Crime and Culpability: A Theory of Criminal Law

Larry Alexander, Kimberly Kessler Ferzan and Stephen Morse

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Larry Alexander, Kimberly Kessler Ferzan, and Stephen Morse's *Crime and Culpability* is an ambitious and interesting book. It seeks to reduce all of criminal law to a single standard of culpability: an actor's choice to risk others' legally protected interests. In the first part of the book, the authors argue that the determinants of culpability set out in the Model Penal Code, purpose, knowledge, recklessness and intention, hierarchical in that order, can be collapsed into a single determinant with two dimensions, namely, recklessness. Both dimensions of recklessness are doxastic, one concerning the risks an agent believes herself to be imposing upon others, the other concerning the reasons an agent has for imposing those risks. Reckless behaviour is the imposition of risks on others for insufficient reasons, and the more reckless an action is, the more culpable it is. The worst kind of recklessness, and therefore culpability, is the imposition of certain harm for no good reasons; the best kind is the imposition of low risks for very good reasons, such as avoiding harm to others. When an agent's reasons for acting justify the risks she believes herself to be imposing, she is non-culpable. When an agent's reasons for acting do not justify the risks she believes herself to be imposing, she is culpable. It is a simple enough idea, and the authors argue that it can do a better job of assessing criminal culpability and assigning criminal punishment than the system currently in place. But it has many implications that jar with current practice in criminal law. For example, on the authors' view, negligence is non-culpable, omissions are non-culpable, successful criminal attempts are no more culpable than failed criminal attempts, and ignorance, both of the law and of relevant facts, is exculpatory.

What motivates their theory of criminal law is the preference for moderate retributivism over other rationales of punishment. On the authors' view, the ultimate goal of the criminal law is the prevention of harm. It achieves this via the inculcation of norms (and reactive attitudes to norm violation) in ordinary people, norms built around the idea of persons having certain interests worth protecting. The violation of those social norms is what licenses criminal punishment. Their view is retributive because it is concerned exclusively with the action of the criminal, and what she deserves in response to that action, and it is moderate because while negative desert is both necessary and sufficient for punishment, it does not mandate punishment. It is a view that is largely consequentialist (the authors comment that not every guilty person should be punished, because punishment is just one good among many), though with the deontic side constraint that no person be punished more than he deserves. The focus of the book is on the culpable choices that give rise to retributive desert, and the authors say that the ultimate aim of the theory would be to replace the current legal system's list of criminal acts with a list of legally protected interests, harm to which is sufficient for culpability. Given this centrality of legally protected interests, it is perhaps surprising that the authors do not in the book say much of anything about what they might be, but this omission is more than made up for by their detailed discussion of the conditions of culpability. Their focus on retributivism threatens to alienate readers who think the scope of criminal law extends beyond the criminal and his negative desert, such as those who think that deterrence, rehabilitation, compensation, or some mixture of these rationales, are an

important aspect of the criminal law. But it is important to note that whatever the correct rationale of criminal law turns out to be, negative desert is bound to be one important aspect of it. And to the degree that it is an important aspect, the arguments the authors make in this book are an important contribution to clarifying its nature.

Alexander, Ferzan and Morse argue for both a subjective and an objective component to the assessment of criminal culpability. An agent unleashes a risk of harm when she has both the capacity and the opportunity to avoid unleashing the risk (e.g. she meets the basic 'ought implies can' constraint), and her choice has been realized in action past the point at which she loses control over the outcome.[1] To give an example from the book, someone lighting the long fuse of a bomb can be culpable only if she has both the capacity and opportunity to avoid lighting it, and becomes culpable only at the point at which it would be impossible for her to change her mind and refrain from unleashing the risk, which is to say, the point at which the fuse has burned too close to the bomb for her to put it out. The authors reject the 'substantial steps toward harm' analysis of the Model Penal Code, on the grounds that it is always possible for the agent to change her mind.

Culpability, on the authors' view, is established by way of risks and reasons, namely the risks imposed by the act, and the agent's reasons for imposing them. But these must be determined subjectively. It is not the *actual* risks that matter, but rather the agent's own beliefs about what the risks she is imposing are. And it is not the *actual* reasons that might exist for imposing those risks that matter, but rather the agent's own reasons for imposing the risks she does. Thus the central components of an assessment of criminal culpability, risks and reasons, are both subjective. But that does not mean that culpability itself is subjective. The agent may permissibly be wrong about what the risks are, and wrong about the reasons she has. For example, returning to the example just mentioned, the bomber may believe that her bomb will destroy a factory but not harm any people, and she may be bombing it because she believes that it is the main supplier of weapons in an unjust war. And it may turn out that she is wrong about the risks, and bases her reasons on false information; perhaps there are many people at work inside the factory, because they are working overtime to meet an important deadline, and perhaps the factory produces only spare parts for automobiles. According to Alexander, Ferzan and Morse, the fact that she is wrong about the risks and the reasons does not bear on her culpability. Culpability must be assessed by holding the actor's assessment of the risks, and her reasons for imposing them, fixed. That is why one implication of their theory is that ignorance is an excuse.

There is something, however, about which ignorance is not an excuse. The agent may believe her reasons justify the risks she imposes, but her beliefs in this respect are immaterial to her culpability. This is the part of culpability assessment which is objective. In the authors' own metaphor, assessing culpability is akin to using a scale. What goes onto each side of the scale is determined by the agent. On one side, the risks she takes herself to be imposing, and on the other side, the reasons she has for imposing them. But the scale does the work of seeing whether the risks and reasons balance. It might turn out that believing a factory to be the main supplier of weapons for an unjust war is a good enough

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[2] L. Alexander et al., *Crime and Culpability: A Theory of Criminal Law* (2009), 223.

reason to justify imposing the relatively low risk that people happen to be working after hours and will be killed by the bomb. Alternatively, it might turn out that even the small chance of there being people working in the factory makes it impermissible to bomb it, even for the stated reason. The question of whether the risks are justified by the reasons is one for the courts to answer. The agent's own beliefs about whether the reasons justify the risks are irrelevant. The authors claim that 'an individual is culpable when her balance of risks and reasons deviates from what a reasonable person in the actor's situation would do', reintroducing, somewhat puzzlingly, the reasonable person test which they spent quite a chunk of Chapter III maligning.

It should be fairly easy to see why this view of culpability mandates such a strong departure from current criminal law. Negligence cannot be culpable, because negligent agents do not have reasons for imposing risks, or ideas about what the risks are. The authors defend this consequence of their view, arguing that everyone is negligent with respect to at least some of their actions. 'The hallmark of criminal responsibility', they say, 'is culpable choice, and negligent actors have not chosen to risk or cause harm'.[2] Omissions are non-culpable, because a risk can not be unleashed past the point at which the agent loses control over the outcome, given that omissions involve a *failure* to act rather than an 'unleashing' of the agent's own. They argue that 'omissions do not and cannot cause anything, and therefore cannot risk causing anything'.[3] (Although if the authors accepted a counterfactual analysis of causation, they wouldn't be forced to that conclusion).[4] Successful and failed criminal attempts are equally culpable, because culpability is a function of ~~the~~ perceived risks and believed reasons, and it kicks in at the point at which the agent loses control over the outcome. Specifically, culpability is about negative desert in proportion to an agent's actions, and thus the entire analysis is deliberately restricted from how things actually turn out. That means that for criminal law, results do not matter. To take up David Lewis's example, Dee and Dum, two gunmen exercising equal effort, intention, malice, and lack of justification or excuse, take a shot at their respective victims. Dee hits, and Dum misses. Under the current legal system, Dee would be found guilty of murder, and might get life imprisonment, or the death sentence, while Dum would be found guilty of attempted murder, and might get a short term in jail.[5] Under the theory of criminal law defended by Alexander, Ferzan and Morse, Dee and Dum would both be found guilty of the same crime, namely imposing a high perceived risk of death upon another person, for the reason that they wanted the person dead. Obviously such a reason cannot justify the imposition of such a risk, and therefore Dee and Dum would be found to be culpable. The interesting departure

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[2] Alexander et al., above n 1, 79.

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[2] Ibid 235.

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[2] See, for example, D. Lewis, 'Causation', in D. Lewis, *Philosophical Papers Volume II* ([1973]1986), 159-213.

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[2] D. Lewis, 'The Punishment That Leaves Something to Chance' in Lewis, *Papers in Ethics and Social Philosophy* (2000), 227-8.

from the current legal system is that they would be found to be *equally* culpable. Finally, and as mentioned briefly already, ignorance is exculpatory. That means that being ignorant or mistaken about what the real risks involved in some action are is exculpatory, basing reasons for acting upon false information is exculpatory, and even more controversially, given how widely held this tenet of criminal law is, being mistaken about *what the law is* is in many cases exculpatory. That is because culpability holds fixed the actor's doxastic states with respect to the risks and reasons involved in her action, it being entirely irrelevant whether those beliefs are true or reasonable. There is some room for willful ignorance to be culpable, because after all it is not genuine ignorance, but negligence and stupidity are both excuses. And that is a consequence of their view the authors welcome, commenting that criminal law should not be concerned with a person's *character*, but only with their imposition of unjustifiable risks threatening harm to others' legally protected interests.

Given these implications of the view, it's worth asking why exactly the authors chose to allow risks and reasons to be determined subjectively. If I understand them correctly, their argument was that they could not make sense of the notion of an objective risk, and therefore were forced to make the assessment of risk subjective. They commented that objective risk could come only from something like a God's-eye view, in which case there is no *probability* that things will turn out one way or another, but only certainty; the chance of some event occurring is either zero or one. And because risk is all about there being some chance of some event occurring, they choose instead the subjective account, in which the risks are whatever an agent believes them to be. But this is something of a strange choice. It appears to conceive of the logical space of theories about probability as consisting of only the objective view in which the chance of any event is zero or one, or the subjective view in which the chance of any event is whatever an agent believes it to be. But there are other theories in that logical space. For example, in his introduction to probability theory,[6] Hugh Mellor distinguishes three types: physical probability, epistemic probability, and credence. The latter is roughly what Alexander, Ferzan and Morse refer to as subjective risk assessment, namely, whatever the agent believes it to be. But neither of the former positions capture their 'God's-eye view' idea of objective probability, although both are objective. Physical probabilities are objective features of the world, for example, the chance that an atom of radium will decay within a definite period is 0.5. Epistemic probabilities, on the other hand, record the extent to which evidence confirms or disconfirms a hypothesis, for example, the degree to which evidence supports the big bang theory of the beginning of the universe. When evidence strongly confirms a hypothesis, the epistemic probability that the hypothesis is true should be high.

These kinds of probability can come apart, for instance I might have a high credence in the proposition that a coin landed on its edge (imagine that I saw it with my own eyes), while maintaining that the objective chance of its landing in that way is extremely low (the examples here are from Mellor).[7] Either of these kinds of objective probability could take the place of credence in the author's theory of criminal culpability. For example, if in the past

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[2] H. Mellor, *Probability: A Philosophical Introduction* (2005).

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[2] H. Mellor, ibid, Ch 1.

when a gun has been fired at a victim, *x* percentage of the time it hits the victim and kills them, or if the best theory of guns firing in particular conditions tell us that when a gun is aimed at a victim and fired it will with a high probability hit the victim and kill them, then we say that the risk associated with the action of firing a gun is high. Then ignorance is no longer an excuse, and perhaps neither is negligence or action by omission. If some action is such that it typically produces grave harms, whether the agent estimates those harms correctly or not, one might think that the agent is culpable. Then the analysis remains the same, but with one caveat. Culpability consists in the imposition of unjustifiable risks threatening harm to others' legally protected interests, but what counts as an 'unjustifiable risk' is something we can determine objectively, and an actor can be guilty of imposing an unjustifiable risk even when she believed it to be a justifiable risk (admittedly there may be some cases where this is too demanding, e.g. where there's little evidence on the objective probabilities. But I take the difficulties in those cases to be preferable to the difficulties of the authors account).

One reason for preferring an objective determination of risk assessment over a purely subjective one is that there are cases we can imagine in which the authors' theory simply seems to give the wrong results. For example, a person sticking pins into a voodoo doll in order to harm her nemesis may be culpable for imposing the risk of death, even though sticking pins into a voodoo doll would be viewed by most people as a completely harmless activity. And in the other direction, a criminal who genuinely believes her victim will *enjoy* an imposed risk may be non-culpable for imposing that risk, even though many people would agree that the imposition of certain kinds of risks is completely unacceptable. Just think of the agent whose reason for molesting a child is that he genuinely believes the child will enjoy the experience (he does not believe himself to be imposing a risk of harm at all). There are many such examples, and it would count against the authors' theory if anyone whose reasons look to give the wrong results had to be classed as insane or irrational. So long as the courts could in theory rule that those reasons, *if they reflected the facts*, would justify the risk imposed, then the agent will be non-culpable.

As a final word, the problem with the subjective determination of the factors relevant to culpability doesn't end with getting the wrong results in imagined cases. It also extends to the implications of trying to implement the theory in the real world. The system of criminal law imagined in *Crime and Culpability* is utterly impractical. The alleged criminal is culpable when the court decides that the risks she believed herself to be imposing were not justified by the reasons she had to impose them. Were we able to apply some kind of retroactive brain-scanner to get a veridical account of the actor's beliefs about the risks, and real reasons for imposing them, then this would seem very much to be a good story about what culpability is, and how it should be determined. Unfortunately, other people's mental states are not so transparent (the same goes for determining genuine ignorance of the law). And given what is at stake (loss of liberty, in some cases loss of life), defence lawyers will have every incentive to argue that their clients believed the risks they were imposing to be very low, and the reasons they had for imposing them to be very good. The criminals will have an incentive to convince *themselves* that their risks and reasons were better than they were. And because these mental states are subjectively determined, the alleged criminal's word is as good as it gets when it comes to determining them. The authors have unfortunately defended a philosopher's version of culpability (the conceptual truth about culpability)

instead of one useful to the legal system, which is a rather grave flaw in a book that devotes a whole chapter to the practical application of its theory.

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