The Double Life of Mens Rea

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I. Mens Rea In and Beyond Criminal Law

A crime is defined as a criminal act committed with a guilty mind or "mens rea." This definition incorporates a normative principle: conduct should not be criminalized without proof of "criminal intent," that is, some relevant awareness on the part of the defendant—purpose, knowledge, recklessness and, more precariously, negligence—as to the conduct, circumstances, and results that comprise the crime.[1] For example, In *Elonis v. U.S.* (2015) the U.S. Supreme Court held that, in federal criminal law, a person criminally threatens another person only if he issues a statement "as a serious expression of an intention to inflict bodily injury or take the life of an individual." It is not enough that the victim feels threatened by the defendant's utterance, or even that the victim has good reason to feel threatened. The federal crime of communicating a threat to injure another person requires that the threat of serious harm is what the defendant intended to communicate when issuing a statement.

Mens rea can be layered and complex. In some U.S. states, burglary is defined as breaking and entering a dwelling, at night, with the intention of committing a felony inside. Committing this crime involves the defendant's *awareness* that he was breaking into a building that he was *aware* was a dwelling, during what he was *aware* was the nighttime, with the *intention* of committing a felony inside.

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[1] Negligence should be treated as an outlier in criminal law, requiring special justification, because it is an "objective" standard that does not require subjective awareness of risk.

Mens rea is and ought to be a basic requirement of justice for criminal law. But why? It is tempting to account for the importance of mens rea to criminal justice through a retributive theory of punishment. According to retributivists, morally culpable criminal wrongdoers deserve to be punished, and mens rea is evidence of moral culpability. On an *expressive* version of the retributive view, *moral condemnation* is an element of the deserved harm. Mens rea is a condition of the justification of punishment because punishment involves morally condemning the guilty, and mens rea establishes that moral condemnation is deserved.[2]

I am wary of retributive theories of punishment, including expressive and communicative versions, because I am alarmed by the punitiveness and social meaning of American punishment practices, which are so brutal and so stigmatizing. I think we should be concerned about how moral condemnation shapes the social meaning of punishment and normalizes abuse. I also think philosophers of criminal law have been overly concerned with justifying punishment and that focusing on punishment is misleading when it comes to evaluating the significance of mens rea. Mens rea has other important roles in criminal law.

The first concerns fairness. Requiring mens rea for criminal guilt helps to establish that the state's coercive, rights-protecting measures are undertaken in a way that is fair to persons in their capacity as agents. It does this partly by providing fair notice, addressed to a person as a chooser, about which actions are eligible for criminal prosecution.[3] This is not the whole story. Fairness also requires attention to the interests of other parties, especially the victim. As we will see, this can lower the mens rea threshold from purpose to recklessness and, in some cases, to

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[2] This is an expressive version of the retributive view, which is not the only formulation proposed by retributivists. On the expressive version of the theory, moral condemnation is a deserved harm. I am especially interested in this version of retributivism because of its connection with the social meaning of punishment.

[3] Here I follow H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968), especially "Legal Responsibility and Excuses," 23-4, "Legal Responsibility and Excuses," pp. 44-8, and "Punishment and the Elimination of Responsibility," 181-2. See also Winne Chan and A. P. Simester, "Four Functions of Mens Rea," *The Cambridge Law Journal* 70, no. 2 (July 2011): 381-96.

negligence. Nevertheless, retaining a mens rea requirement is (ideally) designed to ensure that fair notice to would-be criminal agents is maintained. Attention to the mental state element of crimes—purpose, knowledge, recklessness, negligence—respects and highlights the value of choice as a condition of criminal liability. Fairness requires that criminal liability be contingent on a person's awareness of relevant aspects of their conduct.[4] This fairness requirement holds whether or not a criminal actor is thought morally to deserve punishment. It neither presupposes nor implies a retributive theory of punishment.

In addition to the rights-protecting role of criminal law, restricted in the way I have described by a fair notice condition, is the importance of holding criminal actors morally accountable. Criminal conduct creates a need for moral accountability, especially when criminal wrongdoing involves injuring a victim. This has led some philosophers of punishment to the view that criminal justice should have a retributive aim, namely, to punish actors for their blameworthy conduct. In contrast to such views, I will sketch a notion of accountability in which mens rea figures centrally, yet the point of the accountability practice is not to impose punishment. It is to hold persons responsible for redressing their wrongs and, specifically, to obligate them to persons injured by their wrongful acts. Crucially, a demand for accountability, on this account, is a demand for redress that emerges from the agent's wrongful violation of the victim's rights. Wrongdoing generates a restorative obligation on the part of the wrongdoer to the wronged party. As I will discuss, mens rea has an important role in an accountability process, so understood. The wrongdoer's awareness of their conduct brings with it their potential to engage in restorative justice.

[4] When the requirement of mens rea is negligence, required aspects of awareness may be limited to the voluntariness of the criminal act (actus reus) and to relevant facts about the circumstances under which the agent chooses to act, while not extending to the possibility of causing harm.

In arguing for the relevance of a nonpunitive, restorative model of accountability as a response to crime, my aim is to sketch an alternative to our existing practices of criminal punishment that takes seriously notions of wrongdoing and responsibility but does not do so from within a retributive framework. Admittedly, taking a principle of moral redress seriously would be difficult, within the current framework of American criminal law, whose evident focus is punishing the guilty rather than redressing wrongs. A principle of moral redress is also challenging to implement because the needs of victims vary greatly, for psychological reasons, and because people disagree, sometimes sharply, about which responses to wrongdoing are morally appropriate. This disagreement limits the feasibility of public principles of redress. Accordingly, seeking moral repair requires venturing beyond the traditional framework of criminal law.

The practice of restorative justice does just this. Restorative justice moves beyond the traditional framework of criminal law in a way that respects the diversity of citizens' life experience, philosophical and religious commitments, and comprehensive moralities that is inevitable in a liberal society. The practice of restorative justice offers a flexible, victim-centered model of moral accountability. Its deliberative and collaborative features make it an intriguing alternative to the criminal law's current, more punitive approach.

To substantiate the points I am making about the importance of mens rea to both public criminal law and to interpersonal moral accountability, I will proceed in two steps, each focused on articulating a dimension of criminal accountability. First, I will address what a defendant is and should be accountable for through the public institution of criminal law. Then I will address what the defendant's accountability comes to in the interpersonal morality of redress, both its

agential presuppositions and its interpersonal point, which I will elaborate through the idea of restorative justice.

My focus throughout will be the principles and objectives of a just system of criminal law. My approach is not straightforwardly descriptive or interpretive of criminal law doctrine, and my position on punishment practices is revisionary. I will demonstrate, however, that some important aspects of current criminal law conform to the account I provide, even if standard explanations of those aspects do not. In particular, attending to an agent's awareness of his or her own conduct is critical both to the fair enforcement of criminal law and to the prospect of interpersonal accountability through restorative justice. While this does not disprove the retributive thesis that culpable wrongdoers deserve punishment, it does call attention to aspects of criminal justice that do not depend on this thesis. I hope this encourages philosophers and practitioners of criminal law to think less punitively about criminal justice.

II. Fair Notice

The idea that punishment involves morally condemning the guilty is commonplace. Some regard it as tautological. Years ago, an influential legal scholar at Harvard wrote, "It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment."[5] Legal philosopher Joel Feinberg embraced this idea and elaborated what he described as the expressive dimension of punishment. He writes, "the expressive aspect of incarceration is precisely the element by reason of which it is properly characterized as punishment and not penalty…the very walls of [the prisoner's] cell condemn

[5] George K. Gardner, "Bailey v. Richardson and the Constitution of the United States," *Boston University Law* Review 33 (1953), 176, 193, quoted in Joel Feinberg, "The Expressive Theory of Punishment," *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton Univ. Press, 1970), 99.

him and his record becomes a stigma."[6] Incarceration is, in Feinberg's analysis, "the conventional symbol of reprobation." The point of punishment is, fundamentally, expressive.

R. A. Duff also emphasizes the expressive and communicative aspect of punishment and its connection to moral blame. He writes, "The criminal process aims to call wrongdoers to account, to censure, and to punish them if they are proved guilty….[T]he point of the criminal process is to determine whether the defendant is guilty of the wrong of which he is accused, and to impose an appropriate punishment if he is proved guilty."[7] According to Duff, the imposition of criminal punishment communicates to the defendant, and to the rest of society, not only the wrongfulness of the defendant's criminal conduct, but also the defendant's moral culpability.

These scholars are not wrong to think that criminal punishment, as presently practiced, involves moral condemnation and that it tends to alienate, stigmatize, and marginalize persons who are subjected to it. Indeed, because moral condemnation, through punishment, is so central to the practice of criminal "justice," it is tempting to think that mens rea is relevant to criminal guilt primarily because it reveals moral fault in the attitudes and reasoning that belong to the defendant's decision to commit a crime.[8] In this way, mens rea may be thought to provide the basis for a critical moral evaluation of the defendant, which, together with the defendant's actus reus, forms the defendant's deservingness of punishment.

There is something to be said for this approach. It is often reasonable to infer that criminal conduct reveals disregard for other persons' rights, and that this disregard and the harm it does damages the defendant's relationship to other persons, including but not limited to the

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[6] Feinberg, "The Expressive Theory of Punishment," 99-100.
[7] R. A. Duff, "Repairing Harms and Answering for Wrongs," in *Philosophical Foundations of the Law of Torts,* ed. John Oberdiek (Oxford: Oxford Univ. Press, 2014), 218.
[8] This inference is supported by the broad notion of mens rea found in the history of common law, going back to the medieval period. See Elizabeth Papp Kamali, *Felony and the Guilty Mind in Medieval England* (Cambridge: Cambridge Univ. Press, 2019).

victim. Still, we should be cautious in ascribing moral meaning to a finding of criminal guilt because criminal procedure is mostly unconcerned with such morally critical factors as the defendant's motives, reasoning, character, and personal history. Mens rea describes a defendant's state of awareness regarding elements of the offense—the conduct, circumstances, and outcomes—that the law calls to our attention in its attempt to guide our conduct. It concerns whether the defendant acted purposefully, with knowledge, recklessly, or negligently with respect to those factors. The awareness comprising mens rea is compatible with a wide variety of motives, such as: a desire for money, power, or revenge, an effort to protect a loved one, a pressing need, anger, fear, or distorted perceptions of reality caused by mental illness. Furthermore, this variety of motives is contextualized in a variety of life circumstances. This suggests wide variation in how "blameworthy" various defendants may be, despite the fact that they have been convicted of similar charges. Mens rea provides but a limited window onto the defendant's attitudes, beliefs, desires, and character.

For example, consider the crime of theft. The Model Penal Code (§223.2 (1)) defines theft as follows: "A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." Theft is conduct that violates another person's right to control objects she has lawfully acquired. It requires awareness by the defendant that the movable property in question belongs to another person, as well as the purpose to deprive the owner permanently of it. But the defendant's motive is irrelevant to this assessment. It could have involved greed, anger, need, desperation, or altruism. These motives each bear differently on the moral meaning of an act of theft, yet all are compatible with criminal guilt.

The result is that the "blame" that is warranted by a finding of guilt is understandably limited and unsteady. Its relevance and limits might be expressed in this way: The defendant's awareness of the wrong-making facts connected with his conduct supports the judgment that the defendant should not have acted as he did. In that sense, he is to blame and can be called to account. But without knowing why the defendant acted as he did—what reasons counted for him in favor of so acting, and why alternative courses of action were, from his perspective, not compelling—that is, without a moral *accounting*, the reasonable notion that the defendant should not have acted as he did under-determines the sort of condemnatory response often considered "appropriate" by interpersonal morality.[9] This is not a problem for criminal law, properly understood, though it spells trouble for retributive philosophies of criminal justice. When divorced from a moral reckoning with a criminal actor's "ill will," retributive punishment is ungrounded and bound to invite unruly speculation about the evils of "the offender," with its familiar prejudicial consequences.

The criminal law is and ought to be concerned with the regulation of behavior by a public standard designed to protect a system of equal basic rights. A defendant is rightly held criminally liable when it has been demonstrated that he has violated that public standard by committing a criminal act with the specified state of awareness and no legal justification or excuse. Why a defendant did the crime or how he arrived at the decision to commit it is relevant to criminal law, however, primarily as evidence to establish that he chose to engage in criminal conduct.

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[9] See David Shoemaker, "On Criminal and Moral Responsibility," in Mark Timmons, ed., *Oxford Studies in Normative Ethics* 3 (Oxford: Oxford University Press, 2013), 167. Shoemaker argues that, unlike moral responsibility, criminal liability does not and need not depend on assessments of the quality of the agent's will. Compare Kimberly Ferzan, who argues that moral and legal culpability should be assessed in relation to the reasons a criminal agent had for imposing risks on others and the attitudes the agent manifests. Kimberly Ferzan, "Plotting Premeditation's Demise," *Law and Contemporary Problems* 75, No. 83 (2012), 104.

Accordingly, the criminal process may produce little information about the agent's faulty motives, attitudes, or reasoning. Oliver Wendell Holmes, Jr. puts this point starkly:

> "the actual wickedness of the party, is wholly unnecessary, and all reference to the state of his consciousness is misleading if it means anything more than that the circumstances in connection with which the tendency of his act is judged are the circumstances known to him."[10]

The tendency with which Holmes is concerned is the tendency to cause social harm.[11] Holmes' view is that the state has an interest in regulating conduct that defendants are or should be aware has a tendency to cause harm. Of course, an evaluation of the defendant's decision to act under circumstances likely to cause harm must fit with reasonable societal expectations, as Holmes acknowledges. He writes, "a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear."[12] I agree and would amplify this statement by stressing unfairness to the defendant. Concern with fairness to the defendant imports a moral dimension to the appraisal of the defendant's conduct, which attention to mens rea incorporates.[13] What would be blameworthy in the average member of the community restricts the scope of the relevant legal prohibition. A person who has not violated that standard should not face criminal sanctions. We might conclude that without acting in a way that is, in that sense, wrongful, a defendant could not "deserve" punishment. In this way, reasonable criminal law supports the thesis of "negative retributivism." But the claim that a defendant possessed some awareness of facts in virtue of which his conduct is prohibited is a

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[10] Oliver Wendell Holmes, Jr. *The Common Law* (Boston: Little, Brown, and Company, 1881), 75.
[11] The circumstances in connection with which this tendency is judged characterize the nature of the act, as defined by law.
[12] Holmes, *The Common Law*, 50.
[13] but this evaluation should not be equated with sensitivity to individual moral blameworthiness. It is better understood as a condition of the reasonableness of the law's demands.

pale notion of positive blameworthiness and desert. It falls short of establishing that defendants who possess it morally ought to be punished.

III. The Victim-Sensitivity of Criminal Law

Obligations of fairness to the defendant are complicated by the interests of victims and potential victims. This limits the law's investment in individualizing blame. As a matter of justice, a criminally enforced standard of conduct must be formulated with sensitivity to the interests of all affected parties. This is a basic requirement of due process and the protection of basic rights. A standard of criminal conduct must be justifiable to agents and potential victims alike, with respect to their important security and liberty interests and in line with relevant norms and expectations. Setting a mens rea standard for a criminal offense involves balancing these factors. When appropriately specified, mens rea protects our security interests as potential victims without unduly restricting our liberty interests as agents.[14] In other words, the criminal law should protect the security interests of potential victims, who are threatened by the conduct in question, but it must do this without unduly compromising the liberty interests of agents, who risk punishment for their conduct.[15] This recognizes the importance and limits of liberty to engage in activities, such as sex, free speech, self-defense, or drinking alcohol, that risk harms to others.

Consider criminal law doctrines of sexual assault. The relevant mens rea standard for sexual assault varies by state and so, accordingly, does the scope of liability for sexual assault.

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[14] Oliver Wendell Holmes makes this kind of argument about legal standards of liability, broadly speaking, namely, that they express a liberal political commitment to giving actors a fair opportunity to avoid state sanction. See Holmes, *The Common Law*. See also John C. P. Goldberg and Benjamin C. Zipursky, "Thomas McIntyre Cooley (1824 – 1898) and Oliver Wendell Holmes (1841 – 1935): The Arc of American Tort Theory," in *Scholars of Tort Law*, ed. James Goudkamp and Donal Nolan (Oxford: Hart Publishing, 2019). Many thanks to John Goldberg and Jed Lewisohn for discussion of Holmes's philosophy.

[15] Chan and Simester also stress these considerations, though their analysis connects them more tightly than mine does with the agent's blameworthiness. See Chan and Simester, "Four Functions of Mens Rea," 384-5, 388-93, 395.

States disagree about whether a finding of guilt requires establishing that the defendant engaged in sexual contact without the victim's consent, despite knowing (mens rea: knowledge) or disregarding the high probability (mens rea: recklessness) or failing adequately to investigate the fact (mens rea: negligence) that the victim did not consent. A negligence standard of mens rea for sexual assault—which holds defendants criminally culpable for their failure to exercise due care in establishing consent—provides greater protection to potential victims by criminalizing a wider range of behavior, yet it also permits that a person could unreasonably but in good faith be oblivious to another's person's lack of consent to sexual contact.

A criminal negligence standard of liability provides little insight into a defendant's attitudes and beliefs. In another respect, however, it provides clear direction. It provides notice to those who engage in sexual conduct about the critical importance of consent, and it protects from criminal prosecution those who engage in sex with no awareness or reason to be aware that their partner was not consenting. Whether negligence as a mens rea standard for sexual assault provides adequate protection for defendants is a matter of substantive ethical judgment and debate. Putting all members of society on notice in the way captured by a negligence standard, however, is not to deny that a defendant's psychology is morally significant. Indeed, the morally objectionable nature of the defendant's inattentiveness to the victim's rights is captured by the judgment that the conduct wrongfully violates the victim's rights. But this judgment permits limited if any information about factors—the defendant's motives, attitudes, or character—that are presumably needed to evaluate moral desert and proper retributive punishment.

Conditioning criminal guilt on a mens rea finding protects agents from the possibility of being subjected to criminal liability without a sufficient opportunity to avoid it—that, is, for harms that are caused without objectionable disregard or inattention to the risk of harm to others.

This alerts agents to the factors that bear on which conduct is criminalized, and it does this in a way that aims to strike a balance that is fair to all parties. Specifically, agents are warned about which behavior will count as criminal in a way that is fair because (1) the law criminalizes only behavior the agent is or should be aware has wrong-making features,[16] (2) agents can avoid criminal conduct by making responsible choices, and (3) the law restricts agents' liberty only when greater freedom could not be justified to potential victims. In deference to the value of liberty, criminalization has a narrow scope but, when properly calibrated, it is not so narrow as to leave us objectionably vulnerable to criminal violation. Of course, this balance of considerations can be challenging to capture, and it raises complex ethical issues.[17] One implication is that some people will escape public accountability for serious wrongdoing while others will be held legally to account when they are not morally blameworthy.

T. M. Scanlon's distinction between the deliberative and critical use of principles is helpful for capturing the public aspect of criminal law and contrasting it with interpersonal moral meaning. What Scanlon calls the "deliberative" employment of principles answers questions of permissibility: "whether an agent may perform an action of a certain kind."[18] I submit that we construe the public function of criminal law most fundamentally in its deliberative application: criminal law instructs the public not to behave in ways prohibited by its rules and principles. It is addressed to our self-conscious deliberations about how to act. The expressive function of criminal law is to denounce violations of its standards, and such public criticism reinforces the

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[16] In emphasizing awareness rather than notice, I follow John Gardner, "Wrongs and Faults," *The Review of Metaphysics* 59, No. 1 (Sept. 2005).

[17] For example, in view of gendered sexual norms, a mens rea standard for sexual assault that encompasses a wider range of behavior, by criminalizing merely negligent assumptions about consent, risks criminalizing ordinary sexual conduct.

[18] T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, MA: Harvard Univ. Press, 2008), 2.

action-guiding function of law addressed to persons in their deliberative capacities. Public disapproval of certain types of behavior reinforces social norms and serves as a deterrent.

The "critical" use of principle, by contrast, evaluates the agent by elaborating the interpersonal moral meaning of her conduct, in view of what the agent took to be her reasons for acting. Scanlon puts it this way: principles in their critical use "assess the way in which an agent went about deciding what to do on a given occasion. Reasons of [this] sort depend on what the agent saw as reasons bearing on the decision about what to do."[19] An agent's reasoning is interpersonally significant. It reflects her attitudes and values, which bear on how she decides to treat others and what others can realistically expect of her. What an agent sees as reasons reflect aspects of her personhood that are relevant to praise and blame. Blaming an agent for her wrongful conduct is a way of holding her responsible. When we blame an agent, we take her wrongful conduct to reflect something about her attitudes that, as Scanlon puts it, "impairs the relations that others can have with him or her."[20] The critical use of principles identifies such impairments, elaborates their significance, and invites an appropriate blaming response, which, in Scanlon's view, includes a fitting attitude and behavior adjustment.[21]

Recognizing this distinction between the deliberative and the critical use of principles helps to clarify the argument I am making: the focus of a determination of criminal guilt is not and should not be to evaluate or to blame the defendant, but rather to affirm a conduct-guiding standard and to determine whether the defendant has violated it. Violation of the law must be conscious, in a relevant sense that encompasses recklessness and, by extension, negligence, but

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[19] Scanlon, *Moral Dimensions*, 3.
[20] Scanlon, *Moral Dimensions*, 128.
[21] According to Scanlon, blaming the agent involves appropriately changing our attitudes and behavior toward her, in view of our critical moral evaluation of her conduct. See *Moral Dimensions*, ch. 4.

the mens rea standard itself is not a measure of the moral culpability of defendants. Accordingly, its purpose is not to distribute moral blame. Ascriptions of legal culpability are justified as a protection of our liberty interests as agents, in a way that is consistent with due consideration for our rights as potential victims. It ensures that we will not be held criminally liable for actions we undertake without the requisite awareness of facts that establish their wrongfulness. We are at liberty to engage in conduct that poses some risk to others, provided we meet reasonable standards prohibiting the conscious (or negligent) imposition of risk. When we meet those standards, we may engage in such conduct without incurring coercive intervention and correction by the state.

The idea that mens rea should not be equated with the moral blameworthiness of defendants is a controversial claim. For example, though I draw on Scanlon's ideas to develop this position, he does not endorse it. In his view, a finding of criminal guilt ideally incorporates a moral evaluation of the defendant. He rejects the retributive idea that this moral evaluation justifies the kind of punishment a just institution can impose, but he maintains that a finding of criminal guilt should employ the critical use of evaluative principles to establish that the defendant deserves moral condemnation.[22] A guilty verdict is and ought to be an expression of moral blame by the state even though, on his view, it does not follow that punishment should be a matter of retribution (as opposed to deterrence or incapacitation).[23]

My approach is more cautious. As we have seen, standards for determining whether a person's conduct is criminal typically do not include morally evaluative criteria that relate the defendant's intention (mens rea) to his reasoning, attitudes, and values, with sensitivity to the

[22] See T. M. Scanlon, *Why Does Inequality Matter?* (Oxford: Oxford Univ. Press, 2018), 123.
[23] T. M. Scanlon. "Desert, Blame, and Punishment." Moffett Lecture, Princeton University Center for Human Values, April 24, 2014.

context in which the agent's conduct occurred and to aspects of the defendant's personal history. These are factors that might be introduced in a sentencing hearing, and they are relevant to the exercise of moral blame, but they go beyond evidence needed to establish the defendant's criminal guilt. Thus, we should recognize that criminal guilt is an inadequate basis for evaluating a defendant's moral blameworthiness. Of course, it is typically the case that criminal wrongdoers violate their obligations as citizens and disrupt their relationship with their fellow citizens. This does not, however, establish that a given defendant deserves moral condemnation or punishment, but only that most defendants who are guilty of similar charges have acted in ways that society has reason to prohibit. The violated standard is firmly connected with the legal protections other people have a right to expect, but only loosely connected with the condemnation a particular guilty defendant deserves.

IV. Mitigation in Criminal Law

Thus far I have argued for the importance of mens rea without holding that the purpose of criminal law is to punish the morally guilty. My position is that mens rea should not be interpreted as a measure of moral culpability. The notion that the defendant's conduct would be blameworthy if committed by the average member of the community is not a defensible criterion of individual moral culpability. Legal scholars may resist this point by stressing a narrower, "legal" meaning of culpability. A defendant is culpable, in a legal sense, if it has been established that she has committed a criminal act, with the requisite mens rea, and has no affirmative defense. This is how the law defines criminal guilt. Since guilt includes a judgment of the agent's "legal" culpability, a defendant's deservingness of punishment can be said to be established by her legal guilt. For a criminal defendant to deserve punishment is simply to be

eligible for it by virtue of a finding of her guilt. When a sentence is imposed, "retributive" justice is satisfied, on these grounds.

It is, of course, open to legal scholars to define culpability, desert, and retribution in these formal ways. I note, however, that these are institutionally derivative renderings of these concepts. Once just legal rules are in place, the law implies that defendants who are found criminally guilty are culpable and deserving of punishment. What this means is that, when legal institutions are just, defendants who are convicted are legitimately held responsible and cannot reasonably object to incurring the sanctions of criminal law. It is sometimes helpful to talk about legal concepts in these formal ways. But I have been concerned with culpability and desert in a more foundational sense: as grounds for evaluating the justice of existing legal practices, and for setting up the legal rules in one way or another. The derivative, "legal" sense of culpability, desert, and retribution are located downstream, so to speak, from these foundational questions about the justice or legitimacy of institutional schemes.

If I am correct that criminal conviction does not and need not depend on investigating defendants' individual moral faults—specifically, the interpersonal moral meaning of their personal faults—then we should be cautious about how much moral meaning to draw from a person's criminal conviction. Moral meaning has not been demonstrated, nor is it the point of a criminal trial to prove it and, in fact, the inference may be faulty. The possibility that mitigating or aggravating evidence might be relevant to sentencing concedes this. The sentencing stage of a criminal trial comes closest to the critical application of principles in their concern with the agent's thinking. But the fact that a sentencing hearing follows the finding of guilt, and that it permits the introduction of mitigating or aggravating factors not relevant to the determination of guilt or innocence, only underscores the fact that the jury has not deliberated questions of

meaning, blame, and moral desert. At the guilt or innocence phase of a criminal proceeding, the jury's task is not to explore the moral significance of the defendant's motives, values, reasoning, and decision-making. Neither, typically, does the jury contemplate the defendant's life experience and circumstances. These factors might reveal that a person's moral competence is impaired, or that the defendant's life experience calls for empathy and muddies evaluations of moral desert, or that the defendant's social circumstances mitigate the appropriateness of blame by undermining the moral standing of the state.[24] These important moral matters are not taken up at trial.

Courts do permit the consideration of mitigating factors at trial when they are introduced through affirmative defenses. Legal justifications and excuses negate or mitigate criminal guilt. This might seem like the basis for an objection to the argument I have been making, which stresses the broad and contextual nature of moral evaluation. But it does not go very far. Legal justifications and excuses are more limited than the scope of the morally relevant considerations. Furthermore, legal standards of justification and excuse involve balancing the interests of all parties, in a generalized way that fails to capture what may be morally mitigating factors in an individual case. For example, "provocation" mitigates murder to manslaughter when the defendant's act was caused by severe emotional distress that was "reasonable" under the circumstances. As with mens rea, the relevant "reasonableness" standard applied in provocation, and in other criminal law doctrines of justification and excuse, is pitched to the sensitivities of the average law-abiding citizen in an effort to balance the interests of potential defendants and

[24] I discuss these possibilities in *The Limits of Blame*, especially chapters 2, 3, and 6. On challenges to the moral standing of the state, see Victor Tadros, "Poverty and Criminal Responsibility," *Journal of Value Inquiry* 43(2009): 391-413; Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform*. (Cambridge, MA: Harvard University Press, 2016), Ch. 7; R. A. Duff, "Blame, Moral Standing, and the Legitimacy of the Criminal Trial." *Ratio* 23 (2010): 123-140; and Jeffrie Murphy, "Marxism and Retribution," *Philosophy and Public Affairs* 2 (1973): 217-243.

victims alike. As a result, some agents who are adjudged guilty of a criminal offense may not have had the psychological capacity to avoid breaking the law or, at least, it may have been considerably more difficult for them to comply with the law than it would have been for a "reasonable" person.[25] The extent to which the criminal law permits the individualization of legal justifications and excuses tends not to include consideration of a defendant's psychological abnormality and it ignores features of a defendant's situation that do not directly compel illegal behavior.[26] In those respects, the criminal law remains insensitive to considerations relevant to the moral blameworthiness of persons who are convicted. This insensitivity is not necessarily objectionable. It is compatible with the law's important action-guiding aims, provided that criminal sanctions retain a deterrent function.[27]

If mens rea, supplemented by applicable affirmative defenses, does not encompass an evaluation of the moral blameworthiness of persons who are convicted, then sanctions, when relevant, should not be retributive. Feinberg agrees. He writes that to justify retributive punishment,

> "the moral gravity scale would have to list as well motives and purposes, not simply types of overt acts, for a given crime can be committed in any kind of 'mental state,' and its 'moral gravity' in a given case surely must depend on its accompanying motive."

Moreover, he argues, the judgments required to match suffering to motive, as required by retributive justice, "are not merely 'difficult'; they are in principle impossible to make. …reasonable men not only can but will disagree in their appraisals of comparative

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[25] I argue these points at greater length in *The Limits of Blame*, ch. 1.
[26] On the U.S. Supreme Court's worries about slippery slope arguments based on the general principle that "criminal penalties may not be inflicted on a person for being in a condition he is powerless to change," see *Powell v. Texas*, 392 U.S. 514 (1968).
[27] The threat of sanctions provides prudential reasons for compliance with law to persons whose moral competence is compromised. See Erin I. Kelly, *The Limits of Blame.*, 36-37, 59-60, 86, 134-137. See also Shoemaker, "On Criminal and Moral Responsibility," 171-175.

blameworthiness, and there appears to be no rational way of resolving the issue."[28] Though I cannot fully explore these arguments here, I find them persuasive, if understated, since the idea that punishment could be justified by harming criminal wrongdoers in proportion to their moral blameworthiness is, to my mind, itself morally disturbing. But, if not retribution, what else could justify the imposition of criminal sanctions?

For Feinberg, punishment involves hard treatment and symbolic condemnation, but it is not fundamentally retributive. Condemnation of criminal conduct is achieved through the *symbolism* of hard treatment. Feinberg supports the expressive meaning of punishment, but in a qualified way. He writes, "the degree of disapproval expressed by the punishment should 'fit' the crime only in the unproblematic sense that the more serious crimes should receive stronger disapproval than the less serious ones, the seriousness of the crime being determined by the amount of harm it generally causes and the degree to which people are disposed to commit it." Here we should read Feinberg's reference to the harm a crime "generally causes" to mean the harm it "typically causes."[29] This permits us to deemphasize aggregative considerations, as I believe he intended, and to emphasize the unjustifiability of the criminal's conduct to the victim. The idea is that crimes that are typically more harmful should be more strongly condemned.[30]

Feinberg is sensitive to problems with a reprobative account of punishment. Symbolic condemnation, he says, "poses a special problem for the justification of punishment. The reprobative symbolism of punishment is subject to attack not only as an independent source of suffering but as the vehicle of undeserved responsive attitudes and unfair judgments of blame."[31] Feinberg's remarks are on point. I have argued, and Feinberg would agree, that moral culpability

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[28] Feinberg, "The Expressive Theory of Punishment," 117.
[29] Thanks to T. M. Scanlon for urging this interpretation.
[30] In *The Limits of Blame*, I was drawn to this view. Here I am more guarded. See *The Limits of Blame,* 137-144.
[31] Feinberg, "The Expressive Theory of Punishment," 115.

typically depends on a wider set of considerations than what is required to establish criminal guilt. He queries whether the expressive point of punishment—disavowal and repudiation of the crime by the state; public vindication of the victim—might be achieved by means that are less self-righteous and cruel. This question, he says, is "surely open."[32] I am arguing that this is not only an open question, but also a critical question for the overly punitive American criminal justice system. This gives us good reason to broaden the question: How should the state respond to findings of criminal guilt? To explore possibilities for thinking about a nonpunitive response to criminal guilt, I turn now to restorative justice.

V. Moral Accountability through Restorative Justice

A restorative justice conference involves a dialogue between a crime victim and a responsible party. It is designed to permit victims to negotiate a remedy to criminal harms they have suffered, in conversation with the persons who have wronged them.[33] The involved parties seek agreement on measures of redress that respond to the interpersonal moral meaning of crime. The meaning of the criminal conduct emerges through a conversation that encompasses the relationship of a defendant's conduct to the defendant's attitudes, values, reasoning, and circumstances, on the one hand, and to its impact on the victim, on the other. In this way, a restorative justice dialogue can be understood as treating mens rea in the space of interpersonal meaning, with a focus on healing.[34]

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[32] Feinberg, "The Expressive Theory of Punishment," 116.

[33] See Lydialyle Gibson, "Restoring Justice: Exploring and Alternative to Crime and Punishment," *Harvard Magazine*, July-August, 2021. https://www.harvardmagazine.com/2021/07/features-restorative-justice; Adriaan Lanni, "Taking Restorative Justice Seriously," *Buffalo Law Review*, vol. 69, no. 3 (May 2021): 635-81; and Erin I. Kelly, "Accountability in Criminal Justice," *Journal of Social Philosophy*, 1-19 (2024), published online 23 February, 2024, https://doi.org/10.1111/josp.12560.

[34] Restorative justice addresses the ethical significance, for the victim, of the wrongdoer's intentional conduct, in connection with the wrongdoer's motives and attitudes.

A restorative justice conversation takes place in a structured and supportive group. In addition to the perpetrator (referred to as the "responsible party") and the victim (referred to as the "affected party"), the parties include a mediator and sometimes family and other members of the community. If the process is a "diversionary" program within the criminal justice system, participants could include a representative from the police department or someone from the district attorney's office, though participation by law enforcement is controversial and many models do not include it.

Participants to a restorative justice dialogue sit in a circle. In other words, they are positioned with respect to one another in a peaceful way. The responsible and affected party are each prompted to disclose the meaning and consequences the crime had for them. The mediator, often a trained volunteer, facilitates the conversation to keep time equitably and to ensure that participants address one another respectfully. Meetings include an opening circle, during which an agreement is drafted about what the responsible party will do to redress harm done, and sometimes a closing circle. Some models include additional meetings, sometimes over months.

The restorative justice agreement the parties negotiate might require the responsible party to issue a formal apology or some other public statement, to undertake reflective writing, or to engage in community service. The responsible party may agree to re-enroll in high school, to seek treatment for substance abuse or anger, or to secure employment. Overall, the process focuses on acknowledgment, apology, and change—work a guilty party could do to redress harm done and, if possible, to reconcile with the victim.

Restorative justice draws on an understanding of morality, according to which a person's conduct must be compatible with respect for the rights and interests of other people, whose interests are no less important than one's own. Restorative justice conversations address

wrongdoing in these terms, by calling attention to the criminal actor's violation of the rights and interests of other people as such. In this way, the requirements of morality are understood with respect to what persons owe to one another as equal members of society. This differs from a public policy that aims to promote the overall social good. The aggregate interests of society are important aspects of criminal justice, but they do not explain why what the wrongdoer has done was morally wrong, even if the prevalence of a certain kind of wrongdoing affects the urgency of criminalizing it. The focus of the restorative conversation is how the responsible party has wrongfully harmed other individuals or the community. The theory is that the responsible party's conduct has meaning for affected persons in a way that morally calls upon the responsible party for an appropriate response.

Mens rea has a role here. Mens rea standards imply that a criminally guilty person has disregarded reasons to refrain from engaging in criminal conduct. A reckless agent has rejected reasons to avoid risking serious harm to other persons. Deliberate wrongdoing is conduct the agent took herself to have reason to pursue, despite being put on notice of its possible criminality. Practical reasoning, even when it is confused and misguided, equips a defendant, in most cases, with the capacity to engage in restorative justice.[35] That is because thinking about the reasons one has for making the decisions one faces is, generally speaking, all that is required for moral learning through ethical dialogue.[36]

This brief overview of the restorative justice process and aims is enough to show that restorative justice achieves a better fit than retributive justice does with the relevant threshold of rational and moral competence set by the law to establish criminal guilt. The law's standard is

[35] Negligence is insufficient evidence of a defendant's capacity for moral learning, which is a reason to disfavor it as a mens rea standard in criminal law.
[36] In a restorative justice circle, criminal wrongdoers are empowered to discover that they are capable of redressing wrongs they have committed.

weak. Typically, it is met when a defendant is minimally moral competent: not psychotic or utterly morally obtuse. By contrast, the presuppositions of retributive justice are, by any reasonable measure, much more robust. They imply that the criminal agent was capable of having acted better at the time of her wrongful conduct. Robust moral competence is presupposed by an exercise of retributive justice, since punishing someone for criminal behavior she lacked the moral competence, in either its volitional or cognitive dimension, to avoid committing cannot be deserved.[37] Yet moral competence, so conceived, is hard to substantiate, since the associated counterfactual judgments are difficult to make.[38] It is difficult to evaluate whether a person who failed to act well could have done better.

This evaluative difficulty can be avoided. The possibility of restorative justice depends on a defendant's rational and moral capacities, but in a more modest way. It does not depend on establishing them through retrospective counterfactual judgments. To engage in restorative justice, a guilty defendant must be capable of recognizing and redressing the wrong. These tasks begin with an accounting of what happened and a willingness on the part of the wrongdoer to listen to accounts of the impact of the crime on the victim and others. From there, possible modes of repair are mutually considered by the participants to the restorative justice dialogue. In most cases, somewhat ironically, this deliberative process involves an extension and application of the defendant's capacity for wrongdoing. A person's agential capacity for wrongdoing brings with it a capacity for moral repair. Restorative justice calls upon criminal wrongdoers to exercise that capacity.

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[37] See Gary Watson, "The Trouble with Psychopaths," *Reasons and Recognition: Essays on the Philosophy of T. M. Scanlon*, ed. R. Jay Wallace, Rahul Kumar, and Samuel Freeman (Oxford: Oxford Univ. Press, 2011).
[38] See Kelly, *Limits of Blame*, 46-60.

It is plausible to think that a capacity for empathy is also required for restorative justice to occur.[39] With the exception of some personality disorders, however, empathy is typically cultivated through the kind of ethical dialogue that is structured as a restorative justice encounter. The conversation is inclusive and considerate, if also emotional and difficult. It requires the criminal wrongdoer to confront the injuries the victim has suffered. The wrongdoer's thinking and attitudes toward the victim, which may have been morally egregious, are open for discussion and criticism. But throughout the process, the thoughts and feelings of the responsible agent are treated respectfully. If the dialogue is successful, an agreement is reached about what the responsible party can do to ameliorate the victim's injuries. The experience of empathy, understanding, and sense of community that emerges often surprises participants.

We are now in a position to evaluate the attraction and feasibility of the concept of moral accountability required by restorative justice. Criminal defendants are morally accountable when they are capable of engaging in a restorative justice conversation, acknowledging their wrongdoing, and acting to redress it. Persons who have been convicted of crimes are, generally speaking, morally competent to do this, and they are helped by the structure and support of the restorative justice conference.

A restorative justice encounter has the potential to address Duff's concern that the criminal justice system call wrongdoers to account for the wrongs they have done, though it does not do this in the way Duff envisions.[40] Duff holds that accepting the burdensome imposition of criminal punishment is a way a defendant can communicate "his own repentant recognition of

[39] For a discussion of how a limited capacity for empathy undermines moral competence, see Watson, "The Trouble with Psychopaths."
[40] Duff "Repairing Harms and Answering for Wrongs," 219

that wrong as a kind of moral reparation."[41] In other words, accepting the burden of punishment can be understood as a formal act of reparation. This is, in my assessment, an inadequate approach to reparative justice, partly because both defendant and victim are rendered passive in the formal criminal procedure, as Duff himself laments.[42] Restorative justice, which engages both offender and victim, offers the possibility of more substantial gains. The underlying concept of justice maintains, as does Duff, that a criminally responsible wrongdoer be confronted with the nature of his or her criminal act and required to repair harm done. An account of what happened, from the criminal agent's perspective, which includes recognition of the impact of the crime on the victim, is important to the reparative process. Restorative justice is achieved, not through censure and punishment by the state, but through the agency of the affected parties, exercised in a meaningful encounter.

There is a sense in which Duff is correct. Restorative justice presupposes guilt, and criminal conviction (in principle) establishes it. Censure attaches to a finding of criminal guilt, in this sense: the criminal agent's wrongful violation of law is established.[43] But censure, so conceived, is limited in scope. It is not premised on an evaluation of the defendant's reasons for her conduct, and it leaves open the question what response, by one's fellow citizens or the state, is most appropriate or justified. In other words, it leaves open (1) questions of interpersonal moral meaning and (2) whether or which sanctions should be imposed.

Restorative justice presents an alternative to a punitive response which, in many cases, arguably better serves the objectives of moral accountability and repair. It does not displace the

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[41] Duff "Repairing Harms and Answering for Wrongs," 227. See also R.A. Duff, *Punishment, Communication and Community* (New York: Oxford University Press, 2001).
[42] Duff "Repairing Harms and Answering for Wrongs," 230.
[43] A. P. Simister emphasizes this point, arguing that "[i]t is the *conviction*, not the punishment that labels the defendant a criminal." *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford: Oxford Univ. Press, 2021), 4-5.

obligations of the state to ensure public safety, which may require the sparing use of well-designed coercive measures, and there are important empirical questions about the impact of restorative justice as an accountability process, and further research to be conducted. So, my conclusion about the potential of restorative justice to achieve an important measure of interpersonal moral accountability in the aftermath of criminal wrongdoing is provisional. Philosophically speaking, my argument is on firmer ground. It connects the point of criminal law with a principle of justice that could be applied more broadly in law, for example, in tort law. Though more needs to be said adequately to develop this idea, just law, in the domains of both criminal and tort law, might be understood to share a broad principle: that wrongful injuries call for repair.[44]

VI. Conclusion

I have analyzed the importance of mens rea without relying on the idea that the aim of just criminal law is to punish the guilty. Instead, I have argued that the aim of criminal law should be to protect us, as potential victims, from objectionable harm without unjustifiably restricting our liberty as agents. The public requirements on conduct imposed by the law speak to what people owe to one another as equal members of society. All are obligated by just criminal law to conform to a standard of acceptable conduct, provided it is reasonable to expect that others will do the same. When that standard is just, failures to comply with it are wrongful, and it

[44] On the victim focus of tort law, see Peter Cane, "Mens Rea in Tort Law," *Oxford Journal in Legal Studies* 20, No. 4 (2000), 553-6. My argument for expanding the domain of criminal law to incorporate restorative justice incorporates a concern for victims that Cane argues is missing from criminal law. In my view, theories of tort law that emphasize corrective justice and civil recourse support the broad principle wrongful injuries call for redress and that the "remedy" for harmful conduct should be victim focused. See Jules Coleman, "A Mixed Conception of Corrective Justice." *Iowa Law Review* 77 (1991-2): 427-44; Jules Coleman, "Torts and Tort Theory: Preliminary Reflections." In *Philosophy and the Law of Torts*, Ed. Gerald J. Postema. Cambridge: Cambridge Univ. Press, 2001; and John C. P. Goldberg and Benjamin C. Zipursky, *Recognizing Wrongs* (Cambridge. MA: Harvard Univ. Press, 2018), especially Part I.

is legitimate for the state to takes steps to arrest and to prosecute the criminal wrongdoer. The mens rea requirement restricts the domain of criminal accountability to behavior that involves the defendant's awareness of relevant facts about her conduct, the circumstances in which she acts, and the likely consequences of her behavior. In criminal law, protection of the victim's rights is qualified by this just measure of deference to the defendant's perspective.

The public, rights-protecting aim of criminal law is supported and complemented by restorative justice as a nonpunitive practice of moral accountability. Restorative justice, as an alternative to retributive punishment, serves to maintain the allegiance of people whose rights have been violated, and to address harm done to them and to the bonds of public trust. Furthermore, restorative justice highlights a role that might be played, not only by the state, but also by non-state actors. The mens rea dimension of criminal wrongdoing provides a focus for the restorative encounter, both the need for it and its promise. Through restorative justice we discover a source of hope in the criminal injury: an agent's capacity for wrongdoing contains the potential to engage in ethical repair.

Mens rea partners with deliberative principles to support criminal law's action-guiding aims and with evaluative considerations to answer questions of interpersonal moral meaning. In this paper, I've tried to call attention to the messiness of seductive retributive proposals about mens rea's double life. I have argued that we would do better to relinquish retributive aspirations for criminal law and to pair the law's reasonable action-guiding aims with the less punitive and more flexible approach to interpersonal moral accountability offered by restorative justice.