonal. From a moral point of view, it is a problem that the criminal justice system does not offer individualized, second-personal justice. As Alan Norrie puts it, "The moral grammar of criminal punishment does not have a direct, unmediated, link to what it means to be a human

being coming to terms with violation.”<sup>42</sup> Norrie describes the law and punishment as gaining moral credibility for confronting violations, garnering legitimacy “by trading off the moral experience of violation and grief, a grammar that they have at the same time consigned to the shadows.”<sup>43</sup> Norrie’s point is that the promise of criminal justice trades in the moral currency of moral reckoning and repair without delivering it. Harmed and responsible parties alike must come to terms with the fact of violation, yet what they are offered by the state is retributive justice. We have come to think that punishment is the only morally plausible way to address matters of violation and victimhood, but retributive punishment does not achieve interpersonal accountability. In fact, it is at odds with it. Darwall concurs with this observation. He advocates an understanding of accountability that requires mutually respectful address between persons; “disrespect calls for attitudes and treatment that respectfully demand respect.”<sup>44</sup> So understood, he maintains, accountability takes place in a register of equality that is incompatible with retribution, which aims to lower the status of its target.<sup>45</sup>

I have argued that the expressive function of criminal law is not morally in tune with factors that establish and mitigate blameworthiness. The law’s approach to interpersonal accountability is undeveloped, and understandably so. The individualized practice of moral accountability is ill-suited to the generalized, conduct-guiding aspiration of law. It is also true, as

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<sup>42</sup> Alan Norrie, “Love in Law’s Shadow: Political Theory, Moral Psychology and Young Hegel’s Critique of Punishment,” *Social and Legal Studies* Vol. 28, No. 1 (2018). p. 16.

<sup>43</sup> Alan Norrie, “Love in Law’s Shadow,” p. 25.

<sup>44</sup> Stephen Darwall and Julian Darwall, “Civil Recourse as Mutual Accountability,” *Florida State University Law Review* 39, no. 1 (Fall 2011), 20.

<sup>45</sup> Stephen Darwall and Julian Darwall, “Civil Recourse as Mutual Accountability,” *Florida State University Law Review* 39, no. 1 (Fall 2011), 20. See also Stephen Darwall, “Justice and Retaliation,” 39 *Philosophical Papers* 39, No. 3 (November 2010): 315-341, and Stephen Darwall, “Respect as Honor and as Accountability,” *Honor, History, and Relationship: Essays in Second Personal Ethics II* (Oxford: Oxford Univ. Press, 2013), 11-29.

I will now discuss, that the criminal justice system is poorly set up to facilitate interpersonal reckoning and repair, of the kind envisioned by Norrie and Darwall. The conduct of proceedings orchestrated by the state and through lawyers fails substantially to engage the agency of either responsible or affected parties.<sup>46</sup> The current practice of confronting defendants with their own guilt, and hurting them on account of it, neglects the dialogical pursuit of the mutual understanding, acknowledgment, responsibility-taking, reparation, and reconciliation characteristic of restorative practices of interpersonal accountability. Nor is there any significant role in criminal procedure for apologies, remorse, or forgiveness.<sup>47</sup>

The failure to achieve interpersonal moral accountability through criminal law is recognized by restorative justice's practitioners. Danielle Sered powerfully sums up the situation in this way:

When it comes down to it, being punished requires only that people sustain the suffering imposed for their transgression. It is passive. All one has to do to be punished is not to escape. It requires neither agency nor dignity, nor does it require work...No one in prison is required to face the human impacts of what they have done, to come face to face with the people whose lives are changed as a result of their decisions, to own their responsibility for those decisions and the pain they have caused, and to do the extraordinarily hard work of answering for that pain and becoming someone who will not harm again...Prisons render the most important kinds of human reckoning nearly impossible.<sup>48</sup>

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<sup>46</sup> Danielle Sered, *Until We Reckon: Violence, Mass Incarceration, and A Road to Repair* (New York: The New Press, 2019), especially chapter three.

<sup>47</sup> Sentencing and parole hearings provide settings within which these elements might be more fully incorporated.

<sup>48</sup> Sered, *Until We Reckon*, 91.

Practitioners of restorative justice, including Sered, work with victims and perpetrators in the service of an individualized justice that is grounded in the moral dynamics of answerability, remorse, apology, repair, and reconciliation. These dynamics are not at home in the criminal justice system. As I see it, one aspect of the problem is that proponents of retributive justice knowingly or unknowingly confuse the political function of criminal sanctions—the importance of using the power of the state to uphold and enforce compliance with a shared moral standard—with the practice of personal moral accountability. Enforced compliance is presented as accountability through retributive justice, yet retributive justice is an impoverished form of moral accountability.

Though the criminal justice system is not well set up to elicit interpersonal reckoning, it is understandable that persons who are hurt by crime seek it. The desire for accountability, in a reparative sense, is an ethical response to moral injury that acknowledges an impaired relationship and the need to redress it.<sup>49</sup> The impairment and possibilities for redress are explored through a kind of interpersonal engagement. Michael McKenna conveys this by emphasizing that moral responsibility is not only communicative and expressive, it also has a conversational dimension.<sup>50</sup> The practice of moral accountability unfolds, so to speak, in conversational mode. In acting, an agent suggests the quality or *meaning* of her will to another person, opening up conversational moves between them. The affected person and, more broadly, the moral “interpretive community,” may hold the responsible party to account by communicating an evaluative response via praise and blame. This is done, McKenna says, with the expectation that

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<sup>49</sup> See T. M. Scanlon, “Blame,” *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, MA: Harvard Univ. Press, 2008), 128-31, 186-7.

<sup>50</sup> Michael McKenna, “Power, Social Inequalities, and the Conversational Theory of Responsibility,” *Social Dimensions of Moral Responsibility*, eds. K. Hutchison, C. Mackenzie, and M. Oshana (New York: Oxford University Press: 2018), p. 45.

the responsible party is capable of absorbing the evaluative response and moderating his or her attitudes and behavior. Accordingly, the responsible party may acknowledge the offense, offer an account of her behavior, apologize, make amends, and seek some form of reconciliation. Or, if she rejects the blame directed at her, she may offer an alternative interpretation of the meaning of her action, compatible with morality. Cues at each step in the moral responsibility exchange are nuanced and contextual, in the way conversations typically are, and their outcome is not settled in advance. Each move in the responsibility conversation is done in anticipation of increased understanding, interpersonal engagement, and responsiveness. The process is creative. No conversational move is mandated, though it must be intelligible within the parameters of an ethics of mutual regard.<sup>51</sup>

Restorative justice is a diversionary program within the criminal justice system that presents accused or convicted defendants with an alternative to incarceration. Typically, restorative justice involves a mediated victim-offender encounter that aims to acknowledge and repair the harm a crime has caused. The moral objectives of accountability are importantly accomplished through real dialogue and a joint plan formulated by the affected parties for navigating the aftermath of wrongdoing. Its victim-centered, healing approach includes coming to a restitution agreement that permits the wrongdoer to make amends. The theory is that restorative justice, as an alternative to criminal punishment, brings with it important benefits to victims, perpetrators, and the broader community,<sup>52</sup> and there is some evidence of its success.<sup>53</sup>

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<sup>51</sup> Michael McKenna, *Conversation and Responsibility* (New York: Oxford Univ. Press, 2012), chapter four.

<sup>52</sup> See Sered, *Until We Reckon*. See also Marilyn Armour and Mark S. Umbreit, *Violence, Restorative Justice, and Forgiveness: Dyadic Forgiveness and Energy Shifts in Restorative Justice Dialogue* (London: Jessica Kingsley Publishers, 2018)

<sup>53</sup> Heather Strang & Lawrence Sherman, *Repairing the Harm: Victims and Restorative Justice* Utah Law Review, Vol. 1 (2003): 25-33; Barton Poulson, "A Third Voice: A Review of

A promise by the state to protect each person's rights naturally prompts an expectation that the state will facilitate a response to violation that is morally adequate. Since accountability is both political and personal, moral adequacy is complex. In its personal aspect, it must involve the persons who have been most directly affected by the wrongful conduct. An accountability exchange seeks answerability for wrongdoing and, among other goals, healing and the possibility of resolution or, at least, peace. Retributive justice is not well positioned to provide these outcomes. The focus of retributive justice is the infliction of sanctions which, we have seen, are most plausibly justified in institutional rather than personal mode. State sanctioned violence in the service of protecting rights does not achieve the insight and closure of moral accountability. The personally meaningful dynamics of answerability, reconciliation, and repair call for the dynamic of dialogue. From a moral perspective, the imperative of punishment is a poor substitute for personal accountability. Instead of the *incapacitation* of offenders, moral accountability calls for the *involvement* of responsible parties in an encounter with the people whose lives they have harmed or threatened, that is, when victims are receptive to the responsible party's efforts at repair.

Still, the personal dimension of accountability need not be at odds with the political dimension of rights-protection and the public censure of lawbreakers for their wrongful behavior. Empirical evidence indicates that, in fact, the moral psychology of reconciliation and repair serves the aims of harm reduction. Responsible parties who complete a restorative justice contract are less likely to reoffend.<sup>54</sup> But the role of the state in the practice of restorative justice

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Empirical Research on Psychological Outcomes of Restorative Justice,” *Utah Law Review* 1 (January 2003), 167-203.

<sup>54</sup> Ellie Piggott & William Wood, “Does Restorative Justice Reduce Recidivism?” *Routledge International Handbook of Restorative Justice*, ed. Theo Gavrielides (London: Routledge, 2019) 359-376; David O’Mahoney and Jonathan Doak, *Reimagining Restorative Justice: Agency and*



is necessarily limited. Restorative justice demands the autonomy and voluntariness of moral dialogue. Conversational moves between responsible and affected persons cannot be coerced, nor can the conversation itself. Integrating restorative justice into the criminal justice system requires retracting the role of the state.<sup>55</sup>

The state may, however, support the prospects for restorative justice in another way: by redressing background injustice. The state could enhance the prospects that restorative justice conferences will be successful by redressing the unjust contextual causes of criminal behavior. The presence of systematic contextual causes of criminality is evidence that the basic structure is failing to foster an effective sense of justice. By redressing that failure, the state would support law-abiding behavior and prospects for moral repair.<sup>56</sup>

It is high time for the state to moderate its overly punitive approach to criminal justice. The public has a legitimate interest in the prohibition, prevention, and censure of criminal behavior, an interest that permits the sparing use of criminal sanctions, but this interest does not extend to the practice of retributive justice. Confusion about this has intensified state investment in punishment that does not further the achievement of personal moral accountability. The demand for personal accountability is not satisfied by punishment or more punishment. The criminal justice system should minimize the use of coercive measures and relinquish the aspirations of personal accountability to those parties most intimately involved with the aftermath of wrongdoing: responsible persons and survivors of criminal violation.

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*Accountability in the Criminal Process* (Portland, OR: Hart Publishing, 2017), 175-195; and Heather Strang, Lawrence W. Sherman, Evan Mayo-Wilson, Daniel Woods & Barak Ariel, "Are Restorative Justice Conferences Effective in Reducing Repeat Offending?" *Journal of Quantitative Criminology*, Vol. 31 (2015), 10-11.

<sup>55</sup> This poses difficulties, but the challenges may not be insurmountable. See Adriaan Lanni, "Taking Restorative Justice Seriously," *Buffalo Law Review*, vol. 69, no. 3 (May 2021): 635-81.

<sup>56</sup> Thanks to James Rosenberg for pressing this point.

### *6. Remedies for Collective Wrongdoing*

I have argued, following Rawls, that the state's authority to enforce the criminal law comes from a democratic relationship between citizens rather than the moral deservingness of wrongdoers.<sup>57</sup> The political function of criminal sanctions—the importance of using the power of the state to uphold and enforce compliance with a rights-protecting standard of conduct—should not be confused with the practice of personal moral accountability. Though criminal law recognizes some excusing conditions, they are calibrated to a standard of political reasonableness rather than individual subjective capability. This means that some people will suffer from diminished capabilities that are relevant to assessments of moral blameworthiness but do not mitigate legal culpability. A source of pressure to retain generalized criteria of legal culpability, despite their failure to realize the retributive aspirations of criminal law, comes from the importance of protecting the rights of victims and potential victims. A political notion of accountability that is appropriately victim-sensitive implies that criminal sanctions should not claim to be premised on moral desert.

This is not to say that a criminal agent's wrongful agency does not matter to the law, apart from its impact on victims. Moral agency matters to the law because the law can affect it. A well-designed collective response to wrongdoing would not only enhance the protection of equal rights. It would also enhance the capability of criminal lawbreakers to adhere to important conduct-guiding norms. Once we relinquish the retributive view, and contrary to our current

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<sup>57</sup> Outside of the few exceptions carved out by the law, criminal liability is limited only by the failure of the criminal justice system overall to maintain its basic legitimacy. See [...]

practices, we could embrace interventions that enhance the rational and moral agency of criminal lawbreakers.

In this way, the criminal law of a democratically just society underwrites the importance of democratic equality. On a democratic conception of justice and law, the success of punishment would be measured by whether those who have been punished are less likely to violate society's rules and more likely to contribute constructively to it. Its goals would be the equal protection of rights, through due process of law, and the reintegration of criminal offenders as cooperating members of society. The justification of criminal sanctions would depend in these ways on its prospects for success. Criminal law would be sensitive to outcomes.

Restorative justice conferences between individuals represent promising alternatives to criminal punishment. But the explanatory relevance of background injustice to crime implies that justice must also include forms of recognition and remedy for collective wrongdoing. Societal-wide efforts at restorative justice have been attempted in some transitional societies. For example, South Africa pursued "truth and reconciliation" in the aftermath of Apartheid, and Rwanda undertook a similar effort in response to the 1994 genocide of the Tutsi population. These alternative paradigms of accountability retracted the punitive role of the state to enable interpersonal and community-based responses to wrongdoing. What emerged were discursive efforts to redress injuries and a detailed public record of extensive political violence. Though these processes have been rightfully criticized in certain respects, including their failure to achieve redress for socioeconomic inequality, they have achieved some measure of positive societal transformation. The success of these efforts, however imperfect, suggest the importance of public efforts to achieve reparative justice through deliberative democracy.<sup>58</sup>

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