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BOOK REVIEW: SOCIAL MEANING, RETRIBUTIVISM, AND HOMICIDE[1]

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If the criminal law of homicide expressed only a nonconsequentialist morality, how would it be reformulated? This, in broad terms, is the question engagingly addressed in Samuel Pillsbury's recent book, *Judging Evil: Rethinking the Law of Murder and Manslaughter*. In exploring that question, Pillsbury arrives at the following important philosophical conclusions: reasons and motivations matter to moral and legal responsibility, but inability to do otherwise does not; emotions have their own rationality and are properly considered in moral judgment and legal standards; and the "social meaning" of a crime is the key to determining the actor's just punishment. From these conclusions, Pillsbury reasons that the law of homicide should be significantly recast. He rejects the two usual categories of aggravated murder, premeditation and felony-murder, and would replace these with a new category – intentional killings in which the actor is prompted by any of a set of aggravating motives. The mitigating doctrine of "heat of passion" should be greatly restricted and treated mainly as a partial justification, not a partial excuse. Finally, manslaughter and murder doctrines should emphasize culpable indifference to harm, and not merely consider awareness that harm is risky or likely.

Pillsbury's analysis of legal doctrine is nuanced, thoughtful, and provocative. His critiques of current standards are often persuasive. However, many of the normative arguments underlying these critiques are inadequately developed. The "social meaning" approach is not clearly defined, for example, and the argument that

[1] Review article: Samuel H. Pillsbury, *Judging Evil: Rethinking the Law of Murder and Manslaughter* (New York: New York University Press, 1998), xiii, 264 pp. I thank Peter Arenella for helpful suggestions.

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incapacity to do otherwise is irrelevant to responsibility does not address some obvious objections. Pillsbury himself disclaims philosophical expertise, which may explain why the most philosophical sections of the book are the least fully developed and the least persuasive.

Nevertheless, Pillsbury clearly shows the value of grounding normative arguments for legal reform in more fundamental principles and concepts. Although his own justification of those principles is incomplete, many will nonetheless find the principles defensible. The book includes illuminating discussions of the relation of moral norms to legal standards, including the institutional constraints on expressing moral norms. The book is also replete with well-chosen examples, permitting the reader to test Pillsbury's arguments against her moral intuitions. And Pillsbury is admirably sensitive to the larger social framework within which criminal law is embedded, including problems of racial discrimination, gender discrimination, and social injustice. Still, the fragility of some of the conceptual and philosophical underpinnings of the analysis results in inadequate justification of the very interesting legal proposals that Pillsbury offers.

The book should appeal to several audiences. A lively, sometimes journalistic style should make the book accessible to educated lay readers. Pillsbury's careful examination of the history and minutiae of legal doctrine, with copious and extremely helpful footnotes, will greatly interest lawyers and legal scholars. And ruminations about nonconsequentialist reasons for punishment, the rationality of emotions, the relevance of cognitive science, and the compatibility of determinism with moral responsibility, speak especially to philosophers. This diversity of addressees results in a rich, multilayered work.

After considering Pillsbury's normative assumptions, I will examine his analysis of aggravated murder and provocation, touching only briefly upon extreme indifference murder and involuntary manslaughter. The conclusion addresses whether he has succeeded in presenting a coherent and systematic account of homicide doctrine.

I. NORMATIVE ASSUMPTIONS

Pillsbury begins by explaining that he will employ a deontological approach, rather than a utilitarian approach, in critiquing and justifying criminal law norms. More specifically, he endorses a particular deontological variant that he calls the "value approach," one that "rests on an innate value that all human beings have because of their choosing ability."[2] Regrettably, Pillsbury does not explain why he selects this particular deontological account, nor does he explain its relation to more familiar retributive accounts, or to communicative or educative accounts of punishment. Perhaps his intention is to offer a simple version of retributivism for popular consumption; but the ambiguities and problems with the "value" approach ultimately rob his later analysis of legal doctrine of some of its critical power.

What *is* clear is Pillsbury's desire to distinguish the "value" approach, which recognizes the equal worth of all persons, from the utilitarian approach, which, Pillsbury asserts, merely collects arbitrary preferences.[3] The distinction, however, is inadequately developed. Pillsbury gives the "value" approach little content. Accordingly, a wide range of moral views – including utilitarianism itself – are consistent with recognizing the equal worth of all persons, depending on how "equal worth" is understood.[4] Of course, any complete moral theory, including utilitarianism, must include a theory of value. By a "value" approach, Pillsbury obviously means something more specific, but just what he means is unclear.[5]

In Chapter 2, Pillsbury reviews the philosophical debate about whether moral responsibility is consistent with determinism. He points out that compatibilism might explain why choice is consistent

[2] P. 7. All references are to *Judging Evil* unless otherwise indicated.

[3] Pp. 15–16.

[4] At the same time, a moral view can consider collective preferences without being consequentialist. The moral view that political decisions about abortion should depend on majority vote could be held for nonconsequentialist reasons; indeed, the preferences expressed in that vote could themselves be deontological rather than prudential or consequentialist.

[5] His explanation of the source and epistemological status of "value" is similarly vague: value, he says, is not "objectively verifiable," but depends on "personal experience," especially the experience of free choice. Pp. 14, 30. How one derives a moral conception of value, and in particular the value of choice, from bare personal experiences remains mysterious.

with determinism, but it fails to explain why we *value* choice. Pillsbury's own view is that responsibility based on choice gives "meaning" to life. More specifically, criminal acts declare their own moral meaning, in a "dialogue" with social value. The most violent acts fundamentally challenge the worth of human beings. At the same time, Pillsbury offers some telling criticisms of the "could have done otherwise" criterion of moral responsibility. Correctly applied, the criterion would cast serious doubt on our blaming practices. Yet we do not in fact apply it consistently: we easily concede that many people lack the ability to be an athlete, while we resist the notion that some lack the fundamental capacity for basic decency.[6] Moreover, the criterion invites self-righteousness: those of us who do not commit serious crimes want to think that we can shape ourselves, and that we are better than others who act badly.[7]

In this and the next chapter, Pillsbury invokes this quasi-communicative "social meaning"/"value" approach to argue that the exercise of choice suffices for moral responsibility. A person who, in some sense, is "unable" to choose otherwise because of environmental influences or genetic factors can nevertheless make a choice that disregards another's human value, and he therefore deserves punishment. A psychopath or an abused child might lack full capacity for acting morally, but we should judge his motivations to do good or evil, not whether he was ultimately responsible for possessing those motivations. For the lack of moral capacity does not change the "social meaning" of his action.[8]

To illuminate the problems with an incapacity approach, Pillsbury suggests a provocative thought-experiment. Suppose we could distinguish between three types of people according to their levels of empathy: the purely selfish, limited empathizers (who have shown concern for one or two people in their lives), and full empath-

[6] P. 25.

[7] P. 26.

[8] P. 42. Pillsbury says that he does not mean terms like "dialogue" and "meaning" literally. A burglar's breaking and entering reveals that she does not care for the victim's property, but this need not be a public statement of disrespect. P. 35. Nevertheless, Pillsbury's use of the terms elsewhere seems more literal, and is problematic on that account, as we shall see. And insofar as such terms are only metaphors, they are unhelpful without an account of the principles that underlie them.

izers. Pillsbury wonders how we can compare them on the question whether they have exercised their capacity to do otherwise:

> How can we compare, for example, past interactions between a full empathizer and her professional colleagues, to a confrontation between the full empathizer and a longtime enemy? Is this latter situation different or the same as the limited empathizer encountering a person outside her limited empathy circle? Is it different than the selfish person encountering anyone else?[9]

These concerns are indeed serious. One response is to treat them simply as problems of proof. Such proof problems might justify limiting severely any explicit legal recognition of incapacity excuses (for example, to narrow categories of insanity, duress, involuntary act, and provocation), as the law in fact does.

But Pillsbury's concerns go deeper. Even if a wrongdoer really is incapable of choosing otherwise, in light of her genetic endowment and environmental influences, Pillsbury would hold her criminally responsible for her chosen acts.

That position raises some troubling questions. Why not punish the insane? Don't they actually make choices that disregard the human worth of others? Pillsbury responds that the actions of the irrational are meaningless; they "do not engage us in a dialogue about moral meaning."[10] On the other hand, "[a] psychopath's conduct expresses a philosophy of disregard for human worth that requires formal, forceful response if society means to value human worth."[11]

This distinction perplexes. What does it take to "express" a philosophy of disregard? After all, on Pillsbury's account, neither the insane person nor the psychopath needs to *intend* such a message. Further, even if "social meaning" is in the eyes of those beholding the criminal actor, rather than in the eyes of the actor, many ordinary citizens decipher a different "message" from the brutally violent acts of an insane person: he should be punished, because his acts are so horrific.

Or consider children. From a very early age, children understand in a basic way the consequences of their action and the concepts of right and wrong. Their actions are certainly not meaningless.

[9] P. 41.
[10] P. 37.
[11] P. 42.

Should we conclude, then, that an eight-year old who deliberately kills "expresses a philosophy of disregard for human worth," and therefore deserves criminal punishment? (Pillsbury does insist that responsibility presupposes sufficient choosing experience,[12] but this requirement would preclude criminal liability only of very young children.)

The problem extends to all excuses. If I choose to physically restrain a hostage because a terrorist's gun is pointed at my back, what is the social meaning of my action under duress? That I choose to value my own welfare over the welfare of the hostage? Or that I am blameless because my choice was coerced? Similar questions arise for involuntary intoxication, hypnosis, and other circumstances in which, although I make a choice and act for a reason, and thus apparently satisfy Pillsbury's criterion for moral responsibility, the choice is arguably excusable.

The content of the "social meaning" approach is frustratingly opaque.[13] Granted, responsible choice gives a certain kind of meaning to life. But so does the fortuity of being victimized by a serious crime, and so do innumerable other unchosen circumstances that affect one's character, goals, and social identity. Pillsbury clearly needs a more discriminating conception of social meaning, and one that distinctly expresses a nonconsequentialist approach to criminal law. David Dolinko has shown that social meaning and communicative strategies are deeply problematic as explanations for criminal law principles of just deserts. I share Dolinko's view that the decisive factor in determining just deserts is not the criminal's "message," but his actions: "A rapist deserves punishment not because he has communicated his belief that he is of greater value than his victim, but because he has done so by raping her."[14]

But Pillsbury's analysis is not empty. Rather, I believe that Pillsbury's does employ a hidden retributivist criterion for the "social meanings" that the criminal law may *legitimately* derive from violent acts. Specifically, he seems implicitly to endorse a version

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[12] P. 44.

[13] See also p. 15: Moral responsibility does not depend on ability to do otherwise, but on "participation in an argument about meaning."

[14] David Dolinko, "Some Thoughts about Retributivism," 101 Ethics 537, 552 (April 1991).

of harm-based retributivism. In contrast with *culpability-based* retributivism, which premises just deserts upon the agent's blameworthiness in bringing about a harm, *harm-based* retributivism premises just deserts (at least in part) simply upon the agent's bringing about a harm. Pillsbury, by completely disregarding whether the agent could have avoided acting as she did, and focusing on her immediate reason for action, offers at best a watered down version of culpability-based retributivism, since he would not fully inquire into the conditions warranting an attribution of blame. At the same time, a number of Pillsbury's observations about the "social meaning" approach suggest that he emphasizes harm more than culpability even if culpability is understood only in the narrow sense of immediate motivation for action. For example: "[A] psychopath's conduct represents the same fundamental challenge to human worth that it would if we judged him to have empathy for others."[15]

I am not certain why Pillsbury does not defend a particular version of retributivism explicitly, or why he resorts to the vaguer "social meaning" approach. Of course, a retributivist account would still have to explain why the insane person's incapacity to choose otherwise, or incapacity to understand, warrants exemption from criminal liability, while the psychopath's extreme nonresponsiveness to moral sanctions, and indeed the possibility that every person is causally determined to act just as she does, does not. Such an explanation will not be easy or uncontroversial. However, Pillsbury has not offered any reason to believe that his vaguer "social meaning" approach promises a more satisfactory justification.[16]

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[15] P. 42. Another example:

> Regardless of how he came to be an uncaring, violent person, we blame the rapist for this uncaring, violent act. The cruelty of the rape is a moral fact that requires moral response regardless of origin.

P. 42. Strictly speaking of course, people (not acts) are uncaring. Characterizing the act itself as uncaring is one hint of a harm-retributivist view.

See also p. 52 (If A and B both commit a robbery, the critical consideration in sentencing is the harm they cause to the victim, not the relative difficulty that A and B face in refraining from the crime).

[16] The "social meaning" approach might be interpreted as identifying the criminal law standards that should be publicly announced ex ante as rules of conduct, leaving room for principles of culpability at the ex post stages of adjudication and sentencing. See Paul Robinson, "Rules of Conduct and Principles of Adjudica-

Perhaps Pillsbury scants retributive theory because his interpretation of "incapacity" is unusually broad; thus, he fears that an incapacity excuse will excuse far too many agents who are really responsible. For example, he quickly concludes, from the fact that people often and predictably do not meet reasonable expectations, that they are *incapable* of doing so.[17] But a traditional retributivist would simply concede that people often fail to do what they are capable of doing. Of course, this reply begs the questions of how we define and how we determine moral capacity. But perhaps those questions, and not the analogous questions about "social meaning," are the proper focus of retributivist theory.

Moreover, in his eagerness to avoid an overly broad incapacity excuse in a possibly deterministic universe, Pillsbury ignores the important point that moral responsibility *presupposes* at least some capacities, capacities that might well be causally determined. No matter how badly it acts, my automobile is not a fit subject of moral blame. Only those agents with the genetic and social capacity to make choices and to respond in appropriate ways to the environment (including the moral environment) are moral agents at all. Indeed, at times Pillsbury himself relies on the relevance of capacity to culpability,[18] revealing his own awareness that the separation cannot be complete.

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tion," 57 U. Chi. L. Rev. 729 (1990). But this characterization is consistent with Pillsbury's position that incapacity to do otherwise is simply irrelevant to moral responsibility.

[17] Pp. 42–43.

[18] One occasion is Pillsbury's mixture of partial excuse and partial justification theory in explaining provocation doctrine, discussed below. Another occasion is his analysis of extreme indifference murder. His proposed jury instruction advises jurors that in determining why the actor was unaware of a deadly risk,

> You must determine whether lack of awareness was due to a culpable lack of concern for others or whether it may be attributed to other, nonculpable factors. In such cases you should consider any defects in the defendant's reasoning powers caused by mental disease, low intelligence, youth, lack of training, or education. . . . To the best of their abilities, all persons must look out for serious dangers which their conduct may create for fellow human beings. (P. 194.)

Similar language is found in his jury instruction for involuntary manslaughter. Pp. 195–196.

Finally, I wish Pillsbury had taken more time to explain his harm-retributivist preference. "A boy trained to cruelty by his parents will not be excused from responsibility for his own cruel acts as an adult on the ground that his parents 'made him' cruel."[19] On most retributive accounts, I agree, he will not be *fully* excused. But doesn't the parents' cruelty affect the extent of his deserved penalty, relative to someone who had not been abused? Even a harm-retributivist account which, in assessing just deserts, gives some independent positive weight to the actor causing a harm could also mitigate his responsibility because of a history of abuse.

II. ANALYSIS OF LEGAL DOCTRINES

When Pillsbury turns to his critique of specific legal doctrines, the difficulties that I have just identified sometimes weaken or cast doubt upon that critique. Nevertheless, many of his arguments remain cogent and persuasive.

Pillsbury applies his general framework, and develops new themes, in his treatment of four important doctrines within homicide – aggravated murder, provocation, depraved heart murder, and involuntary manslaughter. Pillsbury's analysis of the first two doctrines is the most original, so I focus on these.

a. Aggravated Murder

How should the law define the most serious category of murder, that which is eligible for the jurisdiction's most severe penalty? Pillsbury powerfully critiques the two categories that the law most frequently recognizes – premeditation and felony murder.

The first category, premeditation, requires that the defendant have calmly and deliberately considered whether to kill. As Pillsbury points out, the moral force of this category comes from serving as a proxy for the worst motives for killing – such as financial gain or furthering a criminal enterprise. But the category is quite overinclusive: other instantiations, such as mercy-killings, do not serve its purpose, which is to punish most severely the most blame-

[19] P. 42.

worthy defendants (or, as Pillsbury puts it, those defendants who most completely commit to "attacking human value"[20]).

But Pillsbury raises another objection to premeditation that is much less persuasive. He asserts that premeditation, along with some other mental states like provocation, strongly privileges first person observers, insofar as it describes an *internal* decision process. By contrast, such mental states as purpose to kill, knowledge that you will cause death, a motive of obtaining financial gain, or animosity to the victim's race, can more easily be proven by third party observation. Indeed, he claims, only a dualistic metaphysics would cause us to think otherwise.

Yet the metaphysical and epistemological issues are (contrary to Pillsbury's implication) distinct. Moreover, Pillsbury overstates the difference between proof of premeditation and proof of other mental states. Whether or not dualism is good metaphysics, proof of premeditation and proof of purpose raise similar epistemological issues. "Internal" reports are helpful in either case: credible testimony by the actor that he did or did not intend to kill when he fired his gun in the general direction of the victim can be as helpful as credible first-person testimony that the actor did or did not premeditate ahead of time. Similarly, "external" reports of a third-party observer at the scene who was very closely acquainted with the actor (and in particular with how the actor characteristically reveals his intentions, motives and beliefs) might have as much helpful to say about either issue. To be sure, reliable proof of premeditation is sometimes extremely difficult to obtain. But the same is true of proof of purpose. How do we know whether the actor, while pointing his gun, intended to kill, to cause great bodily injury, to cause slight injury, or simply to frighten the victim?[21]

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[20] P. 109.

[21] A separate issue is whether first-person accounts of certain mental states, if credible, are (unlike credible third-person accounts) decisive proof of that mental state. If I honestly believe that I have (or have not) premeditated or purposely killed, can I be mistaken? Even if the answer is no, it does not follow that first-person accounts invariable deserve more deference than third-person accounts. For we still need to determine whether the first-person account is credible, and that determination will often depend on "external" evidence, including the actor's conduct and outward expressions of belief and purpose.

The second category of aggravated murder, felony murder, permits a severe penalty whenever the defendant commits a felony and a death occurs in the course of that felony, even if the defendant shows no distinct culpability towards death. (Suppose defendant reaches into someone's handbag in order to rob her, and causes a loaded gun concealed there to discharge, killing the victim.[22]) Pillsbury explains this much-criticized doctrine as follows: it is emotionally satisfying to blame the felon for the death because "we allow our animosity toward the felon to influence our analysis of the homicide. . . . [H]aving proven himself criminally culpable to some extent, we can declare him culpable to the maximum extent."[23] No doubt such unreflective animosity might partly explain the persistence of the rule. But Pillsbury ignores a different, and somewhat more defensible, explanation, noted above: harm-based retributivism. On this view, if A and B each culpably causes a harm, while A also causes an additional harm, A is more to blame, even if he bears no distinct culpability with respect to that additional harm. A more complete criticism of felony murder would address this view – especially since the view appears to underlie Pillsbury's general "social meaning" approach.

Pillsbury's own proposed definition of aggravated murder is a purposeful killing accompanied by any of a specified list of especially heinous motives – "for profit, to further a criminal endeavor, to affect public policy or legal processes, because of animosity towards the victim's race, religion, ethnicity, sex or sexual orientation, or to assert cruel power over another."[24] There is much to be said for this proposal. The idea of defining aggravated murder by specifying aggravating motives is creative and promising. Moreover, the legal standard is no longer grossly overinclusive with respect to the goal of punishing the most blameworthy offenders. For example, we would no longer presumptively treat premeditated mercy killings, or accidental killings in the course of felonies, as falling within the most serious category of murder. But two related features of the

[22] The example is from Joshua Dressler, *Understanding Criminal Law* (Matthew Bender, 2nd ed. 1995), p. 480.

[23] P. 108.

[24] P. 110.

proposal are problematical – the ambiguous "cruel power" category, and the failure to include aggravating factors other than motive.

The view that an especially cruel murder deserves the greatest sanction is certainly plausible. Indeed, the circumstance that a murder was "especially heinous, atrocious, and cruel" has been an important "catch-all" aggravating factor category in death penalty statutes. And the "cruel power" category is an apt response to Pillsbury's criticism of the traditional premeditation category. Impulsive, emotionally charged murders can still display extraordinary culpability.

However, I think Pillsbury mischaracterizes "to assert cruel power over another" as a motive. Most extremely cruel actors, I venture, do not set out to cause a death for the purpose of obtaining power over another (much less for the distinct purpose of obtaining "cruel power"). Rather, their acts *display* cruelty, or *amount* to an assertion of power over another. That is, on any standard view of motives, a motive must be a conscious reason for an intentional action. But Pillsbury's definition is really meant to characterize culpable qualities of the act, not to identify a specific reason for which the agent acted.

This is not a small semantic point. By restricting the "cruel power" category to killings motivated by the desire for power over another, Pillsbury ignores killings that lack such a motive but are no less heinous because they are perpetrated in a brutal manner, or with a wanton pointlessness. Consider Ted Bundy, a serial killer who viciously beat his victims to death and often sexually abused them.[25] The brutal manner of the killings, and not any conscious desire to exert power over others, better explains why he deserves the most severe punishment.[26] Another example is the Robert Alton Harris case: what is especially horrific is not just his gratuitous (or counterproductive) killing of two teenagers in the course of a crime, but also Harris's laughing about the killings and casually eating

[25] Pp. 98–99.

[26] Pillsbury blurs this distinction when he suggests that the manner of violence is one affirmative sign of power killing: "The use of torture constitutes a telling sign that the killer seeks total, brutal domination of his victim as a motivation for the killing." P. 117. But suppose the use of torture is unplanned; doesn't such a murder belong in most serious category, even though "domination of the victim" was not the actor's motive?

the victims' unfinished lunch. Pillsbury interprets these reactions as revealing a desire for power over the victims, yet this is hardly clear. The reactions do, however, reveal a frightening indifference to the harm that Harris had caused, an indifference that ordinarily reveals extraordinary culpability.[27] Indeed, this example illustrates a general point that Pillsbury makes early in the book (though he does not develop the point much in his analysis of legal doctrine): emotional reactions possess their own rationality and can have moral significance.

Interestingly enough, Pillsbury recognizes that many people consider "senseless" killings the most heinous. It would seem to follow that an aggravated murder does not necessarily presuppose an aggravated motive, as I have just argued. But Pillsbury reasons differently. A "senseless" killing is one that lacks any motive arising out of a personal dispute with the victim (about money, sex, love, or personal rivalry), but, he claims, it is not an irrational act.

> In a "senseless" homicide the killer experiences the thrill of ultimate power, the power to take life. By a simple deed he changes the world. He becomes someone important. Killing gives power, and power is one of the most basic motivators of humans.[28]

I agree that the experience of power and domination characterizes many of the most culpable killings, including many killings that would otherwise be considered "senseless." But again, acts that are accompanied by such an experience need not be motivated by a desire to obtain that experience.

Why does this matter? Because an exclusively motive-driven analysis focuses too narrowly on the actor's means-end reasoning, on his reasons for action, neglecting other relevant features of the moral landscape. In his later analysis of manslaughter, Pillsbury makes a similar point well. Criminal law should not, he argues, limit its concern to whether the actor was aware of a risk. It should also consider whether an unaware actor was culpably indifferent to the risk. For example, legal doctrine often treats actors whose intoxication blocks their perception as harshly as actors who are actually

[27] P. 118. I would similarly analyze Sir James Fitzjames Stephens' famous example of a man who, out of sheer wanton barbarity, suddenly decides to push a boy off a bridge to his death.

[28] P. 116.

aware of the risk. The reason, however, is not that an intoxicated actor, when sober, must have been aware of the specific risk that later materialized. Rather, it is that a drunk person can fairly be blamed for a culpable series of actions and decisions (including getting drunk and driving while drunk) that culminate in creating a serious risk.[29] Culpable indifference is a less cognitive, less rationalistic, but more realistic conception of human evil than conceptions limited to motives and reasons for action.[30]

Pillsbury does acknowledge that some "senseless" killings are so bizarre and irrational that they don't challenge our moral values. If a power killer remains in touch with reality, however, Pillsbury says that his actions challenge our moral values and deserve severe punishment.[31] Although Pillsbury is right to emphasize this distinction, his fuller analysis of the distinction is unpersuasive.

The distinction between "madness" and "badness" is indeed fundamental to any nonconsequentialist theory of punishment (especially a retributivist theory). And the distinction is notoriously

[29] See Chapter 9. However, Pillsbury's analysis of crimes of indifference also suffers from an assumption that culpable indifference always presupposes a culpable prior "choice." For example, he says that the culpably unaware actor is guilty of "choosing to assign too low a priority to the value of other human beings." P. 171. But such an actor need not make a culpable *choice*. If selfish preoccupation causes me not to notice that my car is headed towards a pedestrian, my inattention *displays* a culpable discounting of the interests of others, but it hardly seems to reveal a conscious or explicit *choice* to ignore others' interests. Put differently, the overemphasis on choice not to perceive treats culpable indifference as a kind of willful blindness; but culppable indifference is a broader concept than that.

[30] See R. A. Duff, *Intention, Agency and Criminal Liability* (Basil Blackwell: Oxford 1990); Kenneth W. Simons, "Rethinking Mental States," 72 B.U. L. Rev. 463, 496–502 (1992).

Why does Pillsbury focus so sharply upon reasons and motivations, ignoring other features of the moral landscape? Perhaps because he believes that this is required by his rejection of the "incapacity" excuse. That is, if we should not explore whether the actor can *help* (or can be blamed for) having a culpable motivation or reason for action, perhaps we must at least be able to identify such a motivation or reason for action in order to legitimately ground an attribution of culpability. However, even within the parameters of Pillsbury's approach, culpability could be premised upon manner of killing, or indifference displayed in a violent act, without extending to whether the actor had the capacity not to act in such ways.

[31] P. 119.

difficult, for the following reason. The horrific nature of a brutal crime is highly equivocal. It can imply *either* that any sane person who willingly acted in that manner or brought about that result must be extremely depraved, *or* that the actual actor might well have been insane.

Pillsbury's solution to the problem is to note that most power killers seek power, an understandable human goal, through domination, a familiar (though ugly) means. Thus, "their killings express a comprehensible philosophy about human value." The truly insane do not similarly challenge our values.

This solution has merit in emphasizing that morally responsible violent criminals have goals and employ means that are familiar to law-abiding citizens. But Pillsbury's criteria for distinguishing the "mad" from the "bad" are ultimately mysterious. Why exactly does a "bizarre" set of beliefs mean that the actor is not morally responsible, is not "participat[ing] in the ongoing argument about the meaning of human life"?[32] If the "meaning of human life" is that an innocent life should never be unjustifiably destroyed, don't the acts of the insane "contribute" to the "argument" about this meaning?

Perhaps Pillsbury means to say that moral responsibility presupposes that the agent has motives and reasons for action with which law-abiding persons can easily empathize. But what motives, exactly, are those? Most law-abiding citizens could not imagine killing a person for any amount of money; but a murder for hire is hardly a bizarre, irresponsible act. To be sure, selfish and profit-seeking motives are in a general sense comprehensible. But the same could be said of an insane person's motive to protect the victim from harm, in a case where the person believes that assaulting the victim is necessary to save her from the Devil.

Moreover, consider an extreme psychopath who genuinely believes that all other persons have no more status than any material object, and thus views them as things to manipulate or use at will. (If such a person while driving confronted a pedestrian lying in the road, he would give no more thought to avoiding an impact than if he were confronting a fallen tree.) Does such an individual challenge our values? The question is a difficult one; exceedingly few

[32] P. 120.

such people exist.[33] (Even the most hardened gang member treats his friends, family, or fellow gang members with some consideration.) Pillsbury's analysis clearly implies that this person would be morally responsible: he acts from an understandable, selfish motive, albeit to an extraordinary degree.[34] But I think our intuitions about this example are much more uncertain. Such a person appears to be a moral automaton; indeed, he is barely human. The "understandable motive" criterion, in short, is inadequate to explain why and when we believe that people are morally responsible.

b. Provocation

Pillsbury's analysis of the legal doctrine of "provocation" or "heat of passion" is the strongest section of the book. Containing a thorough exposition of the history of the doctrine and an explanation of contemporary critiques by feminists and others, the section also explores the relationship of the doctrine to the justification/excuse distinction and to Pillsbury's own, related distinction between reasons for conduct and capacity to do otherwise. That exploration fails, however, to reconcile the tension between justification and excuse that has long plagued provocation analysis.

Under the doctrine of provocation, an act that would otherwise be murder is sometimes treated as the lesser crime of voluntary manslaughter when the actor has been provoked to anger, rage, or fear at the time of the killing. Pillsbury notes that the law in many jurisdictions has become more liberal, permitting reduction to manslaughter even when a significant amount of time has elapsed between the provocation and the killing, even when the passion aroused was grief rather than anger or fear, and even when the defendant's subjective reaction was not the normal reac-

[33] See Peter Arenella, "Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability," 39 UCLA Law Review 1511, 1614 (1992). In Arenella's terminology, such a person would not be a moral agent.

[34] Thus, Pillsbury considers that the murderers Nathan Leopold and Richard Loeb might have been psychopaths, who "likely lacked the capacity to feel for others and therefore could not see the wrongfulness of their conduct." P. 33. Still, he would hold them criminally responsible. But it is quite doubtful that they were extreme psychopaths in the sense that I have defined, i.e., persons who are completely incapable of moral concern.

tion to such stress. This liberalization reflects the "psychological" approach to provocation, under which the critical question is whether strong emotions compelled the defendant's homicidal act. And this approach, in turn, is an instance of the "incapacity" approach to moral responsibility: one who is overwhelmed by rage, fear, or anxiety is much less capable of conforming to legal norms, and thus deserves a lesser penalty.

Not surprisingly, Pillsbury rejects the psychological incapacity approach, opting instead for a "reasons for passion" approach. A reduction to manslaughter would only be warranted:

> If the defendant had good reason to believe that the victim committed a serious wrong against the defendant . . . and if this provoked in the defendant at the time of the homicide a great and justifiable anger at the victim.[35]

This thoughtful proposal has much to commend it. It interprets provocation doctrine largely as expressing a partial justification, rather than partial excuse, perspective: the defendant has normally[36] committed a lesser wrong when he kills in the face of a "serious wrong." (In Pillsbury's terms, the person who acts with such a motivation "does not challenge our moral values as much as other purposeful slayers."[37]) The proposal is also responsive to powerful feminist objections to modern provocation doctrine, objections pointing out that many men, but very few women, predictably react to rejection with jealous homicidal rage. In Pillsbury's view, anger at an adulterous spouse who betrays personal trust might justify a reduction to manslaughter, but patriarchal and jealous rage that one can no longer possess one's spouse does not justify such a reduction. Pillsbury believes that his approach, by focusing on the proper definition of "serious wrong," permits us to draw the distinction.

[35] P. 142.

[36] The qualification is reasonable mistake. Pillsbury's "good reason to believe" language accommodates this; an actor might reasonably but mistakenly believe that she is being seriously wronged, in which case it reasonable appears that she is partially justified. Whether such a mistake itself sounds in justification or excuse is a debated question. If it is an excuse, then Pillsbury's accommodation of mistake undercuts his general commitment to a partial justification theory of provocation. But there are plausible (and I believe persuasive) arguments for viewing reasonable mistake as a justification, so Pillsbury's position here need not be problematic.

[37] P. 126.

This approach results in a much narrower doctrine of provocation than the psychological approach, which largely expresses a partial excuse perspective. How the approaches differ is vividly illustrated by two cases that Pillsbury discusses – *Gounagias*[38] and *Ott*.[39]

In the first case, Dan George raped John Gounagias and spread the word around town about the rape, ridiculing Gounagias. Three weeks after the rape, after another incident in which townspeople humiliated Gounagias, Gounagias sought out and killed George in his sleep. In *Ott*, the defendant and his wife had an unstable marriage marked by his acts and threats of violence against her and her infidelity. Overcome by jealousy and rage, the defendant followed his wife and her lover home, ran their truck off the road and killed his wife.

According to Pillsbury, the psychological approach actually might provide Ott a stronger claim to mitigation than Gounagias, because Ott might have been more thoroughly in the grip of an overwhelming passion. By contrast, Pillsbury's "reasons for passion" approach firmly supports mitigation for Gounagias but rejects it for Ott.

The contrast of these cases is instructive, and it does provide strong intuitive support for Pillsbury's "reasons for passion" approach. Specifically, a pure psychological approach that looks *only* to the strength of the passions overwhelming the defendant's inhibitions is indefensible. However, Pillsbury tends to overstate the extent to which liberal jurisdictions embrace an unadulterated capacity approach. Instead, they routinely constrain that approach with a requirement that the defendant's loss of control or reaction to stress be "reasonable."[40] People who react to provocation because of

[38] 153 P. 9 (Wash. 1914).

[39] 686 P. 2d 1001 (Or. 1984).

[40] Pillsbury recognizes this, but points to the difficulties of interpreting a "reasonableness" test. Pp. 144–145. The difficulties are real, however, his own test, requiring "good reason to believe," a "serious wrong," and "a great and justifiable anger," will obviously create difficulties of its own. (Recall the distinction he would have a factfinder draw between "betrayal of personal trust" and "patriarchal rage at dispossession.") I agree with Pillsbury, however, that many "reasonableness" tests might encourage a decisionmaker to focus on conventional behavior within a group, and thus to miss the normative issue. Pillsbury's test does put the normative issue more directly.

paranoia, hotheadedness, or belligerence are not entitled to mitigation. That is, the justifiability and the moral content of the reaction are important factors in determining reasonableness. To be sure, these reasonableness requirements are sometimes weakly enforced, or greatly subjectivized, or left to the largely unguided discretion of juries. Still, I would be surprised if many juries, entrusted with that discretion, would support reducing Ott's crime from murder to manslaughter. The psychological approach, as actually applied, is probably more similar to Pillsbury's approach than he suggests.

At the same time, Pillsbury's own approach is also impure. A pure "partial justification" approach would ignore passion and loss of control altogether. Even if Gounagias was not terribly upset by George's rape and attempts to humiliate him, Gounagias's killing of George is (on the partial justification approach) a lesser wrong than an unprovoked killing would have been. Why, if we are focusing on good and partially justifiable reasons for an angry homicidal response, should we require anger at all? If an unusually calm person is not actually stirred to anger, shouldn't he still be entitled to a reduction to manslaughter if he has committed a lesser wrong?

Pillsbury is aware of the difficulty. His response is that provocation doctrine is an admixture of partial justification and partial excuse; he would emphasize the first ingredient more.[41] But this response is insufficient. The powerful criticisms he levies against "capacity" approaches would seem to condemn any consideration of loss of control.[42] And he never explains why the particular mix that he defends (for example, requiring that provocation lead to anger, rather than other emotional reactions) gives the proper relative weight to justification and excuse, or to "reasons for passion" and incapacity.[43] Suppose a battered wife kills her sleeping husband,

[41] Pp. 127–128.

[42] In his proposed jury instruction, it is striking that Pillsbury uses traditional incapacity language to describe the "anger" component: "[The defendant's] anger must be so strong that it affected the defendant's judgment, significantly reducing [his][her] ability to consider the consequences and to refrain from violence." P. 193.

[43] Pillsbury suggests:

> If the justly enraged individual gives way to the temptation of violence, we read this violence as less of an attack on human value, as less of an act of moral disregard than it would be otherwise because of its origin in a morally based

not out of rage, but in a state of overwhelming despondency and anguish. Doesn't she still deserve mitigation?

More generally, Pillsbury does not sufficiently justify his support for a very narrow provocation doctrine. In his examination of provocation doctrine, Pillsbury frequently differentiates cases in which mitigation is much more, and much less, clearly deserved. He then tends to conclude that in the less deserving cases, no mitigation is warranted. The proper comparison, however, is not just to uncontroversial cases deserving mitigation, but also to uncontroversial cases of murder. And then we must ask whether the opprobrious charge of murder, with its harsh sanction, should attach to people who reacted in an understandable way in a situation of enormous stress.

Consider one of Pillsbury's examples. A man's child has just died. Grief-stricken, the father reacts violently to a minor wrong by another. Pillsbury crisply concludes: "Grief may explain his rage and violence in the situation, but it provides no moral justification for either."[44] But the unanswered question is whether such a person deserves the same penalty as a murderer who lacks even the semblance of such an excuse.[45] We can ask the same ques-

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passion. In this sense the provoking situation is like a natural emergency, when the emotions are so powerfully and justifiably engaged that standards of responsibility must be somewhat relaxed. (P. 141)

But it remains unclear why engagement of emotions and passions should matter at all, or if they do, why they should matter as little as Pillsbury would have them matter. Or, put differently, our "reading" factors as an "attack on human value" seems, in this passage, to incorporate elements of both the capacity and the reasons for passion approach.

Other passages suggest that Pillsbury does, after all, give significant weight to the excuse or incapacity perspective. See p. 147 ("Provocation . . . represents a concession to human shortcomings, not only in self-control but also in emotion.")

[44] P. 142.

[45] Pillsbury would narrow provocation doctrine in part because he is sensitive to the feminist complaint that the doctrine mainly benefits violent men who cannot control their rage, especially their jealous rage against women. But a broader view of provocation would also benefit those who react out of anguish, fear, and other emotions apart from anger, a class that is probably less predominantly male. In any event, the argument against allowing mitigation based on jealous rage should stress that such mitigation is inconsistent with defensible notions of justification or excuse, or that it is based on sexist conceptions of responsibility. The argument

tion about the common scenario in which a rejected lover reacts with rage. Pillsbury asserts that accepting mitigation here because of the "psychological reasonableness – the normality – of the accused emotional reactions . . . only illustrates the moral emptiness of psychological assessment."[46] But one need not be suffering from a confusion of "is" with "ought" in order to conclude that when ordinary emotional reactions trigger deadly violence, the criminal law should not impose its heaviest sanctions.

Insofar as a wide range of penalties are authorized for murder, my point weakens somewhat: the distinctions I support could be accommodated at the sentencing stage. Still, murder is the most serious crime, often punished with a severe minimum penalty. And the "murder" label signifies commission of a great evil. Unless we are certain that the defendant deserves that level of condemnation, a lesser charge of manslaughter is warranted. If it *is* feasible and wise to recognize degrees of culpability for understandably provoked defendants at the sentencing stage, the differentiation should occur within the category of manslaughter, not within the category of murder.

III. CONCLUSION

In this review, I have not had occasion to discuss a number of insights in Pillsbury's analysis. For example, Pillsbury points out the potential importance of a distinction between "allusive" and "analytic" mens rea characterizations; the former invite direct moral evaluations while the latter rely on morally neutral criteria.[47]

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that mitigation should be disallowed simply because it would primarily inure to the benefit of men (or women) is too broad. The liberalization of virtually any criminal law doctrine will inure to the benefit of men, since men commit almost all crimes (especially violent crime) at a much higher rate than women.

[46] P. 148.

[47] As Pillsbury notes, these are the two dominant styles of mens rea expression in legal rules. The "allusive" style authorizes the trier of fact to conduct a direct moral evaluation of the defendant's acts, while "the analytic style defines wrongdoing by describing particular aspects of harm doing, such as the actor's goal or state of mind." P. 84. For a similar distinction between "global" and "local" mental states, see Simons, "Rethinking Mental States," at 488 n. 89. "Extreme indifference to the value of human life" exemplifies the former; "knowledge" that

Moreover, the book avoids the common pitfall of analyzing legal doctrine in a social vacuum. Pillsbury frequently sounds notes of humanism, compassion, and social concern. A full chapter is devoted to "Just Punishment in an Unjust Society." It is hypocrisy, Pillsbury points out, to recognize individual responsibility for crime yet ignore social responsibility. Also salutary is his warning of the dangers of self-righteousness and of scapegoating criminals, blaming them even for problems (such as poverty) that social institutions have a responsibility to address.[48]

One last comment concerns the overall structure of the book. Pillsbury promises to rethink the law of murder and manslaughter. Although he has indeed rethought many important aspects of those doctrines, a coherent account of how the doctrines fit together is lacking. The law of murder, for example, includes both aggravated and nonaggravated categories. Within the latter, Pillsbury only analyzes "depraved heart" (or "extreme indifference") murder, mentioning purposeful and knowing killings only in passing. What is the relation between these doctrines? Should they be graded the same? But is a knowing killing (which is a byproduct of another intended action) as culpable or as much a "challenge to human value" as a purposeful one? Are "depraved heart" killings as culpable? Indeed, are some depraved heart murders eligible for "aggravated murder" status? Which ones? Similarly, Pillsbury helpfully articulates a culpable indifference approach to

one's acts will cause death exemplifies the latter. The distinction is a provocative one. Are allusive characterizations inevitable if legal categories are to express moral criteria? Or would it, in principle, be possible to reformulate all allusive characterizations in analytic terms? The influential Model Penal Code travels far in this last direction, in part because of the vagueness of "allusive" definitions and the danger that juries will apply them unpredictably and inconsistently. But this trend has been criticized (Simons, "Rethinking Mental States," at 488–489), and Pillsbury's own endorsement of a culpable indifference test of involuntary manslaughter over a test exclusively focusing on awareness supports the criticism.

The question remains whether criteria such as "culpable indifference" are, at the deepest level, the best expression of retributive norms, or whether instead such analytic criteria as purpose, belief, and motive could, in principle, suffice. Pillsbury's own emphasis on reasons and motivations might suggest the latter answer, but his doctrinal endorsement of culpable indifference tests of murder and involuntary manslaughter suggests the former.

[48] P. 60.

involuntary manslaughter, demonstrating that a purely cognitive approach is inadequate. But the modern trend is toward a more cognitive approach, emphasizing awareness of a risk. Is the modern approach misguided, or should either approach suffice for involuntary manslaughter liability?

My questions are not just about filling a few gaps. They test whether Pillsbury's conceptions of "social meaning" and "respect for human value" are sufficiently well-defined or adequately developed to provide a systematic account of the relative seriousness of different types of homicide. Pillsbury's book does articulate many provocative questions – for example, about the relevance of various forms of incapacity to responsibility, the range of inculpatory and exculpatory motives, the role of emotions in the criminal law, and the tension between justification and excuse. The book also offers cogent criticisms of contemporary homicide doctrine. But it does not fulfill its promise of providing a full nonconsequentialist account of how awareness, indifference, capacity, motive, risk, harm, and other criteria bear on the punishment that a person deserves.

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