

CRIMINAL LAW AND THE SETTING OF STANDARDS

Joshua Paschal

Submitted to the faculty of the University Graduate School in partial
fulfillment of the requirements
for the degree
Doctor of Philosophy
in the Department of Philosophy,
Indiana University

August 2026

Accepted by the Graduate Faculty, Indiana University, in partial fulfillment of the requirements
for the degree of Doctor of Philosophy.

Doctoral Committee

Marcia Baron, Ph.D.
Chair of Dissertation Committee, Rudy Professor *Emeritus*

Matthew Adams, Ph.D.
Mahlon Powell Assistant Professor of Philosophy

Nicholas Almendares, Ph.D.
Associate Professor of Law (*Maurer*)

Timothy O'Connor, Ph.D.
Professor of Philosophy

Defended June 5th, 2026

Joshua Paschal

CRIMINAL LAW AND THE SETTING OF STANDARDS

This dissertation examines and challenges a trend in the philosophy of criminal law that may be called ‘minimalism’. This trend involves a desire to drastically reduce the scope of criminal law, which aligns well to common contemporary worries around criminal justice in the present United States. This dissertation seeks to criticize some such views which fail to convincingly capture the range of significant commitments in our moral practices and in turn fail in their practical suggestions of how to reform the criminal law. Of particular interest are influential criticisms of criminal negligence and hate crime, especially in cases where those criticisms seem to overlap. Against criticisms of criminal negligence and hate crime statutes, this dissertation sketches a broader account of what the criminal law is interested in: holding people responsible for the violation of fair standards, specifically standards which serve to signal, to symbolize, or to discipline; then applies that account to the aforementioned controversies about criminal negligence and hate crime statutes. In the discussion of criminal negligence, this dissertation argues that the limits of criminal negligence should be understood as the limits of rightful demandingness of duties in certain role responsibilities, against criticisms which argue that negligence is innocent or non-culpable. Negligence serves to set standards and to discipline serious violations. In the discussion of hate crime statutes, this dissertation argues that the special treatment of hate crimes is justified under the non-ideal conditions of historical injustices, which grounds a special obligation to addressing injustices experienced by particular protected groups; but, in turn, everyone becomes equally eligible for those protections and it is contingent that some groups and not others end up benefiting more from such additional protection.

Contents

Acknowledgements.....	vi
Introduction.....	1
Chapter 1. Criminal Law Minimalism and its Shortcomings	6
Introduction. Criticizing Minimalism about the Criminal Law	6
1. Crimes, Liberty Restricting Principles, and Moral Outlooks	8
1.1. Defining Crime and Liberty Restricting Principles	8
1.2. The Contrast of Moral Outlooks	11
2. Minimalism about the Criminal Law	14
2.1. Husak's Minimalism in Overcriminalization.....	15
2.2. Identifying the Objected-to Minimalism	17
3. Two Criticisms of Narrow Outlook Minimalism.....	25
3.1. Objection 1: the Special Status of the Criminal Law.....	26
3.2. Objection 2: the Richness of Moral Life.....	30
Conclusion. Against Minimalism about Our Moral Lives.....	38
References	40
Chapter 2. Criminal Law as Standard Setting.....	42
Introduction. Law, Standards, and Guidance	42
1. Sketching the View: Setting Standards and Shaping Ourselves	43
2. Signals as Standards.....	47
2.1. When the Criminal Law Signals	47
2.2. An Objection: Signals and Judgments of Significance	51
3. Symbols as Standards	55
3.1. When the Criminal Law Symbolizes	55
3.2. The Difficulty of Social Harm and the Limits of Authority	59
4. Discipline as Standard.....	60
4.1. When the Criminal Law Disciplines.....	61
4.2. Discipline Narrowly: Role Responsibility of Parents, Doctors, and More.....	63
4.3. Discipline Broadly: Limits of Role Responsibility.....	66
Conclusion. The Weight of Standards within Utopia.....	68
References	71
Chapter 3. Criminal Negligence and Holding Others Responsible	73
Introduction. Criminal Negligence, Responsibility, Discipline	73
1. The Disagreement About Criminal Negligence	75
2. The Lines of Negligence, Responsibility, and Discipline.....	80
2.1. A Tale of Two Doctors, Adomako and Akerele.....	80
2.2. Parenthood, Between the Private and Public	87
2.3. The Limits of Public Interest and Role Responsibilities.	91
3. An Objection Considered: Doubling Down on Criminal Culpability.....	93
Conclusion. Between Duty and the Freedom to Make Mistakes.....	95
References	97

Chapter 4. On The Special Status of Hate Crimes.....	98
Introduction. Is Hatred Worse?	98
1. The Usual Framing	101
1.1 Defining ‘Hate Crime’	101
1.2. The Usual Debate Around Penalty Enhancement.....	105
1.3. Some Alternative Views about Hate Crime Statutes.....	113
2. Reframing and Defending Hate Crime Statutes.....	117
2.1. Hate Crime Statutes: History and Textual Evidence.....	118
2.2. Hate Crimes, the Construction of Protected Classes, and the Special Status	123
2.3. The Double Will (or Intention) of the Most Serious of Hate Crimes	125
2.4. Hate Crime Statutes as Symbolic Commitments with “Bite”.....	128
3. Anticipating Objections	131
3.1. Privilege and the Importance of Neutral Language	132
3.2. Character, Causality, and Punishment.....	134
3.3. Arbitrariness and Accidents of Law	136
Conclusion. Five Comments	139
References.....	142
Conclusion. Summary, Reflections, and Future Directions	144
Appendix A. Overincarceration by the Numbers.....	152
A.1. Incarceration in and Across the United States	152
A.2. Incarceration in the United States and International Comparison	153
Appendix B. Overpunishment by the Numbers.....	155
B.1. Sentencing and Punishment in the United States and International Comparison	155
B.2. Legislative Pressures to Punish Harshly	158
B.3. American Attitudes and Political Pressure to be “Tough on Crime”	160
Appendix C. Overcriminalization by the Numbers	162
C.1. The Number of Criminal Laws	162
C.2. The Reach of the Criminal Law	164
C.3. Overpolicing as Overcriminalization	166

Curriculum vitae attached at end of document, per Indiana University policy.

Acknowledgements

This dissertation is the culmination of seven long years. This project would not have been completed without the support and guidance of so many others; all of whom deserve more than these words alone can capture despite my best efforts.

I would first like to thank my primary advisor and mentor throughout this endeavor, Marcia Baron. You have always been one of the most demanding and thorough mentors I have ever had, and I sincerely appreciate the amount of effort you have put into my growth, even with my constant bouts of uncertainty. I hope your retirement from Indiana University will be everything you dreamed it would be. It has truly been an honor to be your final advisee.

Thank you to the rest of the dissertation committee as well. Matthew Adams, who was an unexpected twist in my graduate journey, as you were hired during my first year. I doubt that I would have gotten through coursework without you, both as a wonderful instructor and a frequent second advisor. Timothy O'Connor, who likewise was always there for support and a laugh, and occasionally a pint and a table tennis match. Nicholas Almendares, who I wish I had stayed in more consistent contact with, but who was always available for support even as a member of the law school and not the philosophy department. All three of you truly went above and beyond in your own ways when, often, I needed such.

The philosophy faculty as a whole also deserves my acknowledgement as group, especially Gary Ebbs, who served as our Director of Graduate Studies during the Covid-19 pandemic. Without his support in a very difficult time for me, I likely would have left the graduate program in that difficult time. Katy Abramson, Sharon Berry, Kirk Ludwig, Katy Meadows, and David Sussman, also all spent time helping me prepare for the difficulties of the job market and more, and deserve special mention here, too, as do John Robison and Adam Leite

for their mentorship with teaching. Seven years is a long time and one that, while I am happy to continue on to new opportunities, will be remembered fondly.

I have had the fortune of a wonderful time in graduate school following the difficulties of the pandemic, so many friends inside and outside of philosophy all deserve recognition.

Of the fellow philosophy students, there are three groups. Of those who came before me, the most important four were Savannah Pearlman, a *de facto* early mentor, and the cohort above me, Zara Anwarzai, Luke Capek, and Kjell Fostervold, all of whom consistently contributed to my growth, and fun, in their own ways. My whole cohort, who shaped my experience the most: Katrina Haaksma, Jake Walerius, Doug Yetman, Ethan Kerns, and Alexander Webb. I remember a surprising amount of proseminar to this day. Of those who started at the graduate program after me, I would like to give special recognition to James Murphy, David Lorenzo, and Matthew Jackson for always challenging me the most, as much as I want to list the entire department. Thank you all, and all those I could not reasonably list out here.

Outside of philosophy, many of my friends here at Indiana University and greater Bloomington have shaped myself into who I am today. Of those who have most contributed to my growth, I would most like to thank: Chris Agostino, Erika Coe, Adri Cruz, Ally Freund, Bryce Greene, Chaundy McKeever, Maygan McGuire, Quan Le Thien, Leigh Levinson, Varun Rao, Denizhan Pak, and Ryan Webster in their own ways, and our many other friends I am having to leave out for brevity.

My Mary Washington community deserves some thanks, too. Thank you to my undergraduate recommenders, Emile Lester, Jason Matzke, and David Ambuel, for believing in my potential. Also thank you to my friends and their continuous support, even when I was not at my best: Robert West, John Huebler, Shoshana Gordon, Kelsey Sheffer, and Ivan Verano.

My final thanks go to my family: my mother and stepfather, Jennifer and Steve Rainwater; my father and stepmother, Matt and Dawn Paschal; my grandmother, aunt, and uncle, Barbara, Susan, and Ron Anderson; and, my sister and now brother-in-law, Erica and Chase Hodges. While I have many people to thank, including many more unmentioned supporters, my family deserves the most recognition of all, I could have never done this without them.

Thank you all.

Joshua

Introduction

This dissertation is the result of a convergence of a number of initially disconnected thoughts. The most significant of these are threefold. The first and most important was a suspicion about the overlap between criticisms of criminal negligence and hate crime statutes, particularly that some of the critics were the same individual thinkers. Why did their thinking converge in that way? Of all of the concerns about criminal justice reform, why were *those* the topics that they chose to scrutinize? Which brings me to the second thought: a divergence of thought about criminal law from similar starting points. Some theorists of criminal law start from a similar starting point, that criminal law has gone too far in some respects, yet ended up focusing on such different areas of criminal law to focus their critical efforts. Some, like Douglas Husak, focus rightly on the criminalization of personal drug users; some others, from a similar starting point, end up landing on the controversies around hate crimes and criminal negligence, even though those areas of law are not representative of criminal law as a wider enterprise. This strikes me as strange given the shared commonplace that I am sympathetic to the criminal justice system of the United States is far too punitive. Yet that initial, common motivation appears to be *lost* in some cases. Which leads me to the third underlying impulse that shaped this dissertation: while we should aim at criminal justice reform, I have come to find myself generally skeptical of philosophical projects to reduce the scope of criminal law in cases where such projects seem to miss out on the actual situation on the ground. From the armchair, the choice to focus on special areas of criminal law where the considerations are quite complex, like criminal negligence and hate crimes, *instead of* drug criminalization, or pre-trial detention, or plea bargaining, or even just the most common type of offenses (property offenses, like theft), *misses this central mark*. This third thought is especially important because it connects to common, everyday concerns

around criminal law. It is in this desire to address the practical situation of criminal justice reform that philosophical work converging on everyday thinking: *many people think things like what these philosophers argue for*. Yet, I think a ranges of views *go wrong* in a way that is actually *instructive* to the more general public, though I try not to rely on such in my substantial arguments, instead only noting such where especially relevant. These background thoughts persist through much of what I claim throughout the rest of this dissertation, so let me say a bit more about each before turning to the body of this inquiry.

First, some words on the suspicious overlap. My work in this area started with the controversies around criminal negligence, though the work included in this dissertation is different from that of earlier work. In my earlier work, I attempted to develop a model standard of care, seeing such a gap in the Model Penal Code's approach that was often used as a point of criticism against criminal negligence more generally—the lack of an articulated, general standard of care. It was then rising incidences of prominent mass casualty hate crimes that made me both more interested in that specific area of criminal law and the writing from, in some cases, the *same* figures, most prominently Heidi Hurd. That overlap is what drove me toward more general thinking on criminal law. Initially, I wrote much on general jurisprudence and the general relationship between law and morality, nearly all of which has ended up cut from this dissertation. Why? Because, overtime, I realized that part of my thinking is that *unlike* law in general, criminal law is often full of explicit, deeply moral concerns, and often ones aimed at very different objectives, as chapter 2 sketches. But this development of a pluralistic account of criminal law, while part of this dissertation, was not my primary ambition: rather, such was developed in large part as an identification of what, I have come to believe, goes wrong in the thinking of others in especially difficult, controversial, but narrow areas of criminal law.

Second, some thoughts on the divergence within the theory of criminal law. In the United States: we overpunish, we overincarcerate, and we arguably overcriminalize. This is mostly uncontroversial. When people are punished, they are punished harshly. We have a disproportionately high number of people who are incarcerated. Too many actions seem to be criminalized. Putting aside peculiarities and disagreements for right now, as three whole appendices are dedicated to these questions, *there is a consensus that the situation is dire*. Given this dire situation, one possible strategy to address the shortcomings of our criminal justice system from the philosophical perspective is to endorse some form of *minimalism about criminal law*,¹ a term I borrow from Douglas Husak's influential *Overcriminalization* (2008). There are a range of views that can fall under this label beyond Husak's own endorsements as this term also captures a very ordinary and common sentiment: *we need to minimize the scope of criminal law*. This broader sense of 'minimalism' is intended also to capture a wide range of minimalist views like those very ordinary and common sentiments which, throughout this dissertation, I resist.

Putting aside these difficulties: the central implication of 'minimalism' in the broadest sense is a practical endorsement—to minimize, *in some way*, the *reach* of criminal law. I am interested in forms of minimalism in the *substantive* sense (Levin's second definition, see footnotes). Since there are different ways to limit the reach of criminal law, there are various kinds of such views. I am not, here, trying to exhaustively reject every kind of view which may be called minimalism of this substantive kind. Some rolling back of our criminal law's scope, or

¹ A difficulty with a task like this is the confusion about this term, "minimalism." Take Benjamin Levin's list of the different senses of 'criminal law minimalism': (1) the number of substantial criminal laws, (2) the reach of the substantial criminal law, (3) carceral punishment, (4) policing, (5) social control, (6) structural inequality, and (7) cultural tendencies (alternatively: "carceral logics" or "punitive impulses") (See: Levin 2024, 1779-92).

Another reason for this confusion is that criminal law minimalism is sometimes used as a contrast with *prison abolitionism*, especially in interdisciplinary circles. Prison abolitionists, in seeking the end of carceral punishment, may also likewise call for the reform or abolition of institutions as various as policing, surveillance, and structural inequalities more generally. This dissertation does not grapple with prison abolitionism.

decriminalizing, is indeed called for. This claim I assume in the background here. Instead, my focus in this dissertation is only on a narrow set of views which lead some to reject the place of certain laws in a just criminal system. A misdiagnosis, I think, though one that is difficult to fully draw out that shapes the earlier discussed strange overlap. The central problematic move is when minimalism leads us to abandon narrow yet uniquely weighty domains of criminal law rather than what would actually address the central problems of criminal justice: that is, of overpunishment, of overincarceration, and of overcriminalization. In short: I am seeking to identify and criticizing forms of minimalism which *misdiagnose* the major *substantive* problems of criminal law, which shapes the earlier overlap.

Third and last, I should also flag part of why I have chosen this area of work. In everyday life, people are worried about the scope of criminal law and the rate of incarceration, and I believe many ordinary people make a similar misdiagnosis to the views I criticize in what follows. The broad principles those in question appeal to—words like *liberty*, *choice*, *will*—are precisely the type of words many of us use in our everyday lives to articulate what matters most to us. But I likewise think many ordinary folk outside of academia make mistakes parallel to the ones I am attempting to identify and resist in what follows. Thus, I hope to have written this in such a way that also speaks to the ordinary sentiments of many people well beyond those I offer as academic archetypes. While I am not trying to wholly dismiss the value of such broad principles like liberty, I am partially trying to articulate why, in some cases, an appeal to such a principle ends up missing out on much of what we should care about upon reflection, even if that ends up pushing back some on the thought that the scope of the substantive criminal law has grown too wide. Again, I share the deep concern with overincarceration and overpunishment, but

I do not see most of what I claim in what follows as undermining any of *those* efforts, as I believe will become clearer as we go.

To wrap up this introduction, I want to make it clear that I am not trying to dismiss the whole wide range of views that may be labelled as ‘minimalism’. I sympathize with Husak’s particular project, especially as it pertains to the decriminalization of drug use. Husak does not, at least not clearly, make the type of further misdiagnosis I have sketched above and will try to elaborate in chapter 1. Most importantly: while we should be cautious about overcriminalizing, certainly, we should also be open about what we want out of the criminal law. In the view that I will sketch later, it is the setting and enforcement of *standards* of all kinds has a legitimate place in a just criminal law (chapter 2), especially in the law of criminal negligence (chapter 3) and the law of hate crimes (chapter 4). We should not allow our desire for leniency and liberty to undermine our justifiable, careful intervention in uniquely risky or uniquely systemic circumstances. We should be careful not to minimize the criminal law in such a way that leads us to abandon core concerns of justice in particularly difficult domains, as I will try to show in what follows.

Chapter 1. Criminal Law Minimalism and its Shortcomings

In the context of overcriminalization, there is a reasonable tendency to seek to restrict the domain of rightful criminalization to the narrowest set of offenses possible on principled grounds. One approach to minimalism about criminal law, I contend, is sometimes grounded in a problematic moral outlook that is overly individualistic and short-sighted. This, in turn, undermines part of what makes criminal law special: it is a means of holding people responsible. This chapter then presents two criticisms regarding (1) the special status of criminal law and (2) the complexity of our moral lives and legal practices, especially regarding scrutiny.

Introduction. Criticizing Minimalism about the Criminal Law

While the objective of restricting the reach of the criminal law is indeed an admirable one, we need to be careful not to hastily dismiss what matters. We need to be cognizant of the role that the law can play in addressing historical injustice. We need to understand the importance of expert judgments of the seriousness of certain violations of law. We need to at least understand why we empower and defer, to some degree, to authorities invested with the power to make difficult choices, such as in the case of prosecutorial discretion or when it comes to the difficulties of sentencing. We need some account of the special status of, say, *taking the stand*. All of these require, to some degree, a robust outlook on the moral features within our criminal law and its practices. Yet some views end up missing out on this and, thus, end up leading us astray.

Rather than addressing the causes of the criminal justice crisis here in the United States, some proposals target *otherwise* controversial areas of the criminal law. In doing so, they make two errors: they misdiagnose the nature of the problem in question and, in turn, offer

objectionable practical suggestions. Put differently, some attempts to minimize the criminal law rely upon an objectionably narrow outlook on our moral lives. This is because their underlying outlook on moral agency is too individualistic and too short-sighted. The outlook is too individualistic insofar as it is insufficiently attentive to our moral relations and how we affect others; the outlook is too short-sighted insofar as it artificially limits our causal explanations for why things went wrong. The outlook is at odds with the richness of moral life, specifically the richness of holding one another responsible. This narrow moral outlook, in turn, leads to objectionable practical advice about what to do about criminal injustice generally and, more specifically, cases of criminal negligence and hate crime prosecutions.

In this chapter, I am seeking to identify this underlying mistake and explain how background assumptions about responsibility, harm, and accountability come to shape what I am identifying as minimalism here. This chapter proceeds in three major sections. In the first section, I define some basic terminology (§1.1); then I introduce the basic contrast between the objectionable moral outlook held by the subset of minimalists I seek to criticize compared to a broad contrasting outlook (§1.2). In the second section, minimalism about criminal law is explicitly defined and clarified. In the first subsection (§2.1), I define minimalism as it is explicitly used by Douglas Husak in *Overcriminalization* (2008). In the following subsection (§2.2), I argue that we likewise can understand “the overlapping four,” Michael S. Moore, Heidi Hurd, Larry Alexander, and Kimberly Ferzan, as minimalists for our purposes. Then I’ll illustrate a shared, underlying problem across those further four: the unduly narrow conception of our moral lives. I advance two criticisms to show this. First, I argue that the minimalists rely on too *punitive* of a picture of the criminal law: while the threat of punishment is an essential feature, it alone does not wholly explain the special status of criminal law (§3.1). Second, certain

minimalists dismiss, or simply fail to recognize, the moral weight behind various ordinary, moral practices, particularly our evaluations of actions based on aspects of our *moral identity* (§3.2). Put together, I conclude that the minimalists in question here rely upon a tacit, objectionable conception of our moral lives that ignores the overlap of our moral lives and the law.

1. Crimes, Liberty Restricting Principles, and Moral Outlooks

In this section, I do two things: first offer some definitions and second introduce the core underlying tension I am seeking to identify. I define some central terminology that will inform the rest of this dissertation: criminal law as “special” and ‘liberty restricting principles’ as found in Feinberg. From there, I offer an initial overview of the fundamental mistake I will be attempting to identify and criticize: a moral outlook that is overly self-oriented and short-sighted which, in turn, motivates questionable criticisms across the theory of criminal law.

1.1. Defining Crime and Liberty Restricting Principles

First: crimes. A criminal offense is, at its core, simply something that is prohibited in a certain kind of way. The classic adage that law students commonly learn is that a crime is an action, an *actus reus*, and a *mens rea*, or a culpable mental state. *Et actus non facit reum, nisi mens sit rea.*² This formula comes from Edward Coke’s commentary on the influence of evolution of treason law as found in his 1644 *Third Part of the Institutes of the Laws of England* and is the classic definition that modern definitions are typically derived from. For example, Cornell’s Legal Information Institute defines a crime as a public offense that is a behavior (act or omissions), deserving of punishment. ‘Mens rea’ itself goes back even further and can be found in the

² Roughly, “An act is not guilty if the mind is not guilty.”

sermons of Augustine of Hippo on the Book of Matthew. Thus, the idea of *the culpable mental state* is central to how we understand and think about crimes, putting aside controversy around strict liability.

Given these definitions, what makes criminal law *special*? We have laws in general, and some of those laws are categorized as ‘criminal law’. This label carries with it, in our ordinary lives, a special weight. The common view of what makes the criminal law special is the strictness of the sanction and what is done upon its violation. This is how most everyday people speak of “crime.” Ordinarily, offenses are often spoken of as “against the public” or “against the society,” and so prosecutions may occur even *against* the wishes of the material victims. Some offenses, those we categorize into ‘crime’, are offenses such that there is a threat of this system of public response: rules that, if broken, the *society* has a right to respond to, usually at the discretion of a prosecutor. We take this for granted and must, in some way, fix our topic of discussion to this: this dissertation will assume that practices like those we call “the criminal law” are justified and endeavor to defend this special area of law and its special status.

The fundamental question of the philosophy of *criminal* law, then, is on what grounds, if any at all, liberty may be rightfully restricted through the specific means of this special area of law. Feinberg gives us a taxonomy of various liberty-restricting views:

- (1) *Legal Liberalism*: Only the harm principle or the offense principle can justify criminalization.
 - a. *The Harm Principle*: preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) can justify criminalization.
 - b. *The Offense Principle*: preventing some serious offense to persons other than the actor can justify criminalization.
- (2) *Legal Paternalism*: preventing harm to self can justify criminalization.
- (3) *Legal Moralism*: preventing evils or wrongs beyond harm or offense can justify criminalization.
- (4) *Legal Perfectionism*: improving character can justify criminalization.

*Abridged and simplified form of Feinberg 1988, xix-xx.³

These four views provide us with the broadest and most relevant contrast for our purposes. (2), (3), and (4) are all explicitly, in Feinberg's view, against legal *liberalism* so defined (to which I have added the 'legal' modifier here for clarity). Legal liberalism, then, captures a range of views

³ Feinberg's taxonomy does not subcategorize what I call 'liberal liberalism', either, which makes how the various views relate to one another harder to track without prior understanding of them. His own taxonomy is as follows, starting with his (1)-(3):

- (1) *The Harm Principle*: It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm in persons other than the actor (the one prohibited from acting) and there is no other means that is effective at no greater cost to other values.
- (2) *The Offense Principle*: It is always a good reason in support of a proposed criminal prohibition that it is necessary to prevent serious offense to persons other than the actor and would be an effective means to that end if enacted.
- (3) *The Liberal Position* (on the moral limits of the criminal law): The harm and offense principles, duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions. ("The extreme liberal position" is that only the harm principle states a good reason . . .)

I have favored clustering these views under 'legal liberalism'. Notice his language also includes modifications such as an assumption of efficacy of any given criminal statute in achieving a given just goal.

For the sake of brevity, I will not fully quote the other 7 views but, rather, explain how they relate, though this will still take some space. (4), "Legal Paternalism," affirms prohibiting harms to self, (5), "Legal Moralism" affirms prohibiting the "inherently immoral," even if "neither harm nor offense" occurs. (6) and (7) are more specific, with (6) being "Moralistic Legal Paternalism," a view that would allow prohibition of "moral harm," thereby blurring the main divisions thus far established, and (7) "Legal Moralism" in the broader sense of prevent any "free-floating" evils, which is intended to be a broader set of wrongs than the inherently immoral but depends on questions of moral theory. I will not discuss (6) and (7) specifically in any further detail in this chapter.

(8) and (9) are benefit-conferring views, namely to-others and to-the-prohibited, respectively, with the requirement that the given criminal prohibition would be necessary to such benefit. These views depend exclusively on what the appropriate set of benefits to be considered are and, thus, I will also not be discussing such views directly.

(10) is the last view, "Perfectionism." Feinberg uses mostly the same language, with the idea being that prohibitions are just when "it is necessary for the improvement (elevation, perfection) of the character," but goes on to distinguish two sub-views: moral improvement of those not actually being limited (those who would not have done crimes otherwise) or to the very restricted party themselves. But I do not think this sub-division makes sense, as any counterfactual analysis of "Who would have been a criminal" is questionable. In a world with a different legal system, people likely would have just been completely different people altogether, and so taking personal identity across such a counterfactual is dubious at best.

The most relevant division is between the legal liberal view of Feinberg's (1)-(3), which I have combined in my reduced version of the taxonomy, contrasted with the legal-illiberal views of paternalism, moralism, and perfectionism. Further divisions are not very necessary for the discussion of that general contrast beyond the distinction between the "extreme" liberal position (endorsers of harm principle *only*), thus my use of the simplified 4-fold division here.

ranging from those that endorse a version of the harm principle, those that endorse a version of the offense principle, and those that endorse both or a hybrid. Importantly, there is a disconnection between liberals who ground the liberty restriction in *only* the harm principle versus those who more broadly assent to *both* the harm principle and an offense principle. Call those who only endorse the harm principle the extreme legal liberals (as Feinberg does). Further, there are those who construe the harm principle to include a broad set of considerations under legitimate prevention of harms versus those who more narrowly construct legitimate means of prevention. Even further, one needs to specify the relevant sense of ‘harm’, because if we speak of social harms, the set of legitimate considerations will increase—likely well beyond the initial scope intended by those who point to the harm principle in its various forms as guiding. We will turn to that in chapter 2, §2.3; for now, we continue on to another initial distinction.

1.2. The Contrast of Moral Outlooks

We have now introduced and explained two of our central concerns: criminal law as special in some sense and liberty restricting principles as the central inquiry of philosophy of criminal law. I now introduce the fundamental moral outlook that I will argue motivates the range of views discussed in §2. The moral outlook that I contend motivates the objectionable minimalists is (1) overly individualistic and (2) agent-causally short-sighted. Put together, I contend this outlook is at odds with our practices of *holding responsible* through *scrutiny*.

Let us start with what I mean by ‘overly individualistic’. My basic claim here is that, in balancing self-interest against the interests of others, some views favor self-interest too heavily. Self-interest always has a place in moral thinking. The question is how we weigh our own moral interests against the moral interests of others. For example, the rudimentary utilitarian supports

the equality of interests: thereby often leading to overly selfless conclusions, such as those famously argued by Peter Singer in his seminal 1972 “Famine Affluence and Morality.” But a *convincing* moral outlook has a *balance* between self-interest and other-interest, even if we may disagree about where to draw those lines. In some cases, this balance is clearly off: self-interests, or more simply *desires*, are hastily taken to be superseding the fair and relevant interests of others with little reason offered for this misbalance. For example, as will be mentioned in §2.2 and discussed in §3.2, a helmetless motorcyclist is taken, hastily, to be justified in his helmetlessness simply because of some casual distaste for “paternalism” or even worse a simple desire to feel the harsh winds in his hair.

Continuing now to ‘agent-causally short-sighted’. ‘Agent-causally’ is meant to restrict the relevant causal story: how a moral agent is involved in bringing about some wrong or harm. In other words, we are interested in their *agency*: how a person carries themselves. Part of this outlook includes *self*-responsibility. We have self-knowledge: we know something about our blind spots, ignorance, flaws, so on. All the more reason for us to be careful sometimes! By ‘short-sighted’, then, I am seeking to identify views that miss out on this because they fail to look backwards far enough to explain whatever is in question. Take any instance of a mistake: we do not, in everyday life, simply dispute whether or not the mistake *itself* was reasonable, we also dispute whether or not how one conducted themselves *contributed* to that mistake. To bring up an example from Hart’s *Punishment and Responsibility* (1968): the negligent breaking of the saucer includes a deeper accusation about why the saucer was broken beyond mere inadvertence (pg. 147-8). The central part of those further considerations, which I will argue some minimalists are simply missing out on, is how one’s conception of self-responsibility comes to be the problem. In some cases, responsibility is not grounded in the moment of the mistake itself but,

rather, how the person carried themselves in such a way as to, eventually, bring about that mistake.

Put together: this outlook lacks any explanation of *holding responsible*.⁴ I will not be fully offering my alternative sketch here. But to introduce the basic idea here as background. Imagine any dispute about whether or not someone did something right. There is some dispute as to whether or not a given decision was the right decision. The details do not matter. The relevant question: *what kinds of things would sufficiently rational and responsive moral agents be asking one another?* When someone is under *scrutiny*, whether that is in a classroom, in a board room, or in a court room, what is on the table to ask about? Quite a lot. We do not just arbitrarily cut off our analysis at the immediate, proximal decisions that were or were not made. We probe further, we ask further, and we often suspend judgment until we, as evaluators of others, feel as if we have *the full picture*. And part of getting that full picture is hearing the scrutinized *account* of what happened: we want the scrutinized to *take* responsibility, even if they have reason, defense, or excuse.

These two aspects of the narrow moral outlook as I have so identified it, lead us to miss out on essential, *moral* features of our criminal practice and, as I will argue, are tacitly part of the outlook that shapes some minimalist philosophy. There is a danger in remaining in the philosophical armchair here, as the judgments involved in the various stages of our criminal practice are not as light or thin as they may appear at first. For someone to take the stand, or

⁴ Alternatively, accountable, but in its ordinary sense of being held to what happened and being expected to explain any mistakes. There is a philosophical literature about the conceptual relationship between responsibility and its various conceptions. This literature is defined by disagreements about the unity or disunity of conceptions of responsibility, including ‘responsibility as answerability’ and ‘responsibility as accountability’, particularly shaped by different readings of Scanlon (1998). Different views hold they are the same or a subset of the same concept (ex: Smith 2012) or are fundamentally different conceptions (ex: Shoemaker 2011). I am not going to attempt to settle this debate: committing to responsibility as answerability *in some sense* is sufficient for my purposes. To be responsible is to be expected to give reasons for what one did or did not do. But because of this literature, I will try not to use the term ‘accountable’ in this way thorough this dissertation.

more generally *offer a defense*, they are necessarily involved in a moral activity—explaining themselves and their agency. This is the main implication of the contrast I am offering here.

Before turning to minimalism about the criminal law itself, let me connect this contrast in moral outlooks back to crime and liberty restricting principles. I previously motivated the claim that criminal law is *special* in some way. I claim something like this sense of accountability that I have just endorsed is essential to understanding the special weight of criminal law. I will now argue that the narrower moral outlook cannot do it justice as it cannot explain the *breadth* of criminal law’s special-making features, as will be the main criticism offered in §3.1. As for the idea of liberty-restricting principles: contrary to some criticisms, we can understand the seriousness of certain violations and their justifiable punishment by appealing to this richer conception of our moral agency. This will be the focus of the criticism in §3.2. Most importantly, we can do so without clearly becoming illiberal, as the rules which are violated in those cases are not unfair or unjust. I now turn to defining minimalism in greater detail and attempt to demonstrate that, in a certain form, it is motivated by the narrow moral outlook.

2. Minimalism about the Criminal Law

Minimalism about criminal law is one of those slippery labels if we are not careful. By minimalism about criminal law, I mean views that endorse a significant reduction in the scope of the *substantive* criminal law on principled grounds. They seek to minimize what is criminalized without dismissing criminalization altogether. To clarify what minimalism is, I will (1) explain Husak’s influential use of ‘minimalism’ that I am drawing from, then (2) argue that some views not usually classified under this label can be understood as minimalists but ones that diverge because of their underlying, problematic moral outlook, as defined earlier.

2.1. Husak's Minimalism in Overcriminalization

The most prominent use of the term 'minimalism about the criminal law' comes from Douglas Husak's *Overcriminalization* (2008).⁵ It is hard to overstate Husak's influence, especially amongst those discussing the realities of the criminal justice system of the United States, to which I have dedicated three appendices. Specifically, Husak's practical endorsements (especially his impassioned defenses of the decriminalization of personal drug use) have been most influential. His work is noticeably practical: Husak makes it clear that his aim is not to offer a "unitary account of the function or purpose of the criminal law" or to engage in any other kind of "grand theorizing." Given this, he uses the term 'criminal law minimalism' not as a label for a legal theory but, instead, as "more of a slogan" for the motivation behind his project.

Husak's overall view is a combination of what he calls the internal constraints⁶ and the external constraint(s)⁷ which, when taken together, allow us to identify when a given criminal

⁵ This is not to say that Husak is the *sole* person to use such label. As Máximo Langer (2020) notes, the terminology does not come from Husak and English-language scholarship has almost completely ignored the use of similar terminology by, particularly, Italian philosopher Luigi Ferrajoli and Ferrajoli's *diritto penale minimo* (See: Ferrajoli 2002, 1989, 1985) translated equivalently to 'criminal law minimalism'. But it is unclear if such are actually tracking the same *concept* as I am trying to bring out in this project, so I have cut further discussion of *diritto penale minimo* from this dissertation.

⁶ The four constraints (pg. 55) are: (1) the nontrivial harm or evil constraint, (2) the wrongfulness constraint, (3) the desert constraint (4) the presumption against criminalization or "the burden of proof constraint." Allow me to unpack these a bit further here for those interested. Firstly (1), "criminal liability may not be imposed unless statutes are designed to prohibit a nontrivial harm or evil." (pg. 66). Secondly (2), the conduct in question is wrongful, with wrongfulness being understood as failure to meet defined excusing conditions (pg. 66). His defense of these first two constraints focuses on showing that they are found within the "mechanics" of the law itself (thus, "internal"): I will not weigh in on this methodological point. The latter restrictions are defended later. The third restriction (3) is about the punishment to be inflicted, "punishment is justified only when and to the extent it is deserved." (pg. 82). The fourth constraint (4) is a requirement that when the state enacts a criminal statute, it is at least capable of providing evidence that supports the imposition of the relevant prohibition(s) (1)-(3) (pg. 100).

⁷ Husak endorses a set of what he calls external constraints but ultimately unifies them under a single one: (a) there is a substantial state interest that is directly advanced by the criminal statute, (b) the law directly advances that interest, and (c) the law is no more extensive than necessary to that end (pg. 128). This is a quite significant endorsement, particularly given the 'minimum necessary degree' restriction, which Husak expands on as "... no alternative that is equally effective be less extensive than the statute in question," which "... imposes a presumption against overinclusive laws" (pg. 154). He later defines *overinclusion* as when an offered justifying rationale of some prohibition applies more than the conduct specifically prohibited by the given criminal statute (ibid.). For example,

prohibition exceeds his account of the just limitations of criminal law. I will not offer an exegesis of *Overcriminalization* or evaluate Husak's overall view. I bring it up for two reasons: (1) to borrow the basic idea, which I will rely on in the rest of this dissertation, and to contrast his minimalism from others. By minimalism, I simply mean *views that endorse a significant reduction in the scope of criminal law on principled grounds*. Husak is just an influential example of this type of view.

Husak calls himself a minimalist and is an example of someone who defends a common sentiment: there are too many crimes in the books. A lot is made criminal that should not be, thus the accusation of *over*-criminalization. Here, I will not be objecting to Husak's particular minimalism. Rather, I am interested in views like Husak's that similarly hold that a lot is unjustly made criminal, but go in an objectionable direction, especially in cases where those practical endorsements become clearly disconnected from the greater criminal justice crisis and its causes. In the next section, I look at some such views. What I will be interested in moving forward is how *in some cases* the narrow moral outlook identified in §1 comes to shape certain endorsements to reduce the scope of the criminal law in ways that are objectionable. This particular type of mistake I do not ascribe to Husak. Rather, the views I now turn to should be understood as *contrasting* minimalist projects: some projects, like Husak's, are fairly unobjectionable; others, as I will attempt to identify, are.

the Brady Handgun Violence Prevention Act of 1993's prohibition of all firearm transfers (involving interstate commerce) to all felons, minors, illegal aliens, illicit drug users, and more, *without any requirement to demonstrate any particular person is of any actual danger to others or self whatsoever* (See: §922(g) US XVIII) (pg. 170-1). If the law truly is intended to reduce risks, the government must provide evidence that those particular persons are indeed risky; the evidence is lacking for some Brady-prohibited groups and the evidence that does exist does not necessarily extend over all of the given group.

2.2. Identifying the Objected-to Minimalism

I will now argue that we can understand the views of philosophers like Michael S. Moore, Heidi Hurd, and Larry Alexander and Kimberly Ferzan, as minimalism about criminal law in the thin sense I have identified thus far. More specifically that they are minimalists about criminal law who arrive at their position because of an underlying, problematic conception of our moral lives as introduced in §1, though I will be holding off on my criticisms until §3. Instead, I here show that they should count as minimalists in the sense I use the term and identify assumptions they make that I will later argue are objectionable.

To understand the various views that I am including under this label, let us first look at Michael S. Moore, better known as a negligence skeptic and a critic of Husak. Here, I am trying to explain why I am counting him as a minimalist in the broader sense that I use the term: that he endorses a significant reduction in the scope of criminal law on principled grounds. To show this, consider the differences between the view offered by Moore and Moore's reading of Husak in Moore's "A Tale of Two Theories" (2009). In Moore's explanation of his own legal moralism, he explains two ways in which liberty fit into his view. Firstly, he endorses a "presumption of liberty" (from Feinberg⁸), that is a "general presumption against criminalization behaviors because doing so diminishes the freedom of citizens' actions." (pg. 32).⁹ He justifies this with an

⁸ Moore cites Feinberg (1973), but Feinberg importantly talks of the presumption of *freedom* instead. Why Moore makes this change is another topic. For such, see: Moore (1997, pg. 747-50) and (2005, pg. 11-15), both of which Moore cites. Moore also cites Husak's work on the presumption of liberty (again, Husak uses the word 'freedom') (See: Husak 1983); to which Moore explicitly claims that Husak's shifting of the burden of proof onto the state to be equivalent to a presumption in favor of liberty (Moore 2009, pg. 48). What to make of all of this I leave to others.

⁹ Moore applies this presumption of liberty to Husak's view in a footnote; there, Moore claims that Husak's shifting of the burden of proof onto the state is another way of stating this presumption of liberty (footnote 35; See: Overcriminalization pg. 99-100). I think this reading by Moore is inaccurate: to demonstrate that a law is tailor narrowly to meet a demonstrable practical need in a society is not the same as an appeal to an abstract presumption of liberty, especially since we may (and will) disagree about what "liberty" rightfully entails.

appeal to various senses of autonomy, most strongly "... the goodness of satisfying the well nigh universal preference for unconstrained human decision making." (pg. 32). Secondly, he speaks of the "derived right of liberty," which he defines as "... the right ... that behavior not be prohibited for paternalistic or conventionally moralistic reasons." (pg. 33). He distinguishes such prohibitions from legislating "genuine moral wrongness" (pg. 33) (though what, precisely, the distinction between moral wrongness and conventionally moralistic reasons amounts to remain unspecified there). So, there is a general presumption of liberty, from which there is a derived right to not be prohibited from doing actions on merely paternalistic or conventional grounds, since such would violate a requirement that all criminal prohibitions must be genuine moral wrongs.

That is the basic sketch of Moore's view and why I count him as a minimalist under that definition. Now, that "derived right of liberty" has sweeping ramifications if we follow Moore. How we are to understand "paternalistic or conventional moralistic reasons" may matter. Likewise, how broadly or narrowly we understand moral wrongfulness, too, may make quite an important difference. We need not settle those questions here. Rather, we can first understand Moore's picture better by explaining the contrast he draws between his view and his reading of Husak. Now: we understand Husak and we understand Moore, so how and why do they diverge?

The most telling of Moore's criticisms of Husak concerns Husak's explanation of the injustice of paternalistic legislation. In Husak's own words, the possible wrongfulness of paternalistic laws generally is "... [they] serve legitimate but not substantial state purposes" (pg. 138). Assuming that this relies upon a distinction between public and private wrongs,¹⁰ Moore

¹⁰ It is unclear to me if Husak's external constraint actually relies upon Husak committing to a distinction between public and private wrongs. The difficult and unclear question is how two claims in Husak's relate: (1) the distinction between public and private wrongs and (2) Husak's external constraint on criminalization. Husak's discussion of the

rejects Husak's explanation of the wrongfulness of paternalistic legislation. That is, Moore rejects the threshold of "substantial and legitimate state purposes." Instead, Moore favors an appeal to his aforementioned presumption and derived right of liberty. Paternalistic laws violate the presumption of liberty (or freedom, if one prefers) and the explanation stops there. It is wrong because it restricts freedom for something other than a genuine moral wrong. This difference is taken by Moore as one of the central differences between Husak's minimalism and his own moralism (Moore 2009, pg. 40). So, it is true that both Husak and Moore are skeptical of using the criminal law for paternalistic ends, but there is a significant difference here.

What should we make of that difference? While Husak takes wrongfulness of this legislation to be the overextension of the state's interest into a private matter without sufficiently substantial purposes, Moore appeals to this aforementioned derived right of liberty. This is telling, as Moore relies on the claim that there is no genuine moral wrongfulness in, for example, taking risks upon oneself. That means both the taking of risks upon oneself directly (the direct wrongfulness of self-harm) and indirectly (how self-harm ends up wronging others, more on such later). Husak's view does not require this: the risk is a private wronging to oneself, and we may balance public and private interests in some cases—even if the distinction between public and private wrongs is unsettled. Moore denies this, and so Moore's view *requires* us to imagine responsibilities to oneself in a peculiar way we will scrutinize in more detail later. Here, all I am

former occurs most notably in two places: (1) immediately before (pg. 135) the initial discussion paternalistic legislation (pg. 138) and (2) in anticipating Moore's objections (pg. 199). What is unclear to me is if Husak's skepticism about paternalistic laws actually *requires* developing the distinction between private and public wrongs within the context of his greater minimalism *or* if Husak is better read as simply using the common distinction's words to draw a different point that does not actually rely on the substantial distinction. One could read the initial discussion of public versus private wrongs as shorthand for the external constraint and its demand to balance, which leads to his skepticism of paternalistic law, in which case the latter discussion of private versus public wrongs is a wholly separate discussion intended to resist Moore's legal moralism.

observing is that while Moore's claim that both he and Husak resist paternalistic laws is correct, they give importantly different reasons.

Compare the practical considerations allowed for under these competing views. Husak's view can be read as a balancing of considerations: some risks are private matters, but some risks are sufficiently public to be a substantial state interest as his external constraint requires. In some cases, the balance goes one way and in some cases the balance goes another. More specifically, Husak's external constraint would require the state to demonstrate, under burden of proof, that the law is narrowly tailored toward an appropriate end. Moore's presumption of liberty, on the other hand, does not allow us to have those disagreements about the range of practical considerations that would be involved. He goes so far as to straightforwardly reject considering how some private harms can extend into public harm, such as the public cost of the crashes involving helmetless bikers by appealing to his derived right of liberty (Moore 2009, pg. 41). This is uneasy, dubious ground for his principled commitment to the restriction of the scope of criminal law to rest upon. This appeal to "liberty" as decisive, without much further specification or grounds for reasonable disagreement, is consistent.¹¹

What I have argued in this section thus far is that we should see Moore as a minimalist for our purposes.¹² Later, I will offer objections in more detail. For now, just recognize that

¹¹ Another telling example is his passing treatment of abortion immediately before his mention of helmetless bikers, which raises many of its own questions: "The non-prohibitability of abortion illustrates the fourth of my limitations. Some abortions are wrong to do, but women have the right to do them. It is the basic right to liberty that bars criminalization here, not the supposedly "private" nature of the wrong." (pg. 41). To justify this, he cites his earlier work on "the basic right of liberty" (Moore 1997, pg. 763-77). Again, the move is quick and seemingly unresponsive to disagreement. In this case, on two levels, as he must claim both (1) that some abortions are wrong to do, which is there undefended, and (2) that there is a general right to abortion, which is likewise undefended. This is particularly telling given just how much philosophical literature is dedicated to the abortion debate!

¹² I do not think it would be terribly surprising to Moore himself, as even his own criticism ends quite sympathetically. To quote Moore: "Husak's label for his theory "minimalism" is quite up front about his ambitions for the theory, which is to justify drastically fewer criminal prohibitions. In this our two theories do not disagree, and this reduces the differences between the theories charted in the last section to comparative quibbles." (pg. 46).

Moore shares this central, underlying motivation—the ambition to justify the dramatic reduction of the criminal law’s prohibitions—but one he arrives at through significantly different principled grounds.

Another person who seems to endorse the type of minimalism of interest here is Heidi Hurd. Here, I attempt to demonstrate that Hurd plausibly appears to be a minimalist in the relevant sense. This is somewhat more difficult given that Hurd does not speak to her general theory of criminal law as Moore does, so showing this will be indirect: her views on criminal negligence and hate crimes, put together, show what I wish to show. Her work is consistently in favor of restricting criminal laws on likewise objectionable moral grounds. Before such criticisms, though, I here sketch her view on criminal negligence and hate crimes, then I bring the two together to illustrate her more general outlook on criminal law: it is her view of culpability as willful *choice* in a narrow sense that leads her to consistently argue in favor of sweeping restrictions of criminal law.

Consider first her view on criminal negligence. She, with Moore, rejects criminal negligence on the grounds that such actions are without genuine moral fault in the sense we want from criminal law in cases where the harm was genuinely *inadvertent* (See: Hurd and Moore, 2011). They conclude that there are three types of cases where punishing for negligence is an error: (1) cases where “there is some unconditional sense [in which one] *could have* done better,” (2) cases where inadvertence stems from “some [supposedly] punishable flaw in their character,” and (3) as “substituting for strict liability.” (pg. 193-5).

It is (1) and (2) that, once clarified, help show the point being made here. Moore and Hurd invoke the case of a child who dies from a tooth infection, in the case of (1) imagined as a genuine and complete failure to advert to the risk by the parents involved. Their core argument is

that the parents did not willfully dismiss the risk; they did not make any *choice* to take such a risk. They were *unaware* of that risk. Likewise in the case of (2), even if the parents indeed did not love the child enough, they should not be held criminally liable if they were genuinely unaware of the lethal risk—not loving one’s child is not a crime and even unloving parents do not necessarily want to risk letting their child die. Both of these views are dubious, but here just observe what they depend upon: a lack of *choice* or *decision*. It is the failure of the parents to choose to harm their child, or risk harm of their child, that somehow comes to excuse what happened to their child. Putting aside the philosophical back-and-forth, there is something deeply curious about this in ordinary life. That is all I am attempting to highlight here: that Moore and Hurd’s practical endorsements rest on something. This questionable dependence on *choice* rests at the heart of their criticism of criminal negligence.

Let us continue to Hurd’s position on hate crimes to show something similar. Hate crime statutes take some offense that is already separately wrongful, like murder, and add an additional penalty for such offenses motivated by hatred of some kind. Hurd rejects such measures, claiming that they punish one’s *moral* character (Hurd 2001, pg. 230-1). Since “vice and virtue appear only indirectly responsive to choice,” Hurd argues that we should resist considering character in our evaluations of blameworthiness, since “liberals typically predicate moral and legal responsibility on matters of choice.” (pg. 230). In her own words, *choice* is what is most essential. Putting Hurd’s point differently, we “cannot choose [our] character traits,” (pg. 230), it is inappropriate to judge, praise, or punish based upon them. Again, specific view about *choice*. The same basic commitment at the heart of a rejection of some measure of the criminal law: a specific doctrine of *choice*. Again, I find this to be dubious but hold off on engaging substantially here (See: chapter 4). Here, I simply wish to show the common thread: under Hurd’s picture, we

do not meaningfully *choose* our character and thus should not be punished on that basis. Choice, understood as willfully deciding to do or not do some particular action, is the heart of Hurd's view of culpability.

Another example of what I contend should be understood as minimalism grounded in this objectionably narrow moral outlook can be found in the work of Larry Alexander and Kimberly Ferzan, mainly their 2009 book *Crime and Culpability* (Also see: Alexander 2000). There, they tie culpability exclusively to a particular conception of willfulness: culpability lies in the willful decision to take on risks. They go so far as to endorse a system of a singular crime: *the willful creation of an unjustified risk to the protected interest of another*.¹³ That is, they think that this crime of “willful creation” should be the *only* crime on the books and that we can understand all kinds of crimes (such as murder, arson) in such terms. Given their centering of the willful decision to take risks, they too dismiss liability for negligence, as negligence, by definition, is not *willed* in the relevant sense.

Alexander and Ferzan's inclusion as minimalists, however, is admittedly more tenuous. Does their endorsement of a system of a singular crime amount to a significant reduction in the scope of the criminal law? Well, yes insofar as they are *also* negligence skeptics like Moore and Hurd. But the consequences of their overall view are mixed and often hard to fully discern. For example, when defending their reduction of all culpable mental states to recklessness in their 2012 reply to Dolinko (2012), they claim, “Purpose to harm is a particularly bad reason for imposing a risk on others, and knowledge that harm will result is a consciousness of a

¹³ For other work on this topic, see: Alexander Sarch's work on insufficient regard, such as Sarch (2017), which while it shares Alexander & Ferzan's basic view of culpability, avoids being overly reductionist through the more nuanced account of what it means for something *manifest* in the mind and a broader view of legitimate protected interests.

particularly high risk of harm” (pg. 284). I am holding off on my substantial criticisms here but honestly struggle to make full sense of this claim. We need not wholly settle such here.

I will be treating it as an open question whether or not Alexander and Ferzan’s singular crime system would indeed be a significant reduction in the scope of criminal law if fully adopted. I am going to assume such because such seems to be an essential *motivation* behind their project, especially as a means to address the concern about overcriminalization understood as “there are too many criminal statutes!” What I am most interested in is the *deflationary* explanation of crimes that Alexander and Ferzan offer in particularly contentious areas of criminal law where the consequences are clearest, such as criminal negligence, and how the background moral outlook as I have read it (and will revisit later) ends up justifying objectionable conclusions like the others discussed in this section.

So, we have a group of four: Moore, Hurd, Alexander, and Ferzan, who all seem to share a mutual commitment to narrowing the criminal law, selected also as representative of otherwise common views that one is likely to encounter in everyday discourse. They differ, especially compared to Husak, as to what *grounds* that commitment, just as we may speak of different justifying principles in ordinary life. In Moore’s case, the constant theme is *liberty*. Liberty, seemingly, in the face of all other considerations. In Hurd’s case, the most common move is to appeal to *choice*. Not moral agency in the broader sense but a binary sense of choosing to do, or not do, some action, without consideration for fully explaining *why* people choose to do what they do. In Alexander and Ferzan’s case, their explicit objective is to explain all wrongdoing and crime in terms of *willfulness*, specifically the willing creation of a risk to others. Contrast these from Husak’s endeavor: a practically oriented philosophical project to articulate the wrongfulness of overcriminalization in light of the actual, present criminal justice crisis in the

United States (See: appendices). This is starkly different from the projects of the others summarized here, which I will now turn to criticizing as a group, especially given that their standard appeals resemble common principles that ordinary people indeed refer to: *liberty*, *choice*, *will*, so on. Why do *these* proposals end up diverging so sharply from Husak and more ordinary sentiments about what should be done about criminal law in the present social context? *What goes wrong?*

3. Two Criticisms of Narrow Outlook Minimalism

The main inquiry of this chapter is what goes wrong with minimalism grounded in, I argue, objectionably narrow conceptions of moral wrongdoing as described in §1. The main goal of this section is to show that the relationship between moral and legal practice is more complex than assumed by the minimalists just discussed (§2.2), particularly due to what seems to ground their various minimalisms. I offer two criticisms of minimalistic projects grounded in this narrow moral outlook. First, I return to the discussion of §1 to argue that some minimalists misidentify the breadth of considerations that ground the special status of the criminal law, drawing on the distinction between punitive accounts and curial accounts of the special status (§3.1). Secondly, I argue in greater detail that the minimalists rely on an underdeveloped understanding of the complexities of *moral* life, returning to the central claim in §1 (§3.2).¹⁴

¹⁴ Here, I wish to only mention two major questions which I will not be attempting to settle here or elsewhere in this dissertation. Firstly, are there moral truths at all? This obviously makes a massive difference as to the kinds of things we say or why we say what we do and what we mean by such, so on. But, for other reasons, I do not think it is necessary to settle. I follow Posner (1997) in thinking that appealing to “moral truth” simply punts our questions to other questions altogether. For those curious, I lean most toward Kantian constructivist views on morality (See: Rawls 1980, Hill Jr. 1989) but I do not rely on that here. Secondly, there is a massive literature on how we should understand criminal culpability, especially contrasted with other concepts like fault and blame (See: Yaffe 2018, Sarch 2022, and Berman 2024). Part of those debates reduce down to the previous point—*what is truly wrong*—and the other aspects of those debates are conceptual questions I need not settle here and thus will not.

3.1. Objection 1: the Special Status of the Criminal Law

In this section, I argue that some minimalists fail to recognize some of the most important features of criminal law and its practice and thereby fail to miss the target of their criticisms (See: §2.2). To this end, I will first introduce a contrast between *punitive* and *curial* views of criminal law. I will then introduce a type of argument that follows from the punitive view that, I argue, the objectionable minimalists rely upon. I will then argue that we should favor the curial explanation of the criminal law's special status, thereby giving us reason to reject the punitive assumption that the singular special-making feature of criminal legal practice is the threat and imposition of punishment. If we take that line, we have little reason to defend the criminal law as a broader institution at all.

To begin, Edwards (2018) draws the distinction between *punitive* accounts of the function of the criminal law and *curial* accounts of the function of the criminal law. Here, I will be taking these to be different accounts of what makes criminal law special: punitive views point to the threat of punishment as criminal law's defining characteristic; curial views point to the procedures of criminal law *as well*. The former is common and intuitive but, I contend, misses out on too much. Moore and others favor the punitive account; others (See: Duff 2013, 2011; discussed more in chapter 2) favor the curial account. To sketch what this distinction is tracking, let us use an example from Edwards:

Imagine Alisha stole from Bintu because she was under duress. Imagine Chika intentionally killed Dawn to defend herself or others. Neither of these defendants, we can assume, is justifiably punished. On the punitive view, criminal law's function does not stand to be fulfilled. On the curial view, things are different. Alisha and Chika both have reason to account for their behaviour—to explain what they did and why they did it. Criminal proceedings invite each to provide that account and put each under pressure to do so. Assuming Alisha and Chika have reason to account in a criminal court, proceedings in which they (are called to) do so are of intrinsic value. One of criminal law's functions is fulfilled even if no-one is, or should be, punished.

The key point that I wish to stress is that the demand to *provide an account* is essential to what criminal law is up to, similar to my earlier discussion of *holding someone responsible*. What is most important is that views which place too much onus on the punishment *alone* are missing out on something important and defensible about criminal legal practice.

To start our objection, consider Moore and Hurd's 2011 "Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence." We will discuss negligence skepticism thoroughly in chapter 3, but for now consider just one of the arguments they offer:

Parents who in no way adverted (in any sense, to any degree, at any level of generality, at any time) to the deadly risk posed by bad odor coming from their child's mouth, may face criminal liability when their child loses his life to gangrene. Punishment in such a case, we think, is in error. It reveals the error of thinking that there is some unconditional sense in which these parents could have done better; or it rests on the error of thinking that in not advertent to this obvious risk, the parents revealed some punishable flaw in their character, such as not loving their own child enough; or it reflects the error of substituting for a liability that requires true culpability, a liability that is 'strict'. Whichever of these subspecies of error motivates such an adjudicative conclusion, we take such a conclusion to go too far in imposing criminal liability.

"Too far in imposing criminal liability," here, is carrying some significant baggage here. Think back to our much earlier discussion of the special status of crime: *one* way to think about it is that it is the furthest degree—*punishment*. So even though a child is dead (as is loosely based on a real case,¹⁵), the involved *decision* involved does not constitute the right kind of decision for culpability under their view because punishment, in common language, "goes too far." This makes sense if we follow the aforementioned, solely *punitive* view of the special status of the criminal law, as Moore's focus on liberty and Hurd's focus on choice leads us toward.

The issue is that it takes criminal law to be relevantly special while conveniently ignoring some of the *practical* features of criminal law that make it special. There is no explanation of the

¹⁵ State of Washington v. Williams 4 Wn. App. 908 (Wash. Ct. App. 1971). Discussed in chapter 3.

curia, even if that explanation would be why we should not think of the curia as part of the special-ness of the criminal law. In this case, the determinations of the prosecutor, or judge, or social workers, or the *jury*, are simply dropped out, contrary to the real case that this example was based upon. Thus, two responses: (1) the criminal law is not *that* special when it comes to punishment, and (2) there are some practices of criminal law that are uniquely weighty in a way that actually favor the use of the means of the criminal law that get ignored in criticisms of our criminal legal practices, particularly *rights in favor of the accused*, which should push us toward a broader view of what the criminal law is up to.

On the first point: when does the difference between ‘criminal’ and other areas of law matter? One way is practical. Imagine a world where someone can both be fined and sued for, say, littering onto somebody else’s property. Littering receives a fine because it is done haphazardly and thus it is hard both to track litterers and to determine and empower possible civil claimants. It would not just be unjust to prosecute petty litterers harshly; *it would also be an unjust allocation of our legal resources*. Treating it as a minor infraction and empowering the state to fine litterers is the best practical route, regardless of if we then ascribe the label of ‘infraction’ or ‘misdemeanor’ or ‘crime’ to it. But in some cases, the difference between the criminal and other areas of law (or practice) is *morally* deeper, not just practical. Some reckless doctors may simply be sued; some reckless doctors may be prosecuted and perhaps punished if their recklessness is taken to be criminal. *Both* are options sometimes. The cases where which route ends up being taken between given options seems most significant are cases involving the death of a victim (But need not be!). Most importantly: the *decision to prosecute* is itself a significant judgment. This is especially so given that it is a judgment being made by a given relevant empowered expert agent of the state: the *prosecutor*. Sometimes it is difficult to see if a

case should be created as criminal or not. That is part of the difficulty of a good prosecutor's job: when to decide that there is a case to be argued, even if it may result in a not guilty verdict. This is an important part of our criminal system and one that explains some of our practices in a way is sometimes unrecognized.

On to the second point: some seem to underestimate how the structural differences between areas of law sometimes *benefit* the accused. The standard of evidence, for example, is greater than in civil cases: in criminal cases, beyond a reasonable doubt; in civil cases: preponderance of the evidence. An ideal prosecutor does not believe some wrong happened but that *the case can be proved to that degree of evidence*. That is no small task. It is already a tall task to get a jury to agree in civil cases; it is a greater task still to get them to agree on a criminal case.¹⁶ This is part of what makes the disputes over negligence specifically frustrating: the cases which are being scrutinized from the academic perspective have *also* been scrutinized from the perspective of involved legal actors, including juries, in many real cases. Jury directions are essential in different trials for exactly this reason: sometimes we reasonably restrict what the jury must decide, other times we leave juries open to making central, moral judgments. But at the very end of a trial. After one is *held to account* in the court. *After* one has faced *scrutiny*. More on such in the second criticism (§3.2). Here, just recognize that the jury does not just read some brute facts and make a judgment in the way legal philosophers do—arguments are offered,

¹⁶ A lot can be said about juries specifically, but that is a different kind of inquiry that I will not include in this dissertation. Juries are, however, a great example of how moral considerations inevitably enter into the criminal law. Horowitz (1985) is an interesting study on how juries behave differently when explicitly informed that they have the power to nullify (that is, render a “not guilty” verdict even if they think the legal violation did indeed occur). In the mock cases of drunk driving, the juries were *more* likely to deliver a guilty verdict! Being informed of their power to nullify made the jury empowered to make moral judgments instead of their otherwise narrow task of legal determination of facts (what did or did not happen). Putting that interesting study aside, the more basic point is that jurors carry with them their moral beliefs and that is a good thing, as we want a set of jurors, even with varying moral beliefs, to a determination of fact of guilt as a collective.

witnesses are questioned, and competing stories are painted in greater color than a mere case summary.¹⁷

These two points put together should push us away from general appeals which simplify what people morally care about to a singular principle like liberty or choice. Much of what we seek in criminal law is some type of consensus of other empowered moral agents. If we fail to fully understand what makes criminal law *special*, including what was sketched above, of course we will be led astray. We should reject the common, assumed punitive view of the special status of criminal law, which undermines some minimalists' projects insofar as they depend upon that punitive assumption.

3.2. Objection 2: the Richness of Moral Life

Here, I turn away from the legal question to advance a moral argument: that our moral lives involve a wide range of considerations that the narrow outlook misses out on, and that the broader outlook on our moral lives explains key features of our criminal legal practice. After recalling Dolinko's criticism of Alexander and Ferzan, I will discuss two central cases: disrespecting a friend and prosecuting Holmes's bricklayer, ultimately arguing that these cases are not as different than as some may otherwise think. I then apply a more general line about moral identity to Moore's helmetless motorcycle rider and attempt to sketch a more general argument about how and when criminal law can rightfully invoke moral identity.

To show this, first consider David's Dolinko criticism of earlier discussed view of Alexander and Ferzan that "only one crime should exist: creating an unjustifiable risk to a legally

¹⁷ This is especially important in understanding why appellate courts leave fact-finding judgments to the jury and, instead, almost always only overrule on procedural grounds. The jury *decides* in a very distinctive way that they can only do so following the details and experience that the trial itself offers them.

protected interest” (Dolinko 2012, pg. 94). The glaring issue with their view, as Dolinko observes, is that it disconnects the action from the actual culpable mental state. For example, in the case of an imagined Fran causing an accident while on the way to fraudulently taking the state bar exam for a friend, Fran would be guilty of reckless driving under their view (Dolinko, pg. 101). In their response, they somewhat agree,¹⁸ claiming that Fran indeed manifests insufficient concern for others and is punishable for such (Alexander and Ferzan 2012, pg. 285-6). Why? Because Alexander and Ferzan grant that the “concern” here is unspecific: Fran is acting recklessly insofar as she is willing to take on the risks involved in taking the bar exam for a friend, and that general recklessness attaches to the harm of the deed of causing an accident. Fundamentally, Dolinko is correct: Alexander and Ferzan’s view say nothing of the requirement of a *specific* intent of any kind. While Alexander and Ferzan seek to flatten criminal law to a singular crime, if this holds, nearly any harm whatsoever could be a crime if the person was not actively considering the abstract concern of all others. This is, at best, odd. But it is still unclear *why* they think this way.

The deeper reason for their unorthodox view is their insistence upon *control*. Fran was in control. Their account focuses upon recklessness because recklessness involves a culpable decision to disregard a risk. Where there was no decision, there could be no culpability present that justifies punishment. And if there was a decision, *even if the risk is an ordinarily perfectly acceptable one like the risks involved with driving*, then they may be punishable. They imagine individuals, in isolation, evaluating or not all risks in their minds, like some strange calculator of all possible risks at all possible times. *They do not imagine moral agents in a richer sense*. So, it

¹⁸ They do claim that reckless driving is “rather inexact,” but I find that particularly frustrating to try to understand given the very issue is that their proposed singular crime is definitionally inexact and necessarily inexact in all cases where we care about the specific intent behind certain crimes.

is no surprise that they simply appeal to control, or lack thereof, as decisive. *That* is the kind of picture of our moral lives with is plainly lacking and that I will focus on.

Turning to this talk of a “richer conception of moral life,” take disrespecting a friend. *Disrespect* is not just *harm*: it is a failure to be responsive to the interests of another person. Even if materially harmless, it displays *a failure to be a good friend*. We blame people for failing to consider the feelings of their friends: that would be to be a bad friend, even without conscious thought. Even without harm. It is not that the disrespected friend feels bad about having been disrespected. In many cases, the friend will forgive! No, the wrong in the disrespect of a friend is still a wrong even if, say, the friend never learns about it and no one else ever thinks or treats the friend differently because of the disrespect. Even if it never affects the life of that friend at all it still, fundamentally, undermines the grounds of the friendship itself. This wholly drops out of Alexander and Ferzan’s view. Take the Fran case: surely Fran is doing something wrong by attempting to take the bar exam for a friend. But is Fran displaying insufficient regard for others? That is just unclear. Even if Fran is wrong for being willing to take the bar exam for her friend, she is still doing so *out of genuine regard for that friend*. People do wrong things for their friends all the time, surely, but that is not a failure *to be a good friend*. The moral failure is greater, like a fraud, or a failure of demanding friends to be morally better (which I am assuming here comes apart). But Fran’s actions only make sense in the first place with the stipulation that she is acting *for a friend*. If that is not acting out of concern for others, I am unsure what is.

This problem goes beyond Alexander and Ferzan’s view. An analogous issue rests at the heart of Moore and Hurd’s work as well. *When someone seriously wrongs me, outside of the particular context of criminal law, do I appeal to my right to liberty?* Only in very narrow imagined cases, such as literal violations of my rights by the government. But the explanation of

what is going wrong in criminal cases seems beyond just talking about liberty and protecting my liberty. There are deep, relational aspects to much wrongdoing. Likewise with appeals to binary choices, one did or did not make. Our interpersonal relationships are far more complicated, so why should our criminal practices be flattened? I am unsure if these minimalists have a compelling background image about what our moral practices should look like, as I want my friends to care about a lot more than just possible causing my outright harm or their atomistic decisions to bring about some risk of harm. What role does *responsiveness* to the interests of others have in our criminal law? Here, we return to the idea of holding one another responsible and the importance of moral scrutiny.

Let us go back to the point about friendship. Imagine a friend has just disrespected you. Let us say that they have revealed to the crowd an insecurity one did not wish to share. You, rightfully, confront your friend about this later on. The friend gets embarrassed by this confrontation and claims, “Oh, I did not know that was an insecurity, you can’t hold that against me!” There are two parts to that response: (1) ignorance and (2) exculpation. Ignorance is claimed to be a morally excusing condition (Wrongfully, as I will explain shortly). After all, how can one be blamed for having not known about an insecurity? The first part of that response we will just assume is true: the friend truly did not know and is not merely claiming that as to justify (2)—if the friend is lying, then they are obviously blameworthy for that lying.

The second part of that response, “You can’t hold that against me!” is not just defensive, it is *dismissive*. It misunderstands the *moral* relation. You *can* hold it against them, even if they were ignorant of such. The friend in question does not understand, in my view, what a *friendship* entails. A good friend *should have* known, or at least should not have risked in some cases, to not reveal such an insecurity, especially given insecurities are usually about certain, known kinds of

things such as one's appearance or one's private, romantic life. At least in cases where the insecurity is foreseeable, though sometimes they are not. It is true that some insecurities are quite unpredictable or unusual. Nonetheless, an apology, even where there was no foreknowledge, is the appropriate response, even if you did not know of the insecurity and *even if the insecurity is irrational*.¹⁹ "I am sorry, I did not know, I will not do that again" is the most appropriate response. By not apologizing and instead claiming *blamelessness*, even when you would see yourself as blameless, you would make the matter *worse* by displaying a moral misorientation toward your friend by dismissing how it makes them feel. In short, you would be showing yourself to be a *bad friend* if a friend at all if you did not, as the common adage goes, "swallow your pride" and sincerely apologize.

In other words: friends are accountable to *the friendship*: both to one another as participants in that friendship and to what friendship, as a rational, responsive relation between people, entails. Within the bounds of fair reason, of course, but figuring out those boundaries and expectations is part of what friendships are.

What does this have to do with *criminal law*? Imagine another story: Holmes's bricklayer (which we will revisit in chapter 3):

When a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if

¹⁹ Marcia Baron gave me the example of how the error can in fact speak well of you, such as a friend who is insecure about not having gone to an Ivy League. By offending the insecurity, you show that you "see nothing to be insecure about." I think this is a good point but nonetheless one compatible with that I am claiming here. Even if you see nothing to be insecure about, *having the discussion* is what the friendship entails. "That makes me feel bad," should be responded to with "I am sorry I made you feel bad, I do not think you should feel bad about it!" If your friend insists on the point, the further response should not be to *badger* them about it, even if they are open to talking about it further, as a good friendship should entail that level of openness and vulnerability, in my view. Though part of that is my own preference of friends, that much I admit. My point here, ultimately, is constructivist: it boils down to a question of what we want 'friend' to mean, or 'bricklayer' or so on and so forth with all the other social kinds that are out there in the world and that have expectations imposed upon them.

it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all.²⁰

The bricklayer, so the story goes, ends up hitting someone on the ground, seriously hurting them.

The bricklayer is, of course, confronted by the local investigators about this. The careless bricklayer declares, “Oh, I did not know there would be people down there, you can’t hold that against me!”

The second part of that response is not just defensive, it is *incorrect*. *The bricklayer does not understand what being a bricklayer entails*. A bricklayer *should have* known, or at least should not have risked it. And that normative claim—the “should have”—is not just a claim of independent moral facts but, rather, one that comes out of understanding what a bricklayer is given a particular given social context which itself generates a form of *obligation*. If the bricklayer in question was new to the job or just an amateur “do-it-yourself” bricklayer, then yes, perhaps a prosecutor, judge, or jury would give them some slack at some point along the road of criminal procedure. That is not how in the original case is imagined. The bricklayer should be assumed to understand what they are doing. Thus, the bricklayer does not just get a pass because there was a fleeting moment of carelessness, as that would entail the bricklayer failing to be adequately *responsible* for their bricklaying. That displays, in my view, both a poor understanding of moral life and what is going on during a criminal proceeding. We hold each other responsible (in the ordinary sense) for our irresponsibility all the time and it is fundamental to seeing people as standing in a truly moral relation. That is central to what the criticizable minimalists are missing in their outlook.

²⁰ Holmes (2004; 1881), pg. 31, drawn from Blackstone (*Commentary* IV, chapter 14, §194). An aside: Blackstone would oppose Holmes’s analysis, as Blackstone goes so far as to refer to malice as “the grand criterion.” (§199).

To show this, let us revisit the helmetless motorcycle rider mentioned earlier in passing.

First, to quote from Moore (2009):

Even if it is wrong for the helmetless motorcycle rider to risk needlessly those who care about him, those who have to see and clean up the mess if he crashes, and those whose insurance premiums may go up, this is not what motivates this kind of legislation. Legislatures typically prohibit helmetless riding because such behavior harms its participants. (44)

In my view, this is a false dichotomy. The harm to the participant *implies* harm to others: it is somewhat obvious if we reflect on why a *legislature* would come to care about such harm. It bothers *others* when people hurt themselves (At least sometimes). When we do foolish things that get ourselves hurt, our loved ones check on us and tell us not to do it again, in large part because *others* care about *us*. The harm to the participant *implies* the other kinds of harm like those Moore mentions yet he fails to make the connection. We do not stand alone in the way that Moore's casual distinction uncritically implies. We do not get to the unjust deprivation of liberty that Moore thinks is found in his example: instead, we get a demonstration of atomistic individualism which blinds the richness of our moral considerations which, in turn, motivate seemingly paternalist laws.

Imagine offering that example to a wide range of others whose interests are dismissed. What is the real range of considerations involved in deciding (1) whether or not to adopt mandatory helmet laws and (2) what, exactly, is involved in the judgment of someone who decides whether or not to follow such a law. Consider the very serious emotional toll on any witnesses. Or the otherwise innocent driver (imaging the case in a certain way) who, now, must live with the agent-regret for having caused the preventable death of the helmetless rider. Imagine, further, that motorcyclist's *loved ones* and the kinds of arguments they would likely have if the motorcyclist claimed this was a matter of rightful liberty. Liberty to *what*, exactly, and

in the face of *what other concerns*? To put the matter most simply: if I were the husband, I would be furious at this suggestion! Married couples certainly get into arguments about one another's driving, especially when the "other costs" are high, such as the possibility of orphaning children. In short: the passing discussion of the motorcyclist who is "deprived of liberty" highlights the very type of move I find both to be motivating some minimalist projects and objectionable for how it dismisses the moral gravity of grounded, sensitive, everyday concerns. Not only would the loved one be right to be upset at the self-centered mentality of the motorcyclist, but they would also be right to hold the motorcyclist *accountable* for not respecting their concerns and interests. The problem is not just that the motorcyclist is making a risky decision. Moore's motorcyclist fails to be responsive in their rational, evaluative judgments, particularly concerning the interests of others. The balance of considerations overwhelms the simple, selfish desire to feel the wind on one's helmetless head.

To put the core point differently: the helmetless motorcycle rider is never *merely* a helmetless motorcycle rider. He is also a motorist, sharing the road with others. He is a son, or father, or both. He may be part of a club, and his recklessness would thereby reflect *on the club*, or just fellow motorcycle riders. If an accident happened, he would be held responsible to all those different aspects of his whole moral identity: as a father, his son and those who care about his son would scrutinize him, as a friend, likewise friends would scrutinize him, and so on. And in the case of criminal law, he would be scrutinized as an experienced biker who acted in a certain way either in alignment with all these considerations or in misalignment with the breadth of his responsibilities, which *in turn* would shape our judgments of his blameworthiness and culpability as part of the explanation of the causal story for why some accident occurred.

This is not to say that we should just *assume* that helmetless motorcycle riding should be illegal. The point here is about what the motorcycle rider exhibits if he willingly *rejects* that standard, even if it is not a law. He disregards others, necessarily. What does the work of justifying a law is a whole range of practical considerations like those Moore hastily dismisses *and* these moral relations—anyone who has seriously witnessed the aftermath of such terrible accidents already know this.

Reconsider these three examples all put together. The friend holds the friend to account for their error as a matter of friendship. This is constitutive of what friendship is in the first place. The bricklayer is held to account for his bricklaying as a matter of his role as a bricklayer. That, too, is constitutive of being a bricklayer. The helmetless motorcycle rider is imagined in such a way as to remove all the other relevant aspects of himself as a whole moral agent. Take any other role which has a moral identity responsive to the interests of others: *which is nearly every social relation people stand in*. This last point is something I will defend more in the later parts of the dissertation (chapter 3)—for now, my claim is simply that once we see criminal law as scrutinizing people under this broad conception of our moral lives and *identities*, within a whole range of fair practical and political considerations from there, the narrow moral outlook becomes less compelling and, in turn, seriously undermines certain minimalist projects.

Conclusion. Against Minimalism about Our Moral Lives

The core of what I have sought to show is that there is much to question about a particular form of criminal law minimalism that rests upon dubious background assumptions about what is most important in our moral lives (§2.2). Most importantly, *the significance of much of our moral lives and practices* (§3). Our moral lives are not as simplistic as they seem to assume. Our lives are

very complicated by the richness of what we demand from each other, in both our moral and legal lives.

We *want* people to take themselves more seriously than just being possible violators of liberty, possible wrong choosers, or consumed by whether or not they are taking reasonable risks. If somebody was consumed by these considerations—worry and avoidance about bringing about harm—we would think that their moral agency thus fundamentally *misguided*. I fail to see why the criminal law, then, should expect that of us as its sole grand criterion. In our ordinary lives at least, we also want people to seek to be *good*, whether that is as a good friend, a good bricklayer, or a good citizen. We may argue still about the limits and legitimate interests of criminal law, as we will in the following chapter. This being said, any project to reform criminal law must answer: *what should we expect from people?* I worry that some minimalists about criminal law give us answers we should reject. While we do not want criminal law to demand everything that is entailed by being a good neighbor, *some* conception of rightful conduct must be part of our explanations of what we care about in at least some cases, like those we will discuss as we go.

Put differently, as discussed throughout this chapter, many of our moral and legal practices alike are means of holding people *responsible* to their *obligations*, both as moral agents generally but also in the specific roles they find themselves in. This concept will come up again in the chapter that follows, but I hope to have motivated the basic idea here: our practices in both our ordinary lives and in the serious matters of law both demand more of us than avoiding harm and. Instead, expectations constantly shape our behavior and agency, especially in cases where criminal law is part of a greater system of setting and enforcing standards.

References

- 4 Wn. App. 908 “*State of Washington v. Williams*” (Wash. Ct. App. 1971)
- 922(g) US XVIII (“Brady Handgun Violence Prevention Act of 1993”)
- Alexander, Larry. 2000. “Insufficient Concern: A Unified Conception of Criminal Culpability.” *California Law Review* 88 (3): 931–954.
- Ashford, Elizabeth and Tim Mulgan. 2018. “Contractualism.” *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition).
- Berman, Mitchell N. 2024. “‘Blameworthiness’ and ‘Culpability’ are not Synonymous: A Sympathetic Amendment to Simester.” *Criminal Law and Philosophy* 20: 91–105.
- Blackstone, William. 1769 (2016). *Commentaries on the Laws of England, Book IV, of Public Wrongs*. Oxford, UK: Oxford University Press.
- Coke, Edward. 1644 (1797). *The Third Part of the Institutes of the Laws of England*. London: E. & R. Brooke, Bell-Yard, near Temple-Bar.
- Dolinko, David. 2012. Review of “Crime and Culpability: A Theory of Criminal Law” by Larry Alexander and Kimberly Ferzan. *Criminal Law and Philosophy* 6 (1): 93–201.
- Duff, R. A. 2013. “Relational Reasons and the Criminal Law.” *Oxford Studies in Philosophy of Law* (Volume 2), ed Leslie Green and Brian Leiter. Oxford, UK: Oxford University Press.
- . “Responsibility, Citizenship and Criminal Law.” *Philosophical Foundations of Criminal Law*, ed. R. A. Duff and S. P. Green. Oxford, UK: Oxford University Press.
- Edwards, James. 2018. “Theories of Criminal Law.” *Stanford Encyclopedia of Philosophy* (Fall 2018 Edition)
- Feinberg, Joel. 1988. *The Moral Limits of the Criminal Law, Volume 4, Harmless Wrongdoing*. New York, NY: Oxford University Press.
- Ferrajoli, Luigi. 2002. *Crisi della legalità e diritto penale minimo*, in *Diritto Penale Minimo* 9: 9–10, ed. Umberto Curi & Giovanni Palombarini.
- . 1989. *Diritto e taggione: teora del garantismo penale*. Rome: Laterza.
- . 1985. *Il diritto penale minimo*, *Dei Delitti e Delle Pene* (3) 493: 511–12.
- Hart, H. L. A. 1968 (2008). *Punishment and Responsibility*, 2nd Edition. New York, USA: Oxford University Press.

- Hill, Thomas E. Jr. 1989. "Kantian Constructivism in Ethics" *Ethics*, 99 (4): 752–770.
- Hobbes. 1651. *Leviathan*. Wording from the Project Gutenberg 2002 version, updated 2021.
- Holmes, Oliver Wendell. 2004; 1881. *The Common Law*. New York, USA: Barnes & Noble, Inc.
- Hurd, Heidi M. 2001. "Why Liberals Should Hate 'Hate Crime Legislation'." *Law and Philosophy* 20 (2): 215–232.
- Husak, Douglas. 2008. *Overcriminalization: The Limits of Criminal Law*. New York, NY: Oxford University Press.
- Langer, Máximo. 2020. "Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then." *Harvard Law Review Forum* 134 (42): 42–77.
- Moore, Michael S. and Hurd, Heidi M. 2011. "Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence." *Criminal Law and Philosophy* 5: 147–98.
- Moore, Michael S. 2009. "A Tale of Two Theories." *Criminal Justice Ethics* (28) 1: 27–48.
- Posner, Richard. 1997. "The Problematics of Moral and Legal Theory." *Harvard Law Review* 111 (1637).
- Rawls, John. 1980. "Kantian Constructivism in Moral Theory." *Journal of Philosophy* 77 (9): 515–572; reprinted in Rawls 1999, 303–358.
- Sarch, Alexander. 2022. "Should Criminal Law Mirror Moral Blameworthiness or Criminal Culpability?" *Law and Philosophy* 41 (2): 305–328.
- . 2017. "Who Cares What You Think? "Criminal Culpability and the Irrelevance of Unmanifested Mental States." *Law and Philosophy* 36 (6): 707–750.
- Scanlon, T. M. 1998. *What We Owe to Each Other*, Cambridge, USA: Harvard University Press.
- Shoemaker, David. 2011. "Attributability, Answerability, and Accountability: Toward a Wider Theory of Moral Responsibility." *Ethics* 121 (3): 603–32.
- Singer, Peter. 1972. "Famine, Affluence, and Morality." *Philosophy & Public Affairs* 1 (3): 229–243.
- Smith, Angela M. 2012. "Attributability, Answerability, and Accountability: in Defense of a Unified Account." *Ethics* 122 (3): 575–589.
- Yaffe, Gideon. 2018. *The Age of Culpability: Children and the Nature of Criminal Responsibility*. Oxford University Press.

Chapter 2. Criminal Law as Standard Setting

Any substantive criminal law establishes a rule for citizens to follow. Sometimes these rules capture central moral commitments, sometimes these rules do something else. In this chapter, I will sketch a view of how criminal law comes to *establish standards*. In this chapter, I argue that establishing standards through criminal law ends up guiding everyday practices in at least three distinctive ways: by signaling, symbolizing, and disciplining. This sketched pluralism is meant as a contrast with objectionable forms of minimalism about criminal law, as this sketched position avoids hastily dismissing complex moral and practical judgments behind certain but unusual uses of criminal law.

Introduction. Law, Standards, and Guidance

It may well be that certain laws do not obviously align closely with some moral intuitions, sentiments, and practices. I do not think this is objectionable. Criminal law is about more than just mirroring our moral practices and enshrining some of our most central moral intuitions. As I argue here, the law, especially the *criminal* law, is also about *guiding* our practices. How then should we understand how criminal law ends up shaping behavior? Criminal law discourages certain actions by threat of punishment. This basic point can shape ordinary behavior by three means: (1) by signaling “Do X” or “Do not do X,” shaping uncritical behaviors such as stopping at stop signs; (2) by symbolizing broader commitments, therefore becoming the ground for certain actions and, possibly, moral beliefs, through that guidance; and (3) by disciplining for violations, especially of standards in specific contexts. Each of these three functions is importantly moral in a way that the narrow moral outlook of minimalists (See: previous chapter)

captures. Criminal law *shapes* us, sometimes subtly, sometimes explicitly, though the broad setting of standards for various purposes.

This chapter proceeds in four sections. In §1, I sketch the overall view I am endorsing in this chapter. While this dissertation is not intended to be an exhaustive account of everything the criminal law is up to, this chapter is intended to introduce an alternative view to minimalism as defined and criticized in chapter 1. The following three sections, then, look at the three partial views of the criminal law as standard setting. In §2, I describe when criminal law *signals* (§2.1), then, argue against some objections, particularly the claim that using the criminal law in this way is inappropriate or politically unjust (§2.2). In §3, I describe when criminal law *symbolizes* (§3.1), then argue against some anticipated objections, particularly that punishing for symbolic harm violates the harm principle's restriction on rightful punishment and is thereby objectionably illiberal (§3.2). In §4, I describe when the criminal law *disciplines* (§4.1). From there, I then explain this function of the criminal law in two senses: firstly, its narrow use in violations of socially central role responsibilities (§4.2); secondly, the broader use in morally thin but nonetheless socially important violations of everyday civil responsibility (§4.3). I conclude with a speculative discussion about what criminal law would look like in a utopia to illustrate the pluralistic picture of the criminal law I sketch in what follows.

1. Sketching the View: Setting Standards and Shaping Ourselves

In the previous chapter, I introduced and criticized a set of minimalists about criminal law. I will return to some of those criticisms in chapters 3 and 4. In this chapter, I wish to offer a contrasting account of criminal law and its relation to our moral lives. In doing so, I am painting a contrast: (1) minimalism, some versions of which depend upon a problematically narrow outlook on our

moral lives, and (2) my own *pluralism* motivated by, as I will describe throughout this chapter, a broader outlook about how various moral commitments and demands come to rightfully shape our behavior. The short version of this view: criminal law does not just capture a range of our central moral commitments but, also, shapes them by *setting standards* in various ways like those sketched in this chapter. The rest of this chapter will be dedicated to explaining and defending this overall view

In what follows I will provide an overview of some aspects of this view. Firstly, what does the contrast between the “narrow” and “broad” moral outlooks amount to? Secondly, what does it mean for something to be a standard? And what does it mean to set a standard? Thirdly and lastly, what, precisely, do I mean by “shaping”?

Let us first recall the contrasting moral outlooks. We first have the narrow moral outlook which, I argued to in chapter 1, is individualist and short-sighted. That outlook, generally, turns questions of responsibility into questions about isolated decisions that led to some error instead of, as I believe we actually do in our lives, looking further back for deeper explanations of *how* things went wrong. Contrary to that narrow picture, I endorse a broad, holistic view of moral agents. I am particularly interested in agents who have the following features. Moral agents should be reflective: they should face the mistakes (of their own or of others) and at least be capable of changing their own behavior in light of that. Put differently, they should be morally *responsive*.²¹ Additionally, they should be introspective: they should think, even if rarely, about the kind of person they want to be.²² They should be self-aware: no one is perfect, but we can be

²¹ See: Fischer & Ravizza (1998). This point is also similar to what Frankfurt (1971) argues is essential for second-order moral agency.

²² Similarly argued in different ways by Sartre (1943) and Korsgaard (2009). In Sartre, every decision is some kind of decision about who one is and is to be; in Korsgaard, our choices are what self-constitutes our agency, in turn, our personhood.

aware of our own fallibility and act, accordingly, including knowing when it is indeed reasonable (or not) to defer to others.²³ And they should be uncertain: again, no one is perfect, and hard moral decisions should lead even the most trained moral deliberator to a state of moral anxiety, albeit in rare cases (for example, medical contexts involving possible death). Once we bring that broader understanding of moral agency and what leads to a decision in the somewhat idealized courtroom (as procedures do go wrong), how we evaluate the accused becomes fundamentally different, as will be discussed moving forward in this dissertation. Given this is not a project about moral agency directly, I will simply assume this general sketch and move along.

Now, ‘standards’. Let us first speak of the use of standards in common, ordinary life. There are at least two common senses of this word: (1) strict standards, such as measurements (one meter) or strict duties (“do not press the button”), and (2) vaguer “standards of conduct,” with more room for interpretation or disagreement, such as the simple “behave.” One is expected to “live up to the standard,” colloquially. When I speak of criminal law as setting *standards*, I primarily mean this latter conception: as standards of *conduct*. Yes, many criminal laws explicitly prohibit a wide set of actions, and so first may appear to be more like a simple rule of “Do or do not.” But, often, actual contentious trials come down to ambiguities in our language: ambiguities which we dispute and attempt to resolve. Even a law that seems to demand something as simple as “do not murder” also does something broader than that, such as defining what it even means to do murder and setting a range of reasonable disagreement about what constitutes such. Thus, we may speak of ‘standards’ here in actually *three* ways: (1) stricter standards of action (example: “Do X.”), (2) vaguer standards of conduct (example: “Behave.”), and (3) the established range of disagreement about (2), usually in ambiguities of moral language found within law (example:

²³ For puzzles about this, see: Thomas Hill Jr.’s “Servility and Self-Respect” (1973).

“... with malice”). I will primarily refer to the second sense, though I admit where to draw these distinctions is unclear sometimes: that I simply grant and move on..

Last, let us discuss what it means for us to be shaped in the sense I will be using it. Recall the broad moral outlook where agents are expected to be at least somewhat reflective, introspective, self-aware, and uncertain or even morally anxious. This picture of the moral agent does not occur in isolation (I doubt it even makes sense to talk about moral agency without social relations). Rather, we are all situated in relations with others and to groups, including institutions.²⁴ One of these institutions is criminal law. We are shaped by rules around us all the time, especially when we are young. Does anything, in principle, preclude criminal law from this story? No, as we know about criminal law, we hear about crimes, and we talk, sometimes disagreeing, about them. It is in this sense that the constant hum of criminal law shapes us: we are aware of the standards, even when they are not applying to us directly as usually orderly. This is part of what explains why the political disagreements about criminal law are so sharp and contested: the question is, at least partially, about *who we want people to be*.

Thus, the account I will be endorsing in what follows is as follows. We are moral agents who have rich and diverse lives. We all stand in relation to others, groups, and institutions. The ways we relate to one another, including via institutions, too are very diverse and variable, but we are shaped by everything around us. One of those institutions is criminal law. We are aware of this institution, to varying degrees, and it is part of what shapes us. The open question, then, is about how criminal law plays a part in setting standards more generally. The *range* of standards

²⁴ A massive background literature lingers here which I do not have space to do justice. This theme appears across Rawls’s work such as Rawls’s “basic structure of society” in *A Theory of Justice* (1971). This theme is even more prominent, across communitarian views such as MacIntyre (1981) and Sandel (1982) and social ontological work such as Searle (1995) and Young (2011). The particular claim I am making here most closely resembles R. Jay Wallace’s *Moral Nexus* (2019, chapter 1 especially), as my point here is that this is *required* for *moral* agency—all of this I leave in the background here to keep the scope of our discussion manageable.

that criminal law helps to set is what I will discuss and defend in the sections that now follow, having now assumed this broad background.

2. Signals as Standards

One way in which law in general does something is by functioning as a signal. The most basic sense of signal is as a sign. A stop sign signals to stop. There are laws which define these signals, how these signals are to be communicated, and, in some cases, what these signals *demand* of us. We can point to laws in a similar way, regardless of how we feel about any particular law, even if citing laws in ordinary life would be somewhat unusual for most people.

This section, then, makes two claims. The first is the basic claim that sometimes the criminal law signals (§2.1). This should not be controversial: the greater controversy is about the appropriateness of using the *criminal* law to signal. I consider this concern and I argue that the appropriateness of any use of criminal law to signal in this way depends upon reasonable judgment of risks in matters of coordination (§2.2).

2.1. When the Criminal Law Signals

In some cases, criminal law signals in the following sense. Consider two examples: jaywalking and trespassing. Imagine, first, some set of legislators has to consider a proposal about jaywalking²⁵ where there is not one yet. On one hand, the freedom of pedestrians to be on the

²⁵ In the United States, jaywalking is not, strictly speaking, a crime, but instead usually a ‘civil infraction’. My argument here rests on the premise that this is more of a verbal distinction than a substantial one. A fine is a fine; a punishment is a punishment. The fine is imposed for the purpose of changing behavior, which is reprobative in the way the criminal law seeks to be (per Feinberg, as discussed in chapter 1). So, fines are punishments. We just do not treat the violation as *serious* enough to warrant even the label of ‘misdemeanor’, albeit I think this muddies the conceptual water more than it helps us understand what is at stake in these discussions.

roads is well-precedented. Roads are for walking, “sidewalks” do not exist yet because there has been little need to make draw a distinction. On the other hand, the world at this time is rapidly changing; people are not used to cars yet. Cars are dangerous and people are stubborn. Some want to drive; some want to walk around as they always have. Cities are crowded and there is a tension between people wanting to adopt this groundbreaking invention versus the people who desire the unaltered freedom to walk on the roads. A decision must be made: should something be done about this act we might decide to carve out as “jaywalking”? To decide *either way* is to carve the world at its joints: to make a law against it makes it a distinct type of action; to not make it a law would be to not make the distinction between it and walking in general.

One *might* think this is a matter of simple risk calculation. Well-meaning legislators look at an example like this and decide, well, there are great risks involved to everybody if we do not do something about people carelessly walking out in front of cars. Jaywalking is now an offense and shall receive, if caught, a fine. A disincentive. What about this is a *signal*?

What makes this a signal and not a mere disincentive is that the act of declaring jaywalking to be a type of violation marks the significance of the risk in a particular way. Specifically, it marks such risks as the type of risk that the state makes its business to address. It signals what the desired behavior is and *whom it concerns*. It is, by virtue of being legislated, *given* a normative weight it did not have prior to that. The careless walking on a road goes from a leisurely, everyday action to, now, one that has some normative salience. We call it ‘jaywalking’, we now disagree about ‘jaywalking’, we now act as if ‘jaywalking’ is a distinct thing. *It is not just saying that there is a risk, it is saying that it is a wrongful risk to take.* The world need not be

I should note that one reason jurisdictions adopt this distinction is to *deny* or *obscure* certain procedural rights to persons accused of such violations that they would be entitled to in a criminal proceeding. This strikes me as a bad thing. But making all traffic court proceedings like misdemeanor proceedings would likewise be unwieldy and impractical. So, the balance of practical considerations on both sides here are difficult to balance differently.

this way. We could easily assert that jaywalking is not the proper domain of the state and abolish such laws; or, we design the world in another way, such as holding drivers at fault for all pedestrian accidents. How precisely we go about such practical objectives, in my view, is best framed as a question as to the appropriateness of the state signaling one way or another.

This is the sense in which criminal law signals. Criminal law signals insofar as it identifies and marks certain actions as having a demand it otherwise would not have had. By identifying some risk as a risk deserving of *this* kind of treatment, a standard is imparted, though of course we may still dispute whether or not those standards are defensible. One more comment on the case of jaywalking before we turn to a similar observation about trespassing.

Most of the time, crossing the street is relatively trivial. Look both ways, no cars are coming, cross. But most do not take those cases of “jaywalking” seriously. It would be silly to give a ticket for jaywalking if no cars are around unless there is some serious risk known to the officer. The reason this kind of case is trivial, however, is that it lacks the spirit which motivated the original establishment of the rule in our imagined version of the case. If we imagine a busy road, however, it becomes quite obvious on reflection that it would be a bad thing for somebody to just be walking down the *middle* of it. That is the most extreme case in the other direction. It is not even really “jaywalking” at that point; it is reckless endangerment of self *and others*. To say “jaywalking” would, to most, come off as trivializing. If someone intentionally walks in the middle of the highway, they must recognize the risk to themselves and others they introduce by doing that. We would not count this as jaywalking, typically, because it is *even more* significant than that label implies. The lines here are all blurry, this I grant and move on from.

Back to the main point. The purpose of *criminalizing* at least some instances of jaywalking is not just to address risks of harm to self and others, it also signals an emergent

social expectation. A second case now to illustrate the point here differently. Trespassing is another case where this signaling of, particularly, possible *hazards* to even the trespasser is important. In the history of trespass, the primary concern was the property rights and safety of the property owners or lawful residents. A trespasser was not welcomed; property owners (or leasees) have a right to privacy and exclusion. But *now*, often trespass law is used to disincentivize people from going to areas that are dangerous to the *trespasser*. Quarries are a good example of this, as abandoned and flooded quarries impose a serious drowning risk. Even more dramatic are superfund sites or toxic waste zones more generally. We might impose a penalty both to disincentivize others and to disincentivize repeat attempts by the same parties. Now, again, we may dispute the appropriateness of any particular instance of signaling *through* criminal law (or fining more generally) in this way. My claim here is that there is some place for criminal law to be used as a means of signaling in a just and appropriate way, especially when it comes to signaling to relatively uncritical, unaware individuals who otherwise might not think further about the actions they are choosing to do. We speak of jaywalking, in part, to get some people not to cross the road recklessly; we speak of trespass, in part, to get some people not to put themselves in serious danger.

Prohibiting through criminalization sometimes distinguishes a judgment from the wide set of social judgments and norms. We sometimes signal in order to attempt to ensure that people know the relevant information that we are trying to communicate. Here, I have attempted to demonstrate this point; I have here mostly assumed that some use of criminal law in this way is just because it is rationally defensible. Of course, we have to be careful in using signals: if we use too many of the same kind, they start to fail to signal. We can only absorb so much information in our everyday lives; using criminal law in some cases is particularly helpful for

communicating with some particularly unaware or uncritical people for exactly this reason. I now turn to considering where others may object to what has been sketched thus far.

2.2. An Objection: Signals and Judgments of Significance

The question of the *appropriateness* of using criminal law as a means to signal in this way is a more complicated question. Let us consider some objections to this partial picture of criminal law. In the previous subsection, I argued that criminalization serves, at times, to signal. This claim is both descriptive and prescriptive: sometimes we criminalize to signal and sometimes we are justified in doing so. Sometimes when we criminalize, we are aiming, first and foremost, to signal. How might some object to this partial picture?

The most obvious objection here is that criminalization, since it threatens *punishment*, is an inappropriate means of signaling. The thought here is, at first glance, compelling. If social signaling were a sufficient justification for punishment, then there seems to be absolutely no coherent limit on criminalization. We *could* signal all kinds of standards of behavior but the criminal law, particularly, threatens sanction. This just seems to be smuggling in some form of perfectionism where-in the state is justified in shaping citizens howsoever it please.

Firstly, criminalization can go too far. That is always true. Standards can always be unreasonable. The question, instead, is about the appropriateness of particular statutes at achieving relatively narrow goals. Consider traffic offenses. In our actual practice, it is fairly rare that most traffic violations ever go to criminal court. Most traffic violations, at least in common law jurisdictions, are considered civil violations. Often the word used for them is ‘infraction’, as to contrast from, particularly, misdemeanors and felonies (the standard distinction of lower and higher crimes, respectively). Traffic infractions are not treated all that seriously and traffic court

is famously expedited. Yet, curiously, we *do* threaten criminal sanctions *at a certain point*. The main consideration is practical: what is or is not working to address collective problems. Reckless driving is a clear example. How do we explain this? Reckless driving is certainly very dangerous, so we might be inclined to say it is a question of how to understand the harm principle as allowing us to punish as a means to prevent harm to others. That is certainly *part* of what is going on. But, importantly here, the possibility of certain driving behavior being labeled as ‘reckless’ can also shape non-reckless driving. The question is more than just a difference of degree. By having a standard such as “Do not drive recklessly,” we also signal how to drive more generally. Statutorily a lot can fall under reckless driving, but even just colloquially we can identify driving as “reckless” or “aggressive,” in doing we, established what kind of driving is *not* reckless or *not* aggressive. In doing so, we make an important *moral* demand of fellow drivers: do not drive like *that*. That is not well-explained by reading the harm principle alone. What reckless driving is, in turn, *shapes* what non-reckless driving is, thereby shaping judgments about how to appropriately drive.

What is underexplained by the harm-centered account is how the different levels of traffic offenses inform one another. The vast majority of traffic violations produce no harm whatsoever. People roll through stop signs so often we have a colloquial term for such: ‘California stop’. Suppose that people “California stop” carefully, so as to avoid risks to others: only when no other cars are in sight and no pedestrians are present. Is it nonetheless the case that these rolling-stop-drivers are doing something, even if quite minimally so, *wrong*? I am inclined to say yes: they are disregarding fairly established rules of the road. They fail to live up to others. The wrongfulness is plausibly explained by possible harms, but the better explanation is that they are *violating a convention that is agreed upon fairly and does not violate anything like established-*

as-fundamental rights. We all get licenses for a reason: it is, tacitly, a fair agreement. “Drive like this or else we will take away that license.” Violating that system is more like cheating. Consider someone driving down a one-way street. Even if nobody is around, it stands in contempt of the fair rules of the road. At a certain point of seriousness, we might decide to treat it differently—at a certain point of standing in contempt of the signaling standards, we might decide to elevate the offense to the level of *criminal*, even if that just means misdemeanor.

What we are doing when we are criminalizing as part of a system of legal signaling, like what goes on in traffic law, is not just assessing risks; we also tacitly assess *significance*. The judgment of significance is not just a threshold of possible harm. It can be a judgment of someone deeming a reasonable standard to “not apply to me.” That is *unfair*. That is cheating in a sense.²⁶ Of course, nobody is perfect, so we all understand that sometimes people speed, sometimes people do not fully stop, so we do not usually make such slip-ups *criminal* violations. But the criminal lurks in the background as a possibility, which gives the lower offenses some bite they would not otherwise have. Consider somebody who continuously receives traffic tickets. Imagine that they keep ignoring stop signs, even when told not to. At a certain point, the traffic officer might decide to charge the driver with “reckless driving” (or some equivalent) for an offense that, on its own, would not be labeled as such. That might emerge if mere infractions become, *upon the judgment of reasonable others*, a *morally* significant pattern. Both the rules on their own, such as the rules about what a stop sign is, *and* the rules as greater systems to be followed more generally, play a part in the story of shaping the behaviors of others.

²⁶ See: Rawls, “Legal Obligation and the Duty of Fair Play,” 1964. I am merely assuming something like this is true and will not provide further reason to agree.

Most of the time we think very little about large set of demands that the law generally is involved in signaling. Traffic standards are the easiest to see. Consider why we drive on one side of the road. That is purely because of the law demanding such of us, it is not by mere social convention. There is no significant reason we drive on one side of the road beyond that having been the decision that became law in a particular jurisdiction for whatever arbitrary reason (putting aside social convention's role in that story here). Every jurisdiction with drivers and roads has to decide which side to drive on. It is a coordination problem. If such a decision is not made one way or another, *we cannot drive together*.²⁷ The very possibility of a social activity like sharing the road is conditioned on the various standards and people following those standards, legal or conventional. That is why, in the case of serious or persisting violations, we would thereby be warranted in sanctioning both for the purpose of correcting the individual's behavior but also to uphold that greater coordinated system (under the assumption that the system is just). The wrongfulness is not, then, found in the action itself (like in *mala in se* offenses), but rather, the violation of the agreement and more importantly the nature of social agreements more generally. Put more simply, signals play a central role in social coordination, and criminal law has some role to play in a greater system of social signaling. Social coordination is fair and appropriate to be demanding about insofar as our coordination depends upon agreement and compliance.

²⁷ This is not a novel point and has been made, amongst others, in Hampton (1984, pg. 210; also discussed later). Under her view, the law out to be based, in part, off of "... imperatives made necessary for moral reasons, for example, 'drive on the right'—so that the safety of others on the road may be insured." I should note that my own claim here is slightly different: it is not just about safety but, rather, *the practical possibility of sharing the road*.

3. Symbols as Standards

Law, and especially criminal law, tacitly promotes a thin conception of good life. In a way, rules as basic and obvious as “Do not kill” make a demand on us. Murder is wrong; criminal law agrees. Sometimes, however, criminal law explicitly demands more of us. Good life includes, for example, not murdering others. Or not stealing from your neighbor. Or not violating fair regulatory standards. Sometimes, however, it seems like criminal law is doing something more than even this. Take hate crimes: what ties the hateful attitude involved in the perpetration of a hate crime to the additional punishment attached to hate crimes? The short answer: particularly in non-ideal circumstances, some injustice generates an additional obligation that certain crimes additionally violate. More on that in chapter 4. In this section, I articulate a view of when criminal law *symbolizes* and the significance of such to our moral agency, drawing on Joel Feinberg and R.A. Duff (§3.1); I then revisit the earlier discussion of material harms to discuss the occasional difficulty of distinguishing material harm from social harm (§3.2).

3.1. When the Criminal Law Symbolizes

We now turn to articulating when, in some cases, criminal law serves to symbolize and express some symbolic significance. To this end, I draw from the work of Joel Feinberg and R. A. Duff, bringing together the expressive function of punishment and the idea of civil order to illustrate what I mean by symbolizing and the conditions under which criminal law symbolizes in the relevant sense that I defend. To first sketch what I mean: in some cases, criminal law imposes a burden upon individuals that is grounded in an attempt to address an injustice. Here, I am attempting to show that sometimes the law is tailored to address some additional, historically *contingent* commitment. In other words, some law is justified by the non-ideal considerations of

justice, such as what we do when things have gone or are presently going wrong. Liberal theories of a just state, for example, tells us that racial disenfranchisement is bad, but it itself does not tell us what is required of a society where such has already happened, even if in the past. Thus, my partial account attempts to explain on what grounds a just society may impose *special* rules through the symbolic use of criminal law intended to address some prior, specific injustice.

Let us first draw from Feinberg's "The Expressive Function of Punishment." To quote from Feinberg (1965, pg. 400):

Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those "in whose name" the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.

The expressive function of punishment, then, is as follows. Something happens which calls for some kind of disapproval, to which one then responds by imposing a penalty *for the purpose of* communicating that disapproval. When it comes to the symbolic use of the criminal law, this reprobation is essential in understanding what is going on with certain criminal laws, most obvious hate crime statutes, attempts to address violence against women, and child sexual exploitation. There are two ways in which I will be diverging from Feinberg here. Firstly, the account I am advancing here is partial instead of general. That is, this symbolic use of criminal law is not intended to explain something that criminal law is always doing, only sometimes, though I am open to that more ambitious thesis. Secondly, Feinberg's inquiry is into what distinguishes punishment from penalty, not punishment in the *context of criminal law* specifically. So our domain here is slightly different: I am taking it for granted that punishment is part of the special making features of criminal law, though return to the discussion in §3.1 from chapter 1 for more on such.

Let's use an example. We have some wrong: in this case, a sexual assault. In general, sexual assaults are already crimes. Why might we seek to treat some cases differently than others? One possibility is that the perpetrator was acting on an objectionably social impulse, say misogyny, *and* that society is generally well-aware of the real problems of sexism and is attempting to alleviate such. How do we connect the first part of this conjunct, the problematic attitude, to the second part, the non-ideal social reality? To answer this, we need an account of when the criminal law *symbolizes* that connects the terrible deed to the greater injustice. An account of something more than usual: in this case, an explanation of how the sexist is somehow, to some degree, responsible for *sexism*, in such a way that justifies this special treatment via criminal law. Some account that justifies this use, even if rare, of *criminal* law.

This idea of criminal law symbolizing something of real normative weight draws from Duff's conception of 'civil order', which is central to the theory he advances in *The Realm of Criminal Law*. For our purposes, his summary from his defense of that book will suffice to make the connection (pg. 468):

A polity's civil order is the normative ordering of its civic life. Its normative ordering is structured by the goals and values through which the polity constitutes itself as a political community: it might be partly defined in a written constitution, as a formal statement of the fundamental goals towards which the polity's collective activities are oriented, and the values by which those activities are to be governed; but it is also implicit in the polity's institutions of government and its citizens' shared understandings of their civic life.

It is important to flag that Duff's use of 'polity' here is in contrast to real, non-ideal democracies. Duff's ambition is to articulate what would ground a public wrong in a just polity, understood to be "republican" and "liberally communitarian" (pg. 471). Here, I am drawing on this concept of a polity's civil order in this sense only as a *partial* explanation of what the criminal law is up to in some cases.

Let's consider hate crimes as an example, albeit briefly since chapter 4 is dedicated to them. Hate crimes are usually treated as enhanced: some crimes are automatically worse because of the *hatred*. Let's simplify and stipulate that someone murders another *because* of a held racist belief, so that there is no open question about whether or not such is indeed a hate crime. Does seeking to punish that hate crime then wrongly seek to punish *merely* the attitude? No: the racist is responsible *for* their racism if the society has generally taken on the task of addressing the legacy of racism in a way that is public recognized and instantiated, willfully, by the perpetrator. If the perpetrator acts in spite of this, tacitly or explicitly, then additional blame comes with that. This is the much-simplified version of the argument that I will advance in chapter 4, so for now I will move on.

I think the space for rightfully criminalizing and punishing on symbolic grounds is relatively narrow. I do not intend this to be a general justification of criminalization. I do not think that criminal law should generally be interested in anything like making people better (See: the later discussion of perfectionism). Rather, as chapter 4 elaborates, there needs to be some important connection between the particular statute in question and the narrow interests of the state specifically. The most plausible domain for this type of intervention by criminal law and practice, in my view, is things for which the state as an abstract entity has some responsibility, such as the ongoing redress of injustice and the live legacies of those injustices. But symbolic use of the criminal law to give force to these massive societal commitments in light of real injustices is justifiable and should play a role in any theory of the criminal law. Let us now consider an objection to this general point.

3.2. *The Difficulty of Distinguishing Social Harms*

A central difficulty when it comes to the law the demands of political liberalism. The harm principle may be taken to be the sole justification for regulation: if it does not cause harm in any discernable way, it is inappropriate to *criminalize*. From this, it would follow that it would be wrong to punish mere attitudes. Related to the harm principle is a more general acceptance of the core motivation behind political liberalism: the balancing of personal liberty with the functional cooperation within society. If the state promotes a certain way of life, it seems to infringe, problematically, on the personal freedom of individuals to decide their substantial values for themselves and to live lives that they shape freely. Or so the initial objection would go.

My general response is that I am not tracking cases of *mere* attitudinal differences or *mere* social harm. Rather, the symbolic use of criminal law aims to address cases in which those attitudes, better yet *ideology*, at least partially explain the nebulous type of harm that certain offenses aim at producing, in part because the distinction between material harm and social harm is undermined by such deeds. Recall the prior discussion of hatred. Or, for another example, consider terrorism. We *cannot* understand the terrorist without reference to the terror that they intend. They do not just aim to directly, materially harm some victims, but also to harm society more generally. That harm is not merely social harm in the way that, say, people are worried about getting robbed in everyday life. Atrocities *change* our lives; they make us more fearful—in this way, the background distinction between material and social harm comes into question in these cases.

A caveat. Crimes in general involve social costs, so if the blurry line between material harm and social harm undermines certain liberal assumptions in *some* cases, does that not apply to criminal law more generally? Not exactly. Yes, when crimes become commonplace, that

undermines social cooperation generally. But some crimes are explicitly oriented toward assaulting the greater social order. The thief does not think this way, except maybe out of disdain for corporations or the rich. But some crimes are willfully intended to harm the greater society and we cannot explain the *mea culpa* of certain terrorist acts or hate crimes without reference to that greater, double will. But the line here may be uncomfortably blurry, that I grant.

What I am claiming here is that it is sometimes appropriate for us to use criminal law to take a stand. The terrorists make a type of ideological claim. In response, by labelling and treating them as “a terrorist”, we project a response. It is a form of Popper’s paradox of tolerance (Popper 1945): in some cases, *we must be intolerant of the intolerant*. We can demand that people not be intolerant *in that way*, but they are still punished because of their *actions*, even if their intolerance is part of the explanation of why they did the terrible deeds that they did. All I am claiming here is that some type of “special treatment” is justified when there are special considerations like those I have sketched here briefly with the examples of hate crimes and terrorism, though, again, chapter 4 will be dedicated to a more exhaustive discussion of such and so I will now move on.

4. Discipline as Standard

One of the central tasks of criminal law, especially the penal law and systems of punishment that follow from criminal sentencing, is to *discipline*. There are two ways to read this claim. The first, broad claim is that “disciplining” is a general feature of criminal law that seeks to thinly shape the behavior of citizens as law-abiding, particularly through various the conditions of civil society like those discussed earlier in §1. Even mundane and obvious rules like “Do not kill” entail some minimal standards of behavior. How far this line can go, however, is an open

question we will consider. The second, narrower claim is that disciplinary standards are central to understanding *role responsibility* in various contexts, specifically with roles that have a substantial public interest involved (i.e., parents and general child welfare; doctors and public trust in medicine). These standards, then, are thicker insofar as they demand specific actions from those who stand in those roles: even a rule as commonplace as “Do not kill” ends up entailing a lot more for, example, a surgeon seeking to live up to a professional standard of care. This section first defends the general claim that criminal law partially serves discipline (§4.1), then considers objections concerning the narrow thesis (§4.2), then the broad thesis (§4.3).

4.1. When the Criminal Law Disciplines

Sometimes when things go wrong, part of the explanation of the seriousness of the wrongdoing involves the obligations grounded in some moral identity. *Doctors* and *parents* are some examples of very demanding roles in this respect. The demandingness is thicker insofar as these demands are more specific and thorough, such as the many rules and procedures that doctors are expected to know and follow as a matter of the professional standard of care. To be a doctor or a parent is morally demanding and morally demanding in more specific, evaluative ways. In some cases, these moral identities involve thinner expectations, as they demand fewer specific actions. We may speak of roles and relations as common as *friends* or *citizens* similarly to how we speak of *doctor* or *parents*, but those demands are thinner insofar as they are less specific and, thus, give us less prior evaluative judgment to work with in cases where things go wrong. What role, then, does criminal law play in the establishment and enforcement of *these* types of obligations? In other words, when it is right to use criminal law to *discipline*?

To start my explanation and defense of this, I want to draw upon Hampton's influential educative theory of punishment. First, let us draw on her general picture of what punishment is up to:

Punishments are like electrified fences. At the very least they teach a person, via pain, that there is a "barrier" to the action she wants to do, and so, at the very least, they aim to deter. But because punishment "fences" are marking moral boundaries, the pain which these "fences" administer (or threaten to administer) conveys a larger message to beings who are able to reflect on the reasons for these barriers' existence: they convey that there is a barrier to these actions because they are morally wrong. Thus, according to the moral education theory, punishment is not intended as a way of conditioning a human being to do what society wants her to do (in the way that an animal is conditioned by an electrified fence to stay within a pasture); rather, the theory maintains that punishment is intended as a way of teaching the wrongdoer that the action she did (or wants to do) is forbidden because it is morally wrong and should not be done for that reason. The theory also regards that lesson as public, and thus as directed to the rest of society. When the state makes its criminal law and its enforcement practices known, it conveys an educative message not only to the convicted criminal but also to anyone else in the society who might be tempted to do what she did. (Hampton 1984, pg. 212)

Take Hampton's fences under this analogy. I do not, like Hampton, want to invoke this as a general explanation of punishment. Rather, in *some* cases, the boundaries of *certain* role responsibilities are partially constituted in this way. The marking of these moral boundaries, in part through criminal law, is partially constitutive of what those roles even are. Hampton's language is very telling and captures the spirit of this *partial* account of criminal law: we are establishing and administering the very moral boundaries *of certain roles*, in doing so partially constructing what those very roles are. Hampton's view here is a discussion of general human behavior, of which the bounds are established by this electric fence of punishment. Whereas what I am claiming here is that we also use these same electric fences to set more specific boundaries for specific groups of people. For example, doctors of all kinds operate within a large practical space, much of it is gray, and at some point they run into an electric fence. Some deeds that a doctor can do result in punishment, either via the internal institutions of medicine or, more rarely,

via criminal prosecution. And this is part of what it means to be a doctor: to work within the bounds of those fences and, even if tacitly, accept punishment upon the violation of such bounds.

We will talk about this picture in a narrow and broad sense shortly, but my general claim here is that in cases where the criminal law plays a central role in determining the boundaries of *demandingness* of particular roles, criminal law is justified in threatening sanction for violations of those boundaries. This is especially so in cases of public interest, as, to invoke Hampton, the message is conveyed to all others: both of the general public and to members of that particular social role. The question is the range of social roles which should be included in this picture: doctors and parents seem less controversially placed in this camp; more controversially, we might make similar demands of one another as fellow citizens, neighbors, so on, leaving open just how far we ought to go in drawing those lines.

4.2. Discipline Narrowly: Role Responsibility of Parents, Doctors, and Similar

Let us first sketch the narrow sense of “the criminal law disciplines” and what it would mean for an account of criminal law to successfully explain and defend this. The essential piece here is the claim that certain moral identities are constituted through this public demandingness, specifically their role-based responsibilities. Without jargon: some roles are defined by public expectation via a set of unique rules. Which roles are reasonably responsive to public interest in the right way as to justify *some* use of criminal law?

Here: two examples of roles that are partially shaped by the public interest in this way to illustrate this. These examples are intended to demonstrate that there are at least *some* cases where the moral identity of people who occupy this role are partially shaped in this way; in turn,

we will then discuss specifically the role of *criminal law* in such. The two main examples here will first be doctors, then parents.

First, doctors and how public expectation shapes what it means to even be a doctor. Doctors go through specialized training, both in medical school and in residency. Part of this is required medical ethics training. Doctors have a set of duties when it comes to patients, most famously the rarely defeasible duty of doctor-patient confidentiality. Doctors likewise join professional organizations, both of doctors generally (i.e. the American Medical Association and of their specialization (i.e., the American Board of Surgeons). Part of being a member of those organizations is pledging oneself to the standards of such organizations, such as the *American Medical Association Statement of Ethics*. There are also a number of established standards of care; deviations from such standards require further reasons, usually articulated to fellow experts.

All of these are examples of ways in which the medical field establishes and maintains expectations in a way that generates and reinforces public trust in the medical profession. Without all of this, or some substitution, doctors would simply *not be doctors*. What it *means* to be a doctor is, partially, some combination of engaging with these institutions, laws, and ethical expectations. This point generalizes to all professions, but we need not go through the analogous point for all possibilities here.

Before bringing criminal law specifically into this, let us examine parents. In the case of parents, the ways expectations and institutions shape parenthood are less obvious. But there are plenty of laws on child welfare. There are departments of child and family welfare. There are social workers. Public schools play a massive part in identifying when things are going wrong. Even homeschooling comes with a set of rules and expectations, both to ensure education but likewise to try and prevent neglect and abuse. Unlike doctors, parents would still exist in some

relevant sense without all of this. But again, what it means to be a parent under such a social context is significantly different. Not everything just goes: to be a parent is, in part, to live up to reasonable, publicly established expectations of what parents will do or guarantee is to be done by others (say, through enrolling in public school instead of homeschooling).

Now, *criminal law*. Criminal law has the unfortunate role of coming into play when matters go wrong. But not just any wrong: *significant* wrongs. What, in *these* cases, makes the wrongs significant in the right way? One might just say it is a matter of degree—this would be hasty. Rather, part of what explains when criminal law comes into play is when it undermines the established, aforementioned systems of establishing and maintaining *standards*. Take doctors once more: criminal malpractice is not just about how much material harm was produced but also how significantly a given doctor deviated from all the norms, rules, and expectations that come with being a doctor in that particular instance (i.e., a surgeon, a primary care provider, so on). Compare this to parents, too: in cases of criminal abuse or neglect, the question is not just a matter of the degree of material harm or risk, it is also often a question of how seriously the parents or guardians deviate from what the reasonable *parent*, not just *person*,²⁸ would have done. The utterly careless person, yet unequipped to handle a child, is less blameworthy than the utterly careless *parent* who took that responsibility *upon themselves*.

Where we end up drawing these lines is an open question, all I am claiming here is that there are justified lines to draw. In the case of doctors, this is hard to resist: the modern medical profession looks like it does largely because of these norms and expectations becoming a more central part of what doctors are up to overtime. In the case of parents, we might draw the lines

²⁸ There is something tricky here with the reasonable person standard, but we could just resolve such by saying something like “The reasonable person under the condition that they willing accept the responsibilities and duties of being a parent.”

differently, as jurisdictions in fact do (For example, the United States is more permissive about homeschooling compared to, say, Germany). We might go even further than parents and speak of people more generally, albeit that question I reserve for the following section instead. Here, I claim that disciplining is appropriate in at least *some* contexts as a means of scrutinizing and demanding more from *certain* roles.

While this is framed as the narrow sense of when *criminal* law disciplines, the ramifications here are still quite sweeping. The emphasis on parents alone shows this: *there are a lot of parents out there!* While here I am claiming that an account of criminal law must account for this, even if as a partial aspect of what criminal law is up to, what I have explained thus far takes us much further than the narrow moral outlook of some minimalists (or, alternatively, the common viewpoint of wanting criminal law to be as small a domain of law as possible). *Special* responsibilities and obligations, and the use of criminal law to *discipline* serious violations of those *special* responsibilities and obligations, must be a part of any picture of criminal law. Criminal law plays a justified role in setting the hardlines around these morally weighty roles, even if far from where real parents and doctors would ever find themselves, and this is part of the system that sets the standard for those roles.

4.3. Discipline Broadly: Limits of Role Responsibility

Having established that disciplining for violations of role responsibility is an appropriate end for criminal law in *some* cases, consider how far this line may take us. Take the previous point about parents: if we think criminal law has a justified place in setting the standards for parents, already this seems to be an permissive and demanding claim. If parents *must* live up to all of the moral standards of being parents, and this justifies intervention via the criminal law in all significant

cases, already this takes us quite beyond the commonplace view of wanting to hold criminal law back (Depending on the open questions about significance). Why stop there? If a role as common as parenthood justifies this, why would we not say the same about friendship, neighbors, employers, employees, citizens, or even just *people*? Thus, some may object here given how far this line about role-based responsibility or obligation goes. While I recognize this is a possible objection, I wish to remain neutral as to how far, exactly, this line about role responsibility and disciplining takes us, for reasons I will now explain.

Firstly, a clarification of my earlier thesis. Criminal law having a legitimate role in establishing standards does not imply it can justifiably do so in all cases. The restrictions there are both practical and moral. We want to set reasonable standards for parents and doctors which both give them enough freedom within their relevant domains while making sure that the most serious of standards are still always lived up to. So, it is not just that anything goes, even if the most important of rules to follow for those groups of people will be more thorough than our ordinary set of expectations.

One central difference is that what it means to be a good friend, neighbor, or citizen, is more of an open question than it is in the case of doctors or parents. Prior values shape disagreements about such—there is great variation in what we want out of *our* friends, *our* neighbors, or *our* fellow citizens. There is less variation in what we want out of *good* parents and *good* doctors. For example: we may want our friends to be kind *or* honest, how we feel about white lies; we almost certainly want our doctors to be *both*, with perhaps few exceptions. This does not mean that the line is clear. We might have other reasons to think that friendship or employment or citizenry *should be* more like that. Maybe so but I am skeptical of such because it would push us more toward being legal perfectionists outright, which is not the point of what I

am claiming here. But *if* one thinks that there are defensible, unified conceptions of these more nebulous roles *and* that those conceptions, if widely adopted, would be publicly responsive in the right way, *then* we would have reason to use criminal law to discipline significant violations of such. Again, though, this strikes me as reinventing legal perfectionism and is not *my* claim. I leave it to others to pursue that further line if they so desire.

Instead, these broader moral roles and relations enter into our criminal legal practices in two ways: (1) through the more definitive but nonetheless common roles many people do hold (again, like parents) and (2) through the procedures of scrutiny and how character more generally plays a role in being held to account for violations, as discussed previously.

Conclusion. The Weight of Standards within Utopia.

We have discussed signaling, symbolizing, and disciplining, as additional, partial endeavors of the criminal law in addition to its central task of punishing for serious wrongdoings. To wrap up our discussion here, imagine, now, a proto-society like those imagined by the classical liberals. We have a set of people spread across some shared area, cooperating to survive but without clear institutions yet. There are informal relationships between people, even ones we would recognize with moral weight, such as parental relationships, friendships, romantic engagements, and so on. Everything is more or less good between everyone: there are still the usual interpersonal issues, but nothing warranting the establishment of criminal law (yet).

What can go wrong in paradise? The most obvious answer: the *mala in se*. People could steal, assault, murder, so on. In such cases, a system of trial and punishment would certainly be adopted. Criminal law emerges, even if it would certainly look very different than the complex systems of today.

What *else* could go wrong? Imagine we give them *cars*. Some rule must be established, such as “drive on the right.” Some rules are established and, well, some people cannot be bothered, either advertently or inadvertently. Something like traffic law emerges and, in some cases, violations are serious or persistent enough to demand something like *criminal* traffic law.

Let’s continue with what could go wrong and appropriate responses to such. Imagine there is diversity in the primitive utopia. Due to nebulous social reasons, some decide that darker skinned members of utopia are untrustworthy. In part due to this prejudice, some crimes are perpetrated against that group. We have the *mala in se* again but, this time, with a uniquely problematic social, collective dimension. What is the appropriate response? Under the assumption that the members of former utopia are responsible for understanding collective problems, there is a new demand generated to stop doing that particularly condemnable action. If they persist in doing so, they are acting in spite of both the moral demand not to harm others *and* the collective efforts to address particular, unfortunate injustices. If they would punish for such differently than they would any other *mala in se*, their criminal law serves a distinctively *symbolic* function.

Let’s wrap up with our hypothetical utopia-gone-wrong. Consider parents of the natural kind, whatsoever they may be. *Some* primitive obligations exist that constitute what it means to be a parent. Some *mala in se* occurs but, this time, in the context of *that* relationship. Maybe if isolated incidents, they would be treated just as any other instance of the same *mala in se*. But if there is greater structural, social reason to demand more of parents *as such*, then that demand is appropriate. If we run the same hypothetical for socially demanding roles such as doctors, we get a similar result: we care about being additionally demanding when there is something greater at stake than the particular harms to particular persons. Sometimes violations undermine massive

social structures (parenthood) or uniquely demanding and important societal roles (doctors). If their criminal law demands that certain roles live up to certain special obligations, the punishment of serious violations enforces the boundaries of those roles via discipline.

The above three thoughts, respectively, motivate my earlier discussion of criminal law's role in signaling, symbolizing, and disciplining, respectively. Even if one objects to some of the sub-conclusions here, they should be motivated to accept that the appropriateness of the various possible responses depends upon the variety of emergent social problems in the fallen utopia.

When things go wrong, many responses are possible. Criminal law's considerations are and should be multifaceted. What we are called to do through criminal law depends upon the depth and range in which things go wrong, not just the mere fact that things sometimes go wrong. Even if one rejects any individual function of criminal law as sketched here, or my pluralistic picture generally, one should still be motivated to accept the broader claim that criminal law can play a justified rule in the greater social process of setting standards.

References

- American Medical Association Statement of Ethics*. 2004, revised 2006.
- Duff, R. A. 2020. "Defending the Realm of Criminal Law." *Criminal Law and Philosophy* 14: 465–500.
- . 2018. *The Realm of Criminal Law*. Oxford, UK: Oxford University Press.
- Feinberg, Joel. 1988. *Harmless Wrongdoing: The Moral Limits of the Criminal Law*, Volume 4. New York, USA: Oxford University Press.
- . 1965. "The Expressive Function of Punishment." *The Monist* 49 (3): 397–423.
- Fischer, John Martin and Mark Ravizza. 1998. *Responsibility and Control: A Theory of Moral Responsibility*. New York, New York: Cambridge University Press.
- Frankfurt, Harry G. 1971. "Freedom of the Will and the Concept of a Person" *The Journal of Philosophy* 68 (1): 5–20.
- Grinols, Earl L. and David B. Mustard. 2006. "Casinos, Crime, and Community Costs." *The Review of Economics and Statistics* 88 (1): 28–45.
- Hampton, Jean. 1984. "The Moral Education Theory of Punishment." *Philosophy and Public Affairs* 13 (3): 208–38.
- Hill Jr., Thomas E. 1973. "Servility and Self-Respect." *The Monist* 57 (1): 87–104.
- Korsgaard, Christine. 2009. *Self-Constitution: Agency, Identity, and Integrity*. New York, USA: Oxford University Press.
- MacIntyre, Alasdair. 1981. *After Virtue: A Study in Moral Theory*. Notre Dame, USA: University of Notre Dame Press.
- Popper, Karl. 1945. *The Open Society and its Enemies*. Princeton, USA: Routledge.
- Rawls, John. 1971. *A Theory of Justice*. Cambridge, USA: Harvard University Press.
- . 1964. "Legal Obligation and the Duty of Fair Play." *Law and Philosophy*, ed. Sidney Hook. Also appears within *A Theory of Justice*.
- Sandel, Michael J. 1982. *Liberalism and the Limits of Justice*. New York, USA: Cambridge University Press.
- Sartre, John Paul. 1943. *Being and Nothingness: A Phenomenological Essay on Ontology*.

Searle, John. 1995. *The Construction of Social Reality*. New York, USA: Free Press.

Wallace, R. Jay. 2019. *The Moral Nexus*. Princeton, USA: Princeton University Press.

Young, Iris Marion. 2011. *Responsibility for Justice*. New York, USA: Oxford University Press.

Chapter 3. Criminal Negligence and Holding Others Responsible

We have some compelling reasons to not wish to hold people culpable for what appear to be, at least at first glance, honest mistakes. However, institutions also have legitimate interest in establishing and holding people to a standard of care, especially in professional contexts.

Doctors, for example, cannot be as free as they would be otherwise when it comes to their duties as doctors. Even outside of professional contexts, special standards of care nonetheless be rightfully imposed. Criminal negligence, then, can be better understood as a question of when it is rightful for the general public to intervene for gross deviations from important standards of care across various domains.

Introduction. Criminal Negligence, Responsibility, Discipline

The philosophical dispute around criminal negligence has focused, primarily, on the culpability of negligent acts. There is a basic puzzle: if the defining feature of negligence is a lack of thought, a lack of a decision or choice, how can we ever hold someone responsible for having acted negligently? If negligence is taken to be some kind of serious inadvertence, how could we ever expect someone to act in a way if they did not in fact advert to? *Prima facie*, this is a problem both in ordinary life and in the narrower context of the threat of punishment via criminal law. We might get upset with children when they do not anticipate some problem that results from their careless mistakes, but we likely would not want to punish if we, adults, did not give the child a fair warning. If our friends make a mistake and tell others a secret without *knowing* it was a secret, it may be hard to blame them. How could they have known? Ignorance of the relevant risk seems, at least in some cases, exculpating. That problem is even sharper in the context of criminal law. If we are going to *punish* someone, we want them to be responsible, in

some serious way, for the action they are being punished for. If they did not advert to some risk which was, in turn, realized, why are we punishing them? If they had the relevant thought, they may have acted otherwise, so we seem, in criminalizing some negligent acts, to be unjustly infringing on the freedom of a good person who just made an honest mistake. Negligence, thus, seems deeply problematic at first glance.

There are also strong intuitions to the contrary, especially when it comes to the most serious of material harm. Take medical errors resulting in death. Imagine an anesthesiologist misreads a warning of low oxygen, allegedly thinking the sensor itself was misfiring, only to deprive a patient of oxygen to the point of later death (*Adomako*, discussed later). Or imagine a traveling physician is giving bismuth treatments to children across Africa and mistakes the dosage by an order of magnitude, thereby killing multiple of those children (*Akerele*, discussed later). Or outside of medicine, imagine a parent inadvertently allowing a child to die from an infected tooth ache. Causing *death* is arguably inexcusable, especially in these contexts of trust. *Some things cannot just be let go.*

We have reasons to be skeptical of criminalizing negligence; we have reasons to think some violations, even if done without a culpable thought or decision, still deserve punishment. This is the core tension within the debate about criminal negligence.

In the previous two chapters, I argued against some minimalism about criminal law (chapter 1) and, in turn, sketched a view about the broad kinds of considerations that can rightfully enter into the criminal law (chapter 2). Within the broader context of this dissertation, the debate around criminal negligence is best understood as a question of when *discipline* is appropriate, following some of the discussion in chapter 2 (See: §4). The core position I will advance here is that while we often focus on serious, egregious harm as justifying criminal

negligence, there is a further question as to when such serious violations become public concerns. That question of public concern, in my view, is best explained by *who* gets to who hold *whom* responsible for certain serious violations.

To these ends, this chapter has been divided into 3 major sections. The first is a quick summary of the prior dispute, which introduces my central view in the context of the negligence skepticism of Moore and Hurd (2011), taken to be representative of skepticism about criminal negligence more generally (§1). The second section involves the main arguments. Firstly, I argue that the negligent mistakes of doctors involve more legitimate considerations than in our ordinary moral lives, contrasting historical cases *Akerele* and *Adomako* (§2.1). From there, I push this line about role responsibility to parents, discussing *State v. Williams* (§2.2). I consider how far this line about role responsibility in the context of disciplining for violations of standards of care can go, ultimately leaving the further implications of my view open (§2.3). I then revisit the initial motivation behind skepticism about criminal negligence, a particular view on *culpability*, and argue against such (§3).

1. The Disagreement About Criminal Negligence

Here, I introduce the core debate around criminal negligence. I then argue that in *some* cases, criminalizing negligence is permissible, and we should instead dispute which cases fall on which side of the line of permissibility on the basis of (1) their role responsibility and (2) the required responsiveness to public interest on the basis of that role responsibility.

The dispute around criminal negligence is an old one (See: Turner 1936; Hart 1968). Here, we will not review those older debates. What is essential to understand here is that when it comes to the condemnation of criminally negligent actors, it is their carelessness, not their mere

thoughtlessness, that we ought to be concerned about. This is not a point that has gone unnoticed.

Consider the influential Model Penal Code's treatment of negligence (as drafted in 1962):

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. (MPC §2.02(2)(d), underline added)

Following the MPC definition here, the most relevant feature of criminal negligence is the *lack* of something: here, the “failure to perceive [the risk].” Negligence, necessarily, is inadvertent, and this is what makes negligence stand apart from the other types of culpable mental states more often used to satisfy the requirements of *mens rea*. Negligence analysis is counterfactual—what an agent *should have* thought—rather than something actual (as in the case of the three other MPC culpable mental states: purpose, knowledge, and recklessness).

Negligence skeptics often rely on the view that we can only prevent harm that is *consciously risked* or *intended*. Negligence, by the simple definition, is thoughtless. We cannot successfully deter negligent harm by then punishing *after* the fact. We can, at best, try to prevent negligent harm from occurring at all. But even if someone knew a given law or rule against a certain action, this would fail to deter: if they are not advertent to a given risk, they cannot be consciously considering the ramifications of that violation from the standard. The empirical question of deterrence is central, as it could be taken to undermine all criminalization of negligence. If criminalizing negligence fails to deter, then we might say that in *all* cases of genuine inadvertence (even if we may dispute such), we should not criminally punish, assuming a certain type of view about the justification of punishment. But this relies upon an unverifiable assumption that, indeed, rules against negligent risk-taking *never* actually change the behavior of

actors. Maybe so, maybe not—I table that question here as, again, it seems somewhat unverifiable either way.

There is something about the Model Penal Code definition and our ordinary speech around negligence that is worth highlighting briefly here. A “failure to perceive” is somewhat vague. We speak of failure in many ways and *one way* to read a failure is as a wider failing, not just a mistake in a moment. This vagueness will be central to the argument in this chapter, for now. Let us just finish setting the stage first.

There is a further question beyond punishing for negligence. Why *criminal* law specifically? Instead of the general question, let us instead focus on the question of whether or not any negligent violations of standards should be made criminal. This question does not demand us to abandon intervening in all cases in which an actor acts negligently but, rather, justify our use of *criminal* law in any case. To answer this, consider Moore and Hurd (2011) and their central three criticisms of criminal negligence as to capture the spirit of negligence skepticism. Consider the following from Moore and Hurd (2011):

Parents who in no way adverted (in any sense, to any degree, at any level of generality, at any time) to the deadly risk posed by bad odor coming from their child’s mouth, may face criminal liability when their child loses his life to gangrene. Punishment in such a case, we think, is in error. It reveals the error of thinking that there is **some unconditional sense in which these parents could have done better**; or it rests on the error of thinking that in not adverted to this obvious risk, the parents revealed **some punishable flaw in their character**, such as not loving their own child enough; or it reflects the error of substituting for a liability that requires true culpability, **a liability that is ‘strict’**. Whichever of these subspecies of error motivates such an adjudicative conclusion, we take such a conclusion to go too far in imposing criminal liability. (pg. 195, boldface added)

The central errors of criminal negligence as they identify here as such are threefold: (1) the unconditional “could have done better,” (2) a flaw of character, (3) substituting strict liability in for genuine culpability. Now, let us unpack them and offer some initial questions.

Let us first unpack and reframe (1), this unconditional “could have done better.”²⁹ Grant an assumption: some mistakes are going to happen in such a way that it does not make sense to say that those who made the mistake could have done better. Even when good people are trying their best, terrible things may happen. Perhaps in *some* cases it is right to say that there is no meaningful sense in which we can say that the negligent actors could have done better. But should we say that about *all* cases of genuine, fleeting, but absolutely disastrous mistakes? That seems hasty. Rather: in what cases are we most likely to say something like the negligent could have done better? Well, most obviously in cases wherein we generally *demand* that some of us do better. In some cases, we do not speak of *could* but, instead, we say some of us *must* do better. In what cases would it be appropriate to speak of a reasonable demand for some people to do better? That is the better question to ask and will be the type of question we engage with in §2.

Continuing our initial framing, let us unpack what is going on in (2), the supposed punishing for flaws of character. Let us first reproduce the central point charitably. Imagine a case where parents genuinely never advert to the particular risk of death involved in a tooth ache and, as a result, their child dies (more on this actual case, *Williams*, later). Assume that this was, in this story, the parents indeed did *not* love their child enough. To seek to punish *because* of not loving one’s child enough is wrong; it is not a crime to not love one’s child on its own. Again, reframe this: no one argues for *that*, to punish for *lovelessness*. Recall a point made back in chapter 1: we do not care about character *merely* to punish for one’s character. We care about character insofar as it explains *why* some harm occurred. To not love one’s child is not a crime, but to *neglect* one’s unloved child is. This objection to criminal negligence consistently conflates

²⁹ Also see: Alexander Greenberg’s forthcoming (online 2024) “Could’ve Known Better” in *The Philosophical Quarterly*, a separate piece clarifying what the ‘could’ in such cases amounts to given the ambiguities involved in such a claim.

these two different questions, which is especially curious because such conflation ignores why we care about character testimony in actual criminal proceedings. Again, as *part* of a causal story being offered under scrutiny. We look to character as it relates to the decisions one made or, yes, failed to even consider, as part of scrutinizing when things go terribly wrong. This will be the focus of §2 in what follows.

Lastly, let us comment on (3), strict liability. This one I will not endeavor to reject and will simply grant: we should not criminally punish for matters of strict liability. I am assuming there is a genuine distinction between criminal negligence and strict liability; I am likewise generally skeptical of the justifiability of criminally punishing matters of strict liability. But such is a different discussion all together—all that is relevant is that we must provide some explanation of how negligence avoids slipping into strict liability, on which I follow Hart (1968) and will not discuss further.

Overall, (1) the “could have done better” and (2) how matters of character shape our judgments of genuine negligence, are the central questions that will be considered in what follows. We can answer these concerns in a way that we still should recognize that the criminalizing of *some* negligence is appropriate. In what follows, I show this iteratively: the strong cases are matters of medical negligence, the intermediate cases with open questions are matters of parental negligence, and the weak and controversial cases are matters of social relations more generally. However, in all such cases, we can better understand what is at stake by asking about the *public-facing* aspect of all these various roles in our society: we have strong public interest in the standards of the medical profession, some public interest in parenthood, and thin public interest in good social relations. How exactly all of this comes together I turn to now.

2. The Lines of Negligence, Responsibility, and Discipline

The better way to understand what is at stake when it comes to criminal negligence is as a question about where we draw morally important lines about when to intervene in cases of egregious deviations from standards of care across various contexts. Here, I seek to resist the claim that criminalizing negligence in cases I will discuss (1) involves an unreasonable expectation of “could have done better” or (2) punishes merely for flaws of character (See: §1). I reject both of these explanations across various contexts. First, I argue that medical negligence is our best starting point, and that we cannot understand the demands of the medical profession without understanding both (1) the internal standards and systems of accountability within medicine and (2) the egregiousness of violations required for criminal prosecution and, in turn, a conviction, thereafter, discussing and comparing the cases of *Adomako* and *Akerele* (§2.1). I then turn to argue that we should understand justified prosecutions of parental negligence as cases in which something so severe has happened that a public response is indeed warranted and appropriate (§2.2). Then, I go further this line and speculate how far we should go with this picture, discussing how far understanding ourselves in relation to others may take us without committing on that (§2.3).

2.1. *A Tale of Two Doctors, Adomako and Akerele*

Here, I want to sketch a contrast with two examples. Medical negligence is the strongest case of some rightful criminalization of negligence, though there are reasons to question this assumption that I am making.³⁰ If *any* cases of criminal negligence are justifiable, they shall be something

³⁰ Marcia Baron, in the defense of this dissertation, asked me about being more patient and understanding of doctors because of the role they play in society, their overwhelming desire to do good, and the stress most of them are under. These factors—it could be argued—should generally work in their defense. No one wants to prosecute a good

like this, even if one comes to disagree with my analysis of these two specific cases. To this end, a few steps. First, I will summarize my basic point here: that doctors are the best example of a profession uniquely responsible for both (1) themselves within the context of their profession and (2) the public as part of their accountability as members of their profession, and that this generates special grounds for criminalizing some cases of gross medical negligence. To show this, I compare two historical examples: *Adomako* and *Akerele*, to show that part of what we care about are explanations of why serious harm occurred, not just the mere fact that serious harm occurred. I then wrap up this section by unpacking how we draw the lines between accountability within a profession versus when public intervention via a criminal prosecution is called for.

No career in modern times is as invested with the trust of others as doctors. This is not by accident: over time, the medical profession as developed their standards in institutionalized manners that the public is generally aware of. Medical school, medical accreditation, medical associations, internal review boards: all across the profession of medicine there are constant checks and rechecks to, hopefully, to be able to offer some social guarantee that doctors are the best that they can be for their patients. These institutions engage politically, partially shaping the laws around what it means to be a doctor via systems like licensure. The law decides much of what it means to be a doctor (it does not make sense to speak of a wholly “independent doctor” for exactly this reason). When things go wrong, internal systems are in place: reporting requirements, internal reviews, medical appeal boards, so on and so forth.

But sometimes when things go wrong, a further step is taken. The prosecution, acting in the interest of the people of a given jurisdiction, *chooses to intervene*. It is easy to miss the

doctor, this I grant. But notice the work ‘good’ is doing. We are, by stipulation, discuss *the worst* of all possible mistakes a doctor can make. So, while I think this line about laxity and moral grace in judgment works for medical mistakes generally, it does not hold for when things go *as terribly wrong as we are imagining in criminal cases*. But it is a good question and an important nuance here and in what follows.

weight of this judgment from the outside, as academic perspectives on the substantive criminal law tend to underemphasize the procedural elements. But a prosecutor choosing to criminally prosecute a doctor is not a light decision and one that we should assume has some serious, considered moral judgment involved. Not only have experts likely been involved in deciding that some violation was especially gross and blameworthy, but a publicly empowered prosecutor has also likewise decided to seek to publicly scrutinize *a doctor's* mistake. In a sense, the prosecutor or some other state agent *chooses* to pierce the professional walls.

The existence of *the medical profession* as we know it in the modern world changes everything when it comes to determinations of medical negligence, particularly the gross, criminal kind. Doctors voluntarily subject themselves to these standards by joining their profession and maintaining themselves as professionals. They know that they are to be held to the highest standards, both within and outside of the institutional confines of the profession. The profession, as a collective entity, is publicly accountable in a unique way that generates further demanding obligations on all particular members of that profession in a way that negligence skeptics cannot, I argue, convincingly dismiss to the degree that their negligence skepticism would so require.

Perhaps this point about *professions* could generalize beyond doctors, including the claims that follow. I will not decide on this here; I will also not decide on the limits of 'professions'. My point in discussing doctors as a profession is that if *any* case of criminalizing negligence is going to be justified, it is going to be cases of doctors violating their standard of care within the context of the medical profession that they willfully joined and are expected to hold themselves to at all times. It is in this context that claims like "I could not have done better" or "I did not mean to!" are not going to be taken to be adequately excusing. And we are

discussing cases in which the harm(s) involved are so serious, even reasonable alternatives like license revocation, are judged to be insufficient recourse for what happened.

Now consider some real cases of serious medical harm to sketch this central point in greater detail: *Adomako* and *Akerele*. After giving an overview of the two cases, I will contrast the two cases to explain why Adomako, but not Akerele, faced criminal prosecution and subsequent punishment. Both cases involved avoidable death, but their difference is best understood as *a difference of how they carried themselves as responsible doctors*, not the just the severity of the harm that they brought about.

Adomako first: Adomako was an anesthetist (anesthesiologist) responsible for the oxygen and anesthesia of a patient, Alan Loveland. The oxygen tube had become disconnected. The blood pressure alarm went off and Adomako attended to the machine, not the patient, assuming an error. He administered drugs for blood pressure based on the warning but did not realize for four minutes that Loveland was turning blue in the face. By the time the mistake was realized, it was too late: Loveland died 6 months later, never regaining his consciousness (For another version of this summary, see: Baron 2019, 339).

Now, for comparison, *Akerele* (*Akerele v. R.* 1942 PC no. 17). Akerele was a touring doctor way back in colonial British Nigeria. John Oni Akerele was traveling around the region near the town of Asaga administering sodium bismuth tartrate treatment for yaws, a cousin infection of syphilis. Over two days, he erroneously prepared the solution at a concentration ten times higher than he intended due to the moving of a decimal place. Ten of his patients, all children, died. So, this case went to British courts, more precisely the Privy Council (Nigeria was a colonial subject and the Privy Council was the legal appellate body for such domains). But unlike Adomako, Akerele was not criminally punished. The courts held his mistake was not rash

or sufficiently negligent and so he, unlike Adomako, could not rightfully be charged with even manslaughter.

Akerele did much more damage than Adomako, yet Akerele was not punished as Adomako was. Why is this? Let us begin with why Adomako was convicted. Well, there are two further details that I think are especially damning: (1) the expert testimony levied against him and (2) his failure to accurately report his mistake. At testimony, A. P. Adams, a professor of medicine, testified that the “lightness” of Loveland’s blood pressure was a sign of hypoxia, “Disconnection of a part of the breathing system is the most frequent of the various problems encountered during an anesthetic and thus should be one of the first things to consider in a crisis.” (Brahams 1990, 981-2). Adomako, too, did not record his mistake and the patient’s resulting cyanosis, “only admitt[ing] to it under cross examination, only admitting the mistake under cross examination in court (Brahams 1990, 982). If that does not seem culpable in some way, I am unsure what is.³¹ Akerele, on the other hand, was operating largely independently by necessity, doing charitable work that otherwise may have never even been attempted by others, and his failure was in the simple mixing of a solution beforehand. Akerele was not *disinterested* in the wellbeing of his patients, quite the opposite! Yaws is a serious condition, so his task was *already* life-or-death. Even though his mistake was very serious, his mistake was categorically different than the kind of mistake Adomako made.

In his fair defense, consider Adomako’s work situation. He was *locum* (on-call relief) for multiple hospitals seven days a week and was called in at the last minute for a procedure he admittedly had little experience with. Whether or not Adomako should have borne such great

³¹ Maybe perjury instead, which Adomako was charged with but acquitted for his spotty notes which he had sworn on, not this particular omission. The hiding of such error is *mea culpa* of *some* kind, albeit not what I am attempting to show here regarding the *negligent* mistake.

responsibility for such an error is an open question—the hospital had reason to foresee such a mistake occurring under such conditions. His employers explicitly did not check on Adomako’s credentials, as “The Mayday Hospital had not taken up references for his locum appointments as an anesthetic registrar since the posts were considered too short duration to warrant this.” (Braham 1990, 981). *No one bothered to check on Adomako*, mainly just because he had worked at another hospital before. Adomako was certainly not *alone* in his responsibility; this I fully grant, but it is not the point I am defending here.

Instead, now imagine the story from the *jury’s* perspective. Adomako is there, on trial, pleading innocent. He is defending himself against a charge of manslaughter. Against this, as Braham reports, “[Adomako] had never joined the Association of Anesthetists” and “The Mayday Hospital had not taken up references,” (Braham 1990, 981) which Adomako likely knew. Adomako was voluntarily moonlighting above full-time. Experts, then, testified against the reasonableness of his mistake. He at least failed to accurately report in his records about the mistake until he was on the stand, including to his colleagues and those who endeavored to undo his literally fatal mistake. It does not just seem that Adomako was not attending to the patient, Loveland, in the right way, it also seems as though Adomako was not attending to *himself as a doctor* in an important way, as he was described as “lacking basic competence and specialist training” and “never should have been given sole and unsupervised responsibility for patient’s lives” (Braham 1990, 982). While not his fault alone, Adomako was not taking responsibility for himself as a doctor, which brought about this tragedy in a way that distinctive attaches to him as an individual, responsible doctor, even with the supervisory failures. And so, he was sent to prison for 6 months.

So, what does *Adomako*, especially compared to *Akerele*, tell us about *criminal negligence*? Remember, our endeavor here is to resist the principled objection to criminal negligence, so our goal is specifically to say that the use of the apparatus of the criminal law here is appropriate even given alternatives like the civil law or private, professional proceeding. *Adomako* is an example of a case where the prosecution for criminal negligence, given the holistic conduct of how *Adomako* carried himself as a doctor, was appropriate and justified. *Adomako* was punished for his negligent mistake *and why that negligence mistake happened*. The mistake was egregious to the point that it does not just call for the loss of license, as such serious mistakes also betray a standing standard that the medical profession holds itself to as a standing promise the general public and their trust in medicine.

We have now captured the beginnings of a more general explanation of why some cases of negligence are elevated to criminal concerns and why some negligence violations of standards are not. *It is not just about the harm itself*. As a matter of fact, if we started talking about the seriousness of the harm, we would be distorting what is going on between these two cases. *It is more about why the harm happened and what was done about it*. *Akerele* took responsibility for his conduct and mistake. *Adomako*, in some ways, did not. A major reason why the story escalated with *Adomako* in a way it did not with *Akerele*, in my view, is that there was little to *investigate* with *Akerele*. This was not the case with *Adomako*, as said before. *Adomako* did not officially report the blue face and disconnected hose. It was *during* the coroner's inquiries that, instead, a criminal investigation and subsequent prosecution was launched. At a certain point there was a key realization: there was more to the death of Alan Loveland. *That* was when the possibility of criminal proceeding came into play, not just as a judgment of what degree of harm had occurred.

If *any* case of criminal negligence is going to be a justified prosecution, it is going to be a case like *Adomako*—wherein the negligent mistake was not in isolation but, rather, was a result of how a doctor failed to carry themselves responsibly. The failure of *Adomako* was holistic, not just isolated, as the further details of the case show. *Adomako*'s failures were so severe that they reasonably were seen as undermining public trust in the very medical profession of which he was a voluntary member. In a sense, *Adomako* was culpable for a *betrayal*: a betrayal of his oath to himself, his profession, his patient, and to the greater society. Our determinations about such cases are not just about the degree of the error but how the type of error(s) made reflect back onto the standard of care, understood as a collective understanding of what is reasonable for a doctor within the context of that profession to do. Sometimes mistakes are more than just mistakes, as I hope to have shown.

2.2. Parenthood, Between the Private and Public

In this section, I discuss criminal negligence in the context of parental error. Firstly, I sketch parenthood as an institution and draw an analogy to medicine as an institution. Then, I discuss the difficult case of *State v. Williams* and take the strong stance that their prosecution was justified, arguing that their mistake demonstrated a clear misorientation toward the interest of their infant. I then conclude this section by defending some cases of public intervention through specifically criminal law, arguing that there is a reasonable demand from the public for children to be raised and raised well enough to become part of that same public, anticipating later discussion of objections to the contrary (§3).

First, the general picture of parenthood as an institution. We may ordinarily, uncritically think of the household relation as a private one, yet nearly every society on the planet has

exceptions to this. Child Protective Services (CPS) in the United States is an example of this. There is a balance of considerations, and, at times, we even forcibly separate parents and children. There are many cases which we may be uncertain about, but this is not an inquiry about the justice of CPS and similar institutions. Parents are also legally defined guardians, and guardianship comes with all kinds of legal duties and responsibilities. Guardians are also responsible for enrolling children in schooling of some kind, and schools then have some kind of mixed responsibility to make sure that the home situation is not neglectful or abusive. Parents do not just exist in isolation from everyone else—to invoke the comment adage, “it takes a village to raise a child.”

In this context of parents within a greater society, as in the institutionalized medical context, we would never seriously consider a plea of inadvertence or *thoughtlessness* to be wholly excusing in the case of parental neglect. Even if we do not necessarily need to *criminally* charge every parent that has their children taken away by CPS, we want answers. For example, poverty: it would be difficult to say that the parent is *obviously* culpable in the right kind of way if their neglect is resulting, substantially, from poverty. If a parent cannot feed themselves, we are more likely to see the story as a familial tragedy and seek to provide aid. But we would still want the parent to at least explain this: “I am sorry, I just could not keep up given the circumstances.” To fail to have a thought is not excusing in these contexts. Why? The central point is that if anything, a plea of thoughtlessness would not ameliorate our judgment of the parent charged with neglect as it might in other areas of ordinary life. If anything, such would be an absurd plea. Such a claim as, “I did not think my child could be starving!” would run *counter* to who a parent is supposed to be. In family courts such a defense would be met with shocked gasps, not sympathetic sighs.

Real cases are sometimes far more nuanced than the case of excusing (or mitigating) poverty or explicitly thoughtless neglect. One such case which has gotten attention the literature on criminal negligence is *State (of Washington) v. Williams* (1971),³² where a child died as a result of an untreated tooth infection:

[B]oth defendants were aware that William Joseph Tabafunda was ill during the period September 1, 1968 to September 12, 1968. The defendants were ignorant. They did not realize how sick the baby was. They thought that the baby had a toothache and no layman regards a toothache as dangerous to life. They loved the baby and gave it aspirin in hopes of improving its condition. They did not take the baby to a doctor because of fear that the Welfare Department would take the baby away from them. They knew that medical help was available because of previous experience. They had no excuse that the law will recognize for not taking the baby to a doctor.

On this basic picture alone, we might make a similar condemnation to the thoughtless starver of their child: “I did not think my child could die as a result of this.” *However*, the Williams family had a further complication: they were worried about the state taking their child away as they were an Indigenous couple and had a reasonable distrust for the government of the United States.³³ Given this, was the *mistake* of the Williams family *reasonable*?

While a difficult case, I contend that the State of Washington was right to pursue criminal charges against the Williams family. While I sympathize with and understand why they acted as they did, their excuses reflect a serious misorientation toward the interest of their child. *Even if* they believed that they would go to jail for child neglect or that their child would be taken away

³² The appeals case: 22 Ill.4 Wn. App. 899, 484 P.2d 1162 (Ct. App. 1971). This case is the basis of Moore and Hurd’s passing mention of the genuinely inadvertent parent, albeit they removed much of the interesting and difficult nuances of *Williams*. The legal question on appeal was whether ordinary negligence, not gross negligence, was sufficient for their criminal conviction, understood as whether or not a reasonable person in their situation would have done similarly or not and if the prosecution had actually shown that. I will not consider this question of law here, instead only discussing the case itself.

³³ There are many sources on the history of Indian boarding schools and child trafficking by the United States government. See: Nick Estes’s 2019 “The U.S. stole generations of Indigenous children to open the West” for just one example. These Indian boarding schools are particularly infamous for their child graveyards, as often more children would die in these schools than would end up graduating.

by CPS, I do not think we should accept their arguably willful ignorance of the risk as excusing. To just give the baby aspirin for an illness for *12 consecutive days* is precisely the kind of distorted interest in the infant's well-being which justifies intervention. *They were more worried about keeping their baby than making sure their baby was going to be alright*, as difficult as that is to stomach and as harsh as that may be to say. Even with their reasonable distrust of the U.S. government, they should have sought out help of *any* serious form.

Let's say some more about justifying *criminal* intervention. What good does it do to punish grieving parents for such a tragedy? Do we punish to express our reprobation? Do we punish to educate them and other parents? Perhaps both, but I think something more. When parents fail, who serves to pay respect to the rights of the dead (or otherwise harm) child? *Someone* has to stand for the rights and interests of child when the parents fail, even in understandable ways as in *Williams*, and so even without seeking reprobative or educative ends, someone acting in some way in the interests of another against the erroneous actions of the parents is justified—even if we may, in turn, disagree about who should do so and how. The mistake of the parents in this case and similar ones is, again, like a betrayal: they failed in their commitment to what their child needed, not just in making an understandable mistake but in carrying themselves in such a way that make a mistake that is no longer understandable upon further reflection. Remember: *12 days*.

Overall, I have sought here to show that parents are not so different from doctors. Parenthood may not be as expressly institutionalized as the medical profession, but their responsibilities are responsive to their role and to the public interest in that role in a similar manner. Even if we may be more forgiving than in medical cases, parents voluntarily accept their

responsibilities as parents and are rightfully expected to not even allow for the very possibility of such terrible, gross errors.

2.3. The Limits of Public Interest.

How far does the general line of thought here go? We accept a role, we accept responsibility, we accept being held to that. So far, we have discussed doctors and parents. And thus far this has been grounded in reasonable public interest in severe deviations from standards of care. What is particularly important is when a role, by the very nature of the tasks that role is invested in fulfilling, is accountable to the public more generally. Doctor-patient relations are individually private, but everyone has an interest in their doctors taking themselves very seriously and not just forgetting to check an oxygen line. In order for the doctor-patient relationship to work, that trust has to be there, and in order for that trust to be there, just invoking the idea of “innocent mistakes happen” cannot be enough. Parents, too, must be held to certain demanding standards for us to have trust in parents as a social institution. That trust must be there, and we must be able to trust parents to raise their kids; trust, in turn, demands accountability for when that trust fails. Sensible thoughts, surely, even if we are not yet explicitly talking about *criminal* negligence—we will return to this in considering an objection in §3, for now let us just consider how far the line may go first.

There is a danger here. If what we care about are uniquely morally weighty roles, do we not start to capture a *lot* of people? Already, parenthood does—most people will have children in their lifetime. We spoke of doctors and professions, but if we might say similar things about *any* occupation, suddenly we may be speaking of anyone who is employed, thereby exploding the domain of claims I ought to defend.

I am not trying to say for certain where we should draw these lines: rather, my discussion of doctors and parents is intended to show that some cases belong in the camp of rightfully criminalized negligence. I remain open and uncertain of how further cases may fall more reasonably on one side of another between the permissibly criminalized versus the impermissible to criminalize. So, let me speak toward being more inclusive first, then let me conclude this section by discussing dangers to avoid.

Perhaps we should be even more inclusive than what I have illustrated and defended here. Consider the relationship between employers and employees. If we say that the relationship of employment may generate obligations like those that ground criminal negligence in some cases, then indeed many more cases of criminalizing negligence may be justified. I am open to this but would most care as to *why* one might want to claim this. Perhaps we may want to criminalize negligence which resulted in massive societal harm, such as environmental disasters, and place a special onus on employers to ensure that their employees are doing all that they can to prevent such (or vice versa). I would be open to that, but it would be a different endeavor than the one I am seeking to justify here. Perhaps we may want to criminalize negligent breaches of trust, but I am more inclined to think that contractual breaking of trust should be a contractual manner, not a public matter, as the claim that trust between employers and employees is a public matter seems dubious at best at a glance. Again, however, I leave such questions to others to consider further if they desire.

Rather, while my inquiry here is interested in justifying *some* cases of criminalized negligence, I tend to favor fairly restrictive views on when such is appropriate. Doctors and parents are cases where I am confident in my judgments for reasons I hope have made clear, but my confidence in the picture of rightful cases of disciplining use of criminal law quickly

disappears from there, except for case of corporate neglect (but whether such is ever actually ‘negligence’ I find dubious and so is a different conversation). While I think that criminal law is multifaceted and rightfully so, I still do also think that the criminal law should be fairly restricted, just not in the principled restriction-for-its-own sake that I identified and rejected in certain minimalisms about the criminal law (chapter 1).

3. An Objection Considered: Doubling Down on Criminal Culpability.

All of what we have discussed thus far is *not* to say any *major* violation should become automatically *criminal*. Remember: our goal in this inquiry is to address the *principled* objection to criminal negligence and to show that *some* cases of criminalizing negligence are justified. My view depends upon the claim that by taking on certain roles, we voluntarily place ourselves in a position of higher standards and thereby becoming rightfully held to those more demanding standards of care. The doctor, by virtue of becoming a doctor, accepts this, should accept this, and should reaffirm this. That is what it means to be a responsible doctor and, further, others are then justified in holding that doctor responsible. Likewise, parents who become lawful guardians become parents, including the moral identity of parenthood grounded in a special conception of the role-based responsibility of being a parent. In both cases of doctors and parents, their status as a doctor or parent denies them the excuse of “I did not think!” or “I did not know!” They are responsible in a way that goes beyond the ordinary responsibility afforded to careless fools.

But *criminally*? *Criminally* responsible? That *specific* skepticism still lingers. Some may see cases like Adomako and Akerle and still resist the idea that *criminal* law is an appropriate means of holding even the most serious and damning of mistakes as criminally responsible. No negligence mistake, no matter how gross, should be treated criminally, for they are not *culpable*

in the right way—in a sense, this objection is a doubling-down on the central claim of negligence skepticism.

My reasons for rejecting this require us to go back to the discussions of earlier chapters. Recall, the moral outlook that, I argued, was at the heart of certain, objectionable minimalisms about criminal law. The explanation of what we care about in criminal law was flattened to something like liberty, choice, or willful risk (See: chapter 1). Any range of views suffices here, but think about all of the possible, simplistic explanations we may offer to try to excuse some terrible, isolated moment. Now take some very serious medical error, like Adomako's. We may blame him, we may even punish him for *other* errors he made, but not for negligent homicide. He did not in any meaningful sense intend to bring about Loveland's death; he never even adverted to that possibility. Adomako made an innocent and fleeting mistake, even if he made culpable decision before and after that fateful moment. We might offer a number of moral defenses for Adomako that resemble those earlier views: Adomako lacked a culpable *choice*, Adomako failed to *willfully risk death*, or some view about Adomako's liberty, so on. Why should we not accept those kinds of defenses we may offer?

Again, my main problem with this picture is that it *isolates* Adomako at that passing moment, removing him both from the context of himself and his conduct up to that moment *and* the greater context of his job, his career, and his profession. There is no convincing reason to cut off our analysis of Adomako's moral agency as a doctor in such an artificial way. It denies us the judgments of fellow experts in Adomako's profession *and* the public scrutiny and judgment he underwent. From the armchair and removing that central importance of scrutiny and accountability under pressure, we might forgive Adomako, but at that point we are no longer actually talking about the real case of *Adomako*. Adomako was, in reality, put on trial, and in

reality convicted for something. Adomako's best defenses seem to ask us to reimagine the actual, difficult case of Adomako, which is a tall task from the arm chair and one that we should resist without really thorough and compelling evidence, *such as that offered in a real, long trial*.

Further, there is little reason to think that we want to narrow the interest of criminal law to just not scrutinize cases in which someone claims a genuine mistake. It is often an open question as to whether or not a mistake was genuinely and wholly inadvertent and in some cases that might be the crucial difference in trial. But, again, *in trial*. To prejudicially reject the role of criminal negligence in what we want out of criminal law goes against part of what we want out of criminal law: as a narrow means of disciplining the most severe and serious of deviations from the standard of care (revisit chapter 2, §4 for more on such). And so, I find myself unconvinced by the doubling down on negligence skepticism.

Conclusion. Between Duty and the Freedom to Make Mistakes

We have two types of large moral concerns that are in tension. On one hand, we have the usual innocence of mistakes, which gives us some initial reason to resist being too harsh on the truly thoughtless mistakes we are all guilty of sometimes. This seems to give us reason to resist criminal negligence. But on the other hand, we have the seriousness of certain role in a free society, like the trust put into doctors and parents alike. We want to demand more from *certain* others in a way that undermines that initial innocence of mistakes. "I just made a mistake!" is not an excuse we accept from certain people. Whether or not we should expand that category, those with *special standards of care*, I here leave open. What I have wished to show is that negligence skepticism has a difficult, narrow problem of explaining away the role of criminal negligence in certain gross deviations from the standard of care in *those specific moral contexts*.

Ultimately, and a separate, greater inquiry, is that this depends on what we *want* criminal law to *do*, which is part of the greater inquiry of this dissertation. If one endorses minimalism of the type earlier rejected, then this discussion will have been a non-starter; in earlier chapters, though, I have resisted this tendency. We should care about these serious offenses which reflect a unique type of failing of one's role-based responsibilities, and I see no principled reason to exclude such concerns from the domain of interest of criminal law.

References

AIR 1942 PC no. 17 / 1941 8 WACA 56 (*Akerele v. R.*)

1 A.C. 171 (1995) (*R. v. Adomako*)

4 Wn. App. 908 (Wash. Ct. App. 1971) (*State of Washington v. Williams*)

Baron, Marcia. 2020. "Negligence, *Mens Rea*, and What We Want the Element of *Mens Rea* to Provide." *Criminal Law and Philosophy* 14: 69-89.

Brahams, D. 1990. Two locum anaesthetists convicted of manslaughter. *Anaesthesia* 45: 981-2.

Greenberg, Alexander. *Forthcoming*. "Could've Known Better." *The Philosophical Quarterly*. Available as an online advance article, 2024, pqa130

Hart, H. L. A. 2008; 1968. *Punishment and Responsibility*, 2nd Edition. New York: Oxford University Press.

Model Penal Code §2.02(2)(d).

Moore, Michael S. and Hurd, Heidi M. 2011. "Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence." *Criminal Law and Philosophy* 5: 147-98.

Turner, J. W. C. 1968; 1945; 1936. "The Mental Element in Crimes at Common Law." *The Modern Approach to Criminal Law: English Studies in Criminal Law* vol. 4 (Kraus Reprint: Nendeln, Liechtenstein): 209.

Chapter 4. On The Special Status of Hate Crimes

The central dispute around hate crimes, especially leading up to the passage of the 2009 Matthew Shepard and James Byrd Jr. Act, is a concern about whether or not a crime is worthy of linear penalty enhancement because of a motivating hate toward a specific group. Here, this chapter argues that the political project to address serious and persistent problems faced by particular social groups in a liberal society grounds the special status of hate crimes, thereby justifying the establishment of broad protections shared by everyone. This also helps to explain the special status of at least some hate crime perpetrations, giving some defense of the special treatment of those offenders compared to more ordinary offenders. Centrally, hate crime statutes need not specifically enhance penalties to successfully identify and ameliorate patterns of injustices. I argue that this identification and carving out is a justified symbolic use of criminal law, leaving open what precisely the practical, special treatment should amount to.

Introduction. Is Hatred Worse?

What, if anything, makes hatred toward a *group* worse? A slew of crimes occupies a special moral space as the most morally detestable: arson, assault, rape, murder, just to name a few. The motivations behind those crimes involve a range of culpable mental states or detestable attitudes. Sometimes people murder out of jealousy. Sometimes the desire for revenge overwhelms otherwise good people and things get carried too far. Sometimes we are betrayed by the people we love; we grow to hate them. Hate crime statutes, though, have one unique feature: they treat a crime as special when motivated by *hatred* (or some analogy like *animus*, see: §1) toward a protected group. Moral sentiments around actions driven by hate are quite strong, but that is often because hatred motivates bad deeds more generally. Like murder. But criminal law is full

of stories of deeply repugnant attitudes. Many different kinds of vicious attitudes can motivate crimes, not just the type of animus found in hate crimes. What, if anything, makes certain *directed* hateful attitudes more detestable than the other kinds of attitudes which motivate other serious offenses? Is any such difference the kind that should be legally relevant? What justifies the special status of *hate crimes*?³⁴

Firstly, the special status of hate crime *law* is explained and justified by its symbolic function, grounded in a fair collective commitment to address injustice; secondly, the special status of at least some hate crime *perpetrators* is explained by the fact that their hateful motivation directs their actions toward both direct *and indirect* victims. This paper defends both of these claims: the special status of hate crimes and the special culpable mental state of at least some hate crime perpetrators.

³⁴ Discussions around hate crimes are often motivated by cases of incredibly brutal violence, most obviously the recent discussions and legislation around lynching (See: Emmett Till Antilynching Act; amended 18 U.S.C. §249(a)(5-6), defining the *conspiracy* to commit a hate crime as itself a federal crime). Those types of offenses receive the most attention in academia, law, and in the public eye in some cases, sometimes motivating new legislation outright.

Luckily, these especially heinous offenses are actually exceedingly rare: 219 cases of murder or non-negligent manslaughter were reported as hate crimes to the FBI between 2012 to 2022; contrast these from by far the most common offenses reported as hate crimes over the same period: intimidation (29,179, 31% of all offenses), property damage (22,781, 24%), simple assault (21,095, 22%), and aggravated assault (11,395, 12%). Offenses such as murder, rape, and kidnapping all account for less than 1% of offenses each. It should also be noted that while hate crime prevalence is rising, hate crimes generally remain relatively rare: in 2022 alone, 809,381 violent offenses, 5,049,721 property offenses, and 1,342,270 larceny or other offenses were reported to the FBI. For contrast, 11,613 crimes were reported as hate crimes. Around 0.1%. Narcotic violations alone (13,120) are more common than *all* reported hate crimes combined.

However, hate crimes are statistically more violent than crimes generally: types of assault (intimidation and batteries) account for a majority of hate crimes whereas property crimes (i.e. burglary, larceny, theft) are a supermajority of general criminal offenses, as the numbers above show.

These numbers are imperfect, as not all jurisdictions report to the FBI. The National Incident-Based Reporting System (NIBRS), which these numbers are based on, covers 75% of the population, leaving room for some error. Underreporting is a serious concern when it comes to hate crimes, especially in areas where law enforcement is significantly biased. But these are the best numbers available.

This chapter proceeds in three main parts. In the first part, I frame the dispute: first by defining hate crimes (§1.1), then by summarizing the usual debate around penalty enhancement for hate crimes (§1.2), and lastly by discussing some alternative concerns about hate crimes (§1.3). In the second part, I reframe this usual debate and argue in favor of an alternative position. There, I first draw on the legal history and statutory text to justify my subsequent reframing (§2.1). I then explain the core position of this chapter: that hate crime statutes are a symbolic use of criminal law justified by non-ideal considerations of justice (§2.2). After this, I argue that we can defend the special treatment of at least some perpetrators of hate crimes by reference to their *double* will or intention, which directly inculcates them in a distinctive way compared to other forms of crimes (§2.3). From there, I summarize my alternative view as hate crime statutes serving as “symbolic commitments with bite,” where I argue that the real, brutal realities of hate crimes call for unusual but indeed justifiable measures (§2.4). In the third part, I consider some objections. First, I revisit and reject a dispute about unjust privileges from the actual political debates leading up to the 2009 act (§3.1). Then, I revisit Hurd’s objection that hate crime statutes come to unjustly punish merely for differences of character, which I reject on the grounds that we punish for how one’s character and agency goes into the causal explanation for why what happened, not just in isolation from the deeds in question (§3.2). Third and last, I discuss Card’s objection that hate crime statutes arbitrarily and unjustly select a set of crimes as special for their disproportionate burdens without selecting for other group-based, disproportionately harming offenses, such as sexual violence, an objection which I partially grant and partially attribute to accidents of law (§3.3). The chapter then concludes with five points as to what this chapter has sought to show.

1. The Usual Framing

The usual concerns about hate crimes are twofold. The first is a concern about the very category: that the hate involved in hate crimes is not special in a way as to justify a special, unique label. The second is a concern about the usual penalty enhancement clauses, which take an already established crime and add usually a static penalty. In this part, I first define ‘hate crime’ and describe possible variations, drawing mainly from the framework offered by Brudholm (2015) (§1.1). Then I focus on the two usual concerns about the special label of ‘hate crimes’ and their affixed penalty enhancement (§1.2); the latter concern I partially grant³⁵ but argue later that it is a misdirection about what hate crime statutes are intended to redress. I then look at some alternative worries about hate crime statutes and offer reasons for avoiding or dismissing such concerns (§1.3), as to justify my subsequent reframing of the central question and response in the next part of this chapter.

1.1 Defining ‘Hate Crime’

We should first take some time to explain, precisely, what a hate crime is. Brudholm (2015) is helpful here, as he offers a clean four-part definition that I shall follow:

- (1) **A criminal act.** Hate crimes do not “stand alone” as offenses; without the hatred, the offense is still a crime.
- (2) **Attitudinal requirement.** Hate, specifically, is not always required: hate, prejudice, antipathy, animus may meet the threshold in certain jurisdictions; mere ‘discriminatory selection’ for instrumental reasons may suffice in some jurisdictions.
- (3) **Evidential requirement.** Specifically, sufficient proof that the crime was a *hate* crime, separable from evidence of the base offense. May require proof of partial motive or full motive, depending on concept and jurisdiction.

³⁵ As to not hold my cards to my chest: the automatic penalty enhancements are a symptom of the more general problems of overpunishment in the United States. If we lived in a world which overpunishment was not such a prominent concern, even such linear, uncritical additions to usual sentences would not be nearly as objectionable. But in a more ideal world, under the view I advance in this chapter, both (1) punishment would be generally lower but (2) additional penalty for hate crimes would be nonetheless justified.

- (4) **Relevant object of attitude.** Not all objects of hate will count, groups need to be defined as protected: usually based on race, gender, nationality, religion, sexual orientation, disability, or similar categories. Some groups would be unusual or inappropriate to seek to include (e.g. pedophiles and Neo-Nazis).

(Summary of Brudholm 2015, pg. 84-7)

Let us take some time to clarify each of these features and understand how they can vary. The first requirement, a criminal act, is fairly straightforward. There are no hate crimes that would not be crimes if not for their motive. Take intimidation: intimidation is, roughly speaking, a type of assault. The most famous type of intimidation is cross-burning on someone else's property. While burning a cross on property one owns is protected first amendment speech (See: *Virginia v. Black*, 538 U.S. 343), what makes cross-burnings criminal intimidation, typically, is that it is directed at a person, usually by being done on *the victim's* property. The "intent to intimidate" is required for it to be a crime. What makes it a *hate* crime if it is intended to intimidate someone on the *basis of* some protected identity, such as their status as Black, Catholic, gay, etc. The point here is that hate crimes, without hatred, are still crimes. There are no hate crimes which, without *hate*, would not be crimes.³⁶

The attitudinal requirement requires some specification of the referent of 'hate'. What, under a given statute, does it mean to hate? Typically, we assume it is explicit and motivating racial hatred ("I hate them!") or prejudice ("They are bad! I should punish them!"). Someone hates, say, gay men and so kills a gay man. That being said, a statute could, set this line to be somewhere else, such as antipathy or animus, imagine claims like "I just don't like *them*!" Strictly speaking, an *attitude* might not even be required, as statute could merely require some

³⁶ *Outside* of the United States, the exception to this is hate speech. But the criminalization of hate speech in other countries often distinguishes hate speech as a crime from hate crimes as we speak of them in the United States. So these distinctions can become muddled—here, we are concerned with hate crimes as I am so defining them, though I will sometimes mention parallel debates about the criminalization of hate speech in other countries.

discriminatory selection, such as someone motivated to do a hate crime for obscure instrumental reasons; say, someone could be motivated to do racial killings based upon a belief that it will bring about a race war and, in turn, some preferred state of affairs, such as a white ethnostate. Or an even lower bar of discriminatory selection, such as robbing Jews because one would “Feel less bad about it” or even robbing from a protected class simply because “They are easier to rob.” Here, what I am saying is that any hate crime statute must define its required mental state *or* what constitutes sufficient discriminatory selection (See: Lawrence (1999) for more on questions about discriminatory selection). All this being said, U.S. standards tend to require explicit antipathy at minimum: there must be some attitude about the group and that attitude must have been at least partially motivating beyond instrumental reasons.

Now, the evidentiary standard. A hate crimes statute must define what must be shown by a prosecution, such as if the relevant attitude must be shown to have been *partially* or *wholly* motivating. An evidentiary standard that required hate crimes to be shown as having been solely motivated by hatred, for example, would end up including fewer offenses than one that required proof only of partial motivation. Take explicit hatred. In a racial killing, should the prosecution have to prove for an offense to be a hate crime that the perpetrator’s racial hatred was *the main reason* they committed a crime or *a part of why* they committed a crime? Those lines are not always clear and having to prove central motivation may be difficult. The point here is that a statute can vary on requiring proof of sole or primary motivation or merely require proof of partial motivation, often depending on various practical, prosecutorial concerns.

The relevant object of attitude, simply put, is the defined set of protected classes. If a statute says ‘race’, then any crime committed intentionally (or another defined required mental state) against someone for their race gets counted. Statutes vary a lot in some of these categories.

Political orientation and housing status are examples of identity claims *not* counted for the purposes of being counted as hate crimes under American federal statute, though some states do include such in their state-level hate crime statutes.³⁷ Further, some categories may end up generating some unexpected consequences. A protection of ‘political identity’, for example, may end up to including certain groups that Americans would usually be disinclined to include such as Neo-Nazis, which runs counter to an assumed inappropriateness restriction. A protection against racially motivated crimes targeting marginalized groups could be constructed as to *not* include offenses targeting white people in a context where white people are not marginalized. American federal statute *does* include anti-white offenses: 17.1% of race-based federal hate crime prosecutions involved white victims (48.6% were anti-Black bias incidents, for comparison).³⁸ Conceptually, jurisdictions could choose otherwise, instead opting to be more specific by saying something such as ‘Black’ instead of ‘race’. U.S. statutes do not do this, and it is unlikely any such statute could stand scrutiny due to the 14th Amendment’s guarantee of the equal protection of the laws.

With this summary of hate crime statutes and what features such laws must have, let us now turn to discussing the central controversy around them. The central controversy concerns not the definition of hate crime statutes or how, precisely, we should design them but, rather, the typical *penalty enhancement* that is attached to them. More on that now.

³⁷ As of 2025, D.C., Iowa, Utah, West Virginia, cover crimes targeting political affiliation or expression; D.C., Florida, Maine, Maryland, and Utah cover crimes targeting the homeless.

³⁸ 2017 FBI Hate Crimes Statistics as part of the Uniform Crime Reporting Program.

1.2. The Usual Debate Around Penalty Enhancement

With the basics of what counts as a hate crime statute clarified, now we turn to the main disputes about actual hate crime statutes. One part of this dispute is the very specification of some crimes as special by statute, but the second and more practically significant part is the penalty enhancement tied to that. Hate crimes receive additional punishment: by federal statute, a simple addition to time served typically. This last part is problematic, which I straightforwardly grant, but I will later argue that the focus on this concern ends up misframing what these statutes are intended to do and are justifying in pursuing. In this section, however, I only seek to review the usual criticisms of hate crime statutes.

The first concern: that the special label of ‘hate crime’ is unwarranted. The most obvious and intuitive response—a common moral sentiment—is that hatred is *worse*, both as an emotion and as a motivator of action. Hatred itself is bad; hateful acts are bad. There are a variety of reasons people feel that way. In ordinary life, someone acting upon hatred or malice will almost always do something wrong or at least worse than they would have otherwise. We dislike the ways hatred manifests in our lives: prejudice, betrayal, dehumanization, and so on. It is usually considered *vicious* for good reason. Thus, hate crimes should be considered culpable because their underlying attitude is a more detestable one, similar to why we punish purposeful and intentional harming worse than harming stemming from recklessness or negligence (e.g. murder versus manslaughter), so the line goes. Regardless of why and how reasonable such a view is, hatred has a special status among the moral emotions. And that special status, in turn, motivates treating it differently from other motivating attitudes in our moral practice and, here more relevantly, our legal practices.

But there is also reason to question this common sentiment. Particularly, there is resistance to the common sentiment that hate is a particularly detestable emotion. Berit Brogaard's *Hatred* (2021) expressly argues that while hatred is more dangerous, it is wrong to think it is a morally worse emotion. For Brogaard, hatred can be justified and proper when directed toward some objects, such as an oppressive system which denies rights and freedom to marginalized peoples. Paula Keller (2021) resists this line, instead arguing that Brogaard confuses hatred with similar attitudes such as contempt and resentment.

This being said, saying anything about *hatred* as a moral emotion generally misses out on what hate crime statutes end up tracking actually wanting to track. Hate crime statutes require that hatred (or prejudice or animus) be targeted in a specific way. *However*, if one claims hatred is not deserving of its special moral status, one *might* think that is decisive against both penalty enhancement and the special status of hate crimes more generally. Especially if they are focused on *mens rea* culpability analysis and questions of which attitudes are worse than others and how that explains the differences in penalties. If there is nothing morally distinctive about hateful attitudes in general, there certainly cannot be something morally distinctive about hateful attitudes toward a group without saying something more, such as an explanation of when there is something special going on. But we can provide this with an account of systemic harms or wrongs, as will be provided later, so for now we can continue on.

Instead of arguing about the moral blameworthiness of hate as an emotion, Claudia Card (2001) resists the legal carving out of hate crimes apart from crimes more generally. The difference is not clearly morally significant enough to warrant the general distinction between hate crimes and other crimes, especially when contrasted to other kinds of serious offenses like sexual violence. The concern there is about the role of attitudes in our *mens rea* analysis. Sure,

we have the everyday sentiment that hatred makes us worse moral agents. But even if we take that for granted to some degree, it is not obvious that the type of hatred involved in hate crimes is always so distinct from the types of attitudes found in other crimes. The attitude has to be some hateful (or equivalent) attitude toward a protected group and as such; but why should that kind of attitude be punished more severely than the kind of hatred found in many other kinds of crimes? Hatred, or other similarly overwhelming emotions, are not just found in prejudice. Really heinous offenses involve incredibly repugnant attitudes yet do not categorically receive the same kind of penalty enhancement as imposed by hate crime statutes. One may be motivated by an irrational jealousy toward someone they desire, even without being in a relationship, and may kill an unfortunate third victim. One may be motivated by envy: “they have so much I do not have, I cannot bear it, I must *take it for mine...*” Wrath is only one of the deadly sins. Yet hatred (which I take to be similar to wrath) gets parsed out by hate crime statutes in an otherwise unusual way for criminal law to carve out a specific emotion. This is certainly a curiosity to grapple with and one of the problems for proponents of penalty enhancement, and indeed hate crime legislation more broadly, to address. But the concern is clear: this distinguishing of hate crimes as *special* in the way the statutes treat, including the special procedures and penalty enhancement, them seems unjustifiably arbitrary.

The second objection to the carving out of hate crimes is about hate crime penalty enhancement. Hurd (2001) argues that penalty enhancement is at loggerheads with the deep commitments about punishment in liberal contexts. Specifically, Hurd’s concern is with the liberal principle that we only punish for actual harm (or, sometimes, serious attempts to cause actual harm), thus it is inappropriate and unjust for liberal societies to seek to punish people for who they are as a *person*:

But hatred and bias towards whole groups of persons (particularly groups defined by such morally irrelevant criteria as race, ethnicity, gender, age, religion, or disability) *does* appear dispositional... There is thus a significant difference between the sorts of mental states (intentions concerning future states of affairs) that are targeted by specific intent crimes and the sorts of mental states (emotions and beliefs) that are targeted by hate/bias crimes. While one's intentions are often a product of certain aspects of one's character, one may form an intention to do an act (say, to steal) without being disposed to do such an act (i.e., without being a greedy or thieving person). But one cannot hate or be prejudiced against Asians and women without being a racist and a sexist—that is, without being disposed to feel antipathy whenever one is confronted with members of that race and sex, or without being disposed to believe derogatory things about them and to act in ways that oppress them (when capacities and opportunities permit). In punishing defendants for the intentions with which they act, then, specific intent crimes do not punish defendants for having bad character. But in punishing defendants for hating or being prejudiced against their victims because of their victims' membership in particular groups, hate/bias crimes necessarily punish defendants for having bad character. In fact, their enhanced penalties punish defendants *solely* for their bad character.

Hurd (2001), pg. 223-4.

Hurd's words speak for themselves: it is unjust to punish defendants for their *dispositions*, as they do not choose to have such problematic dispositions in the way that criminal culpability should require. This is the most central of three that Hurd offers insofar as this chapter is concerned. Hurd's concern here, while understandable, should be rejected as it relates to the special status of hate crimes. There is a massive difference between the claims that racist or sexist *beliefs and attitudes* seem dispositional versus the claim that racist or sexist *actions* seem dispositional. This is a fatal equivocation here. Who someone is as a person, such as a racist or sexist, may explain why they sought to harm, but we *punish* them for the *actual* harm (or the actual risk of harm) that some form of *mens rea* inculcates them to. While this does not settle the question of penalty enhancement, Hurd's claim that we end up *solely* punishing for bad character is pulling apart the mind of the perpetrator in a nonsensical manner.

Proponents of hate crime penalty enhancement may be tempted to instead point to the actual harm generated by hate crimes instead of an argument about culpability. That is, one might

argue that what makes hate crimes worse is that the harm caused by those offenses is greater, rather than that the culpability is worse. There are, however, some problems with taking this line. Firstly, this is an open empirical question, as Hurd (2001) notes in her rejection of this route, as does Reidy (2002), highlighting the lack of evidence as to whether violent hate crimes generally produce greater aggregate harm than violent crimes more generally. I will not attempt to reject this, as I agree that the actual aggregate harm is indeed an open question. But I do not think it is decisive either way.

Suppose that there was evidence that in general more harm is caused by hate crimes. Even so, that would not necessarily justify hate crime penalty enhancement. A secondary problem looms. Even if we hold that a particular crime causing great harm is a justification for a harsher punishment, it is quite another matter to treat as a justification for a harsher punishment the fact (supposing it is a fact) that crimes of this sort *tend* to cause greater harm. This would make any individual perpetrator somehow responsible for the greater social problems of a society even in cases where the particular incident did not itself produce greater harms.³⁹ When we make a claim like “Greater harm, greater punishment,” we refer to the individual criminal act, not all the ways in which that type of criminal act produces harm. Thus, there are two problems here, (1) the open question of whether or not we can demonstrate that, indeed, there is greater harm being produced, and (2) how significant, either way, that is to how to punish any given hate crime perpetrator.

³⁹ Another domain in which the question of aggregating harms comes up is in the concerns about racial profiling and cumulative injustice (See: Mogensen 2019). Even if we are unable to show that a greater unjustifiable injustice is produced in every single instance of racial profiling, Mogensen argues that the larger pattern of racial profiling does produce a significant wrong, as those actions “collectively realize a state of cumulative injustice.”

Just saying “greater harm means greater punishment” alone fails to answer those two questions. Take the carjacker example. We could imagine those carjackings in many different ways. If a rich person in a town has recently had their very expensive car stolen, he may wish for carjackers in that area to receive greater punishments.⁴⁰ And there is greater aggregate material harm than before (assuming the car’s value is statistically significant). But we should hesitate in that. If someone then carjacks a 2006 Kia Sportage, no one should say, “Well, carjacking harms have been going up recently!” based solely on the rich man case. The problem of carjackings, however, may come to produce a trend. And a trend makes it an open question. A crime becoming a social feature may produce further harm such as the harm of citizens being anxious about driving around at night. But it needs to materialize in a way that is relevant to the lives of otherwise uninvolved people. If the people of an area start to fear for their ability to live happy and normal lives because of the rising prevalence of a certain type of crime, an intervention is then justified. It is not just any and all actual harm but rather the way certain types of harm actually come to change the way people can enjoy their freedom. Just more aggregate material harm is one matter; relevant and shared harm is another. Even then we should be careful: we then are justified in further punishing carjackers for the *part* they play in those further social harms, not for *the entirety* of those shared social costs.⁴¹

Even if we assume that there is indeed greater material harm in the relevant way, this is not *sufficient* for distinguishing hate crimes from crimes more generally. Take, for comparison, how sexual violence disproportionately harms women, yet current law does not automatically

⁴⁰ Even if insurance covers it! Just because insurance covers the monetary cost, people get attached (irrationally) to *their* cars. Even if that attitude is irrational, the emotions that come with it are real and would, reasonably from that underlying irrational attachment, hurt. A lot can be said about sentimental value though, so I will cut that off here.

⁴¹ The question of justifying punishment more generally lingers here, specifically questions of how deterrence works. This is a more general debate than the hate crime penalty enhancement one and, further, would be an empirical question as to whether or not such statutes do in fact deter or not.

treat such as hate crimes. Card (1991) and Baron (2016) both point to rape as harming women as a *group*. This is, as an empirical matter, undeniable. Women are targeted far more often than men. Yet, rape is *almost* never prosecuted as a hate crime. That poses a conceptual question for what hate crime legislation is up to. Hate crime statutes not only define a unique class of crimes but also enhance the given penalty. Symbolically, it would be reasonable to think the law is saying such crimes are thus worse crimes. Sure, especially since we have already *assumed* here that hate crimes do produce greater aggregate harm. But it is uncontested that rape, as a category of crime, both disproportionately targets women *and* is disproportionately motivated by negative attitudes toward women as a *group*, i.e. misogyny. Yet sexual violence is not automatically enhanced *in this way* as a manner of law and hate crime statutes are distinct from the common aggravating and mitigating harms analysis in sentencing law. If something is classified as a hate crime, it is not an open question as to how aggravated the sentence should be: that is specified by law. It stands apart in a way we do not carve out any other kind of crime *by statute*. One could take this to be problematic: hate crimes *should* be treated as aggravated offenses; the special status of hate crimes is what is then left unjustified. At least without a necessary bridge principle: the prevalence of hate crimes changes the lives of otherwise uninvolved third parties (as discussed in the carjacker examples from before). That is a serious worry to flag but, as it is somewhat an accident of law, I leave somewhat open and continue along.⁴²

⁴² However, the *conceptual* relation between ‘sexual violence’ and ‘hate crime’ is trickier than it may seem at first for two reasons. Firstly, there is an accident of law that may account for this: hate crimes statutes were not designed to address sexual violence, other statutes were. The Violence Against Women Act is the best example of this. The distance of federal involvement in hate crime prosecution and the federal involvement in sexual violence prosecution might just be a division of what statute grounds those prosecutions. Perhaps this is something we would want to, upon deeper reflection, change. But the exclusion of sexual violence in principle from the current federal hate crimes statute need not be the case. There are reported hate crime rapes; there is already legal overlap. Between 2012 and 2022, 158 rapes were reported to the FBI as having been hate crimes. Rape motivated expressly by

Given all of this, I grant some points to the objections to hate crime statutes, specifically penalty enhancement. Hate crime penalty enhancement clauses are unjustified under two conditions: (1) the penalty enhancement is rigid in a way sentencing otherwise is not and should not be and (2) criminals are already generally overpunished in the first place. These, however, are not *principled* issues with hate crime statutes as Hurd alleges them to be. Hate crime statutes could very well be more like the protections offered by statutes like the Violence Against Women Act. What we want hate crimes statutes to do, then, is to give *salience* to a specific category of wrongdoings. Indeed, I think since much of the literature on hate crimes, this has happened. People speak of “hate crimes.” People know of “hate crimes.” The label has some to carry with it real normative force, both identifying a specific type of injustice and seeking to do something about it. This I defend in greater detail later in this chapter.

Overall, I have sought here to summarize and partially grant two major worries about hate crime statutes. The first is a concern about the special status of hate crimes, specifically when it seems to make hatred special. I reject this broad worry: hate crimes are not about making the emotion of hate special but *directed, acted upon hatred* special. It is the *directedness* that is special, otherwise hate crime statutes would also target more ordinary interpersonal hatred. The

misogyny (See: Manne (2017) for an analysis of misogyny) could be prosecuted as hate crimes in most jurisdictions (at least as a form of aggravated assault).

Misogyny can manifest in a range of ways, not just as focused, targeted anti-woman violence. Mere animus, if that were the standard of a given statute, would certainly change that. But many hate crimes do involve sexual violence. Often that is because of how queer folk are disproportionately targeted in a certain way, it should be noted. Just as racial minorities are more likely to experience intimidation (ex: cross burnings) for socio-historical reasons, sexual minorities are more likely to experience sexual harassment and assault. Nothing about hate crimes statutes in general prohibits, conceptually, the inclusion of all sexual violence, or all sexual violence against women (or any other group), from being included. It just presently does not do so. In part because of the Violence Against Women Act having sought to address those grim realities. Overall, I do not think there is a deep disagreement here: the separation of hate crimes from the otherwise ordinary domain of criminal law is more of an accident than a deeply principled distinction. The Violence Against Women Act could have included a strong hate crime statute within it, it simply did not. The initial concern simply indicates how navigating two distinctively special areas of the criminal law (sex crimes and hate crimes) at once compounds the complexities of the conceptual questions involved in both, not that there is some underlying theoretical tension to resolve.

second concern is about the rigid penalty enhancement clauses. This concern I grant but only because of *how* it is done: we already overpunish and we should resist rigidity in sentencing generally. Neither problem is unique to hate crime statutes though and do not undermine a principled claim: that harsher punishment for hate crimes can be justified if we addressed those worries about the particular statutes that have been adopted. I now move to addressing some other existing concerns about hate crime statutes before advancing my own view in greater detail.

1.3. Some Alternative Views about Hate Crime Statutes

We have thus far defined hate crimes, articulated some concerns about hate crime statutes, and offered some preliminary rejections and concessions. Here, I discuss and address some other views and explain what I am following and what I reject under the view I am endorsing here. Here, I discuss Kahan's rejection of the liberal view's reliance on clean distinctions between thought, value, and action; I reject Kahan's overall view in favor of accepting only some form of the claim that the law is "judgmental." I then discuss an economic view about hate crimes: that hate crime statutes are justified on the grounds of being a more just allocation of legal resources, following Harel and Parchemovsky (1999). I reject this argument as a justification of hate crime statutes and the special treatment imposed upon specific, individual hate crime perpetrators, arguing that it is the wrong type of justification of a criminal statutes, even if it is true. I then discuss David Reidy's view that hate crimes are an attempt to fulfill an obligation to oppressed groups, which I will follow and develop in a different direction in the subsequent parts of this chapter.

First, a critical view about the usual concerns. Dan Kahan (2001) argues that the entire framing of the dispute about hate crimes as a question of punishing for harm versus punishing for the values of the criminal is confused. Kahan considers it the influence of the moral tenets of liberalism that ground this framing of the dispute—punish only for culpable harms, as Mill and company would so say. To punish for mere difference in *thought* or *value* is inappropriate the common line goes. But Kahan thinks this is confused: the question should, instead, simply be a question of whether or not hate crimes “... express valuations that are more reprehensible than those expressed by other types of violent crimes.” (pg. 176). Under his view, the framing of the usual concerns is off in first place: those that characterize the dispute as one between harms and values are already supposing, without justification, a view about what the criminal law is up to in the first place (See: earlier discussion of Hurd). The law, Kahan says, is “morally judgmental” and disguising this through the language of liberal neutrality (punishing for harm and not character) actually reinforces traditional social norms and ends up blocking reform. The law necessarily takes a position on contentious moral matters, including when it relegates certain things to some supposed neutral domain outside of politics. For example, if we do nothing about hate crimes in favor of saying something like “we cannot punish the racist for their racism,” we fail to address the greater patterns of wrongdoing and harm that hate crimes impose on vulnerable populations. The thoughts and values of the racist *go into* their actions, so this liberal insistence upon isolating the action is unjustifiable. The supposed neutrality takes a position: one that leaves room for such terrible deeds. Criminal law, as Kahan says, *ought* to be judgmental: that is, it ought to make judgments about what is right and wrong and ought to insist upon rightful, justified reforms.

Here, I only wish to flag that Kahan's point about the law being *judgmental* is appropriate here, but I will not go so far as to accept his rejection of the difference between thought, value, and action. I agree that the law is judgmental but only insofar as the particular statute in cases like hate crimes is explicitly grounded in normative, societal concerns, as discussed later. But this does not entail that the law is generally justified in punishing for mere thoughts or values. It is not just about what is *expressed* by violent crimes but, rather, what explains why a *violent crime* occurred. It is causal, with the attitude as *part* of the causal explanation.

Another position is that the category of hate crimes is warranted by concerns about the *distribution* of legal resources. Distributive justice and the requirements of the equal protection of the law ground one possible view of what justifies hate crime statutes, as argued in Harel and Parchemovsky (1999) (and discussed in Reidy (2002)). Certain groups being more likely to be victimized means there is a problematic inequality; importantly, that inequality gap may self-reinforce. Criminal law, specifically *prosecutions*, can be thought of as a limited resource to be distributed just as any other resource is. Courts and lawyers cost money and time and attention is always limited. Hate crime statutes, then, help ensure that resources are shared fairly and justly.

This practical, economic view offers some insight as to the motivation behind hate crime statutes but fails to justify the special treatment imposed on individual hate crime perpetrators. Criminal law is a *retributive*, not *distributive*, enterprise. It is true that hate crime law originated as a response to a failure of prosecution, especially in the American South. The federal government's provisions, as discussed later, were in response to the failure of Southern states to prosecute many racially motivated crimes like lynchings. So, this view does capture at least part of the historical motivation behind these laws and part of the justification behind treating them systemically special. But their view is insufficient: it fails to offer any explanation or

justification for treating *individual hate crime perpetrators as having done something special*.

Thus, their account is as best insufficient to explain what this chapter is seeking to explain and justify.

The secondary concern about Harel and Parchemovsky's view is that such a view leads to absurd implications. Reidy (2002) is critical that their account leads to a problematic implication: if it is a question of resource distribution, *motive* is deemphasized. We thus have little reason to speak of the necessary hate involved in *hate* crimes. This alone seems absurd, as we would be providing a justification for this category without even having to mention its supposed essential feature. This also leads to objectionable practical suggestions. For example, as Reidy argues, Harel and Parchemovsky's account would make Black-on-Black violence eligible for hate crime prosecution (pg. 274), as Black-on-Black violence receives disproportionately low resource allocation.

Reidy's first point, but not the second, I assent to. The economical account gives us the wrong type of answer. I, however, am less skeptical of the practical suggestions that may be offered by such account. I would not object to prosecuting Black-on-Black violence as hate crimes *if* the particular instances were indeed motivated by some form of internalized or dissonant racism. This is not as absurd as it may seem on its face: for example, colorism is quite prominent in non-white communities. In a world where colorism is so prominent that it becomes a major casual contributor to societal injustices, it would *then* be justified in such a world to give such crimes the special mark of *hate*. The reason such a suggestion seems ridiculous is because it is not the patterns of offenses we are already familiar with when discussing hate crimes. More on such later when I advance my own view in greater detail.

Reidy (2002) himself favors an alternative approach. Reidy offers a view under which it is the socially privileged position of non-oppressed groups that grounds their moral obligation to respond effectively to the vulnerability of the oppressed (pg. 276). That is, non-marginalized people, merely by virtue of not being marginalized, should then be motivated to address marginalization of others. It is not an obligation all people have to all people, it is specifically a moral obligation placed on those in the social position to proactively make a difference in the lives of others in the context of existing, prior oppression. The hate crimes, then, involve “particularly egregious” violations of that special obligation help to “make extra efforts” to redress vulnerabilities and oppression (pg. 277). Reidy only offers this as a suggestion and does not flesh it out much further, so I will cut myself off here and continue.

It is this last sketched alternative view that I find most promising, even with it being left undeveloped. The main point that I *disagree* with is the directionality of the obligation such that it is an obligation of the privileged class alone to address the injustices suffered by the oppressed. Instead, in what I will endorse in what follows, such obligations are *general* and are contingent upon the nature of the actual oppression. Everyone has *some* obligation not to act upon and reinforce the massive problems involved in sweeping societal inequalities, even those *within* marginalized groups. But this basic point about “extra efforts” indeed has something behind it. What those extra efforts amount to I turn to now.

2. Reframing and Defending Hate Crime Statutes

In this section, I seek to do four things. Firstly, review the statutory history of federal hate crime legislation, in turn arguing that the history and actual text of these laws show that such laws are uniquely *symbolic*, which reframes the central question to the appropriateness of such symbolic

use of criminal law. In the second section, I argue that hate crime legislation seeks to construct protected classes in non-ideal circumstances and is justified in that purpose, thereby justifying the special status of hate crimes under the law. In the third section, I argue that we can defend the special treatment of at least some hate crime perpetrators by reference to their unique double will or intention, which directly inculcates them to that special status under the law, but again only clearly so in some cases. This section then concludes with a sketch of hate crime statutes as “symbolic commitments with bite,” putting the special status of hate crime law and the special status of some hate crime perpetrators together.

2.1. Hate Crime Statutes: History and Textual Evidence

Let us first review the history of hate crime law in the United States through the legislation that shaped its present form. We will then highlight an underemphasized aspect of this legislation: the *certification requirement*. I argue that this certification requirement highlights a central feature of the legislation here—a rare explicit concern with considerations of *justice* that empowers *intervention*, as will be explained. This feature of the law is exceedingly rare and surprising when compared to the usual laws and procedures of criminal law and supports one my central claims in this chapter: the hate crimes statutes serve an essentially *symbolic* purpose.

Of many laws which shape hate crime law in the United States, three are particularly worth noting here: the Civil Rights Act of 1968 (18 USC §245), the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 (18 USC §249), and the recent Emmitt Till Antilynching Act of 2022 (amended 18 USC §249), all of which are federal law. The 1968 Civil Rights Act established modern federal hate crime law but, in its initial conception, was limited to offenses done during the engagement with *federal protected activities*. There were two broad

classes of offenses created in that law: those without regard to identity and those with regard to identity. It prohibited any interference or intimidation of the following kind, *regardless of* identity of victim (18 USC §245(b)(1)(A)-(E)): (A) voting or qualifying to vote, (B) participating in any federal benefit or activity administered by the federal government, (C) while applying for or while employed by any federal agency, (D) serving the court as a juror, or (E) participating in any program receiving federal financial assistance. The more specific violations which required interference or intimidation “... because of his race, color, religion or national origin” (18 USC §245(b)(2)(A)-(E)) were: (A) enrolling and attending public school or university, (B) participating in any federal benefit or activity administered by the federal government, (C) while applying for or while employed by any *employer* or agency of *any* State or subdivision or in the use of the services of any labor organization, hiring hall, or employment agency, (D) serving the court as a juror, and then the broadest two provisions (E) and (F), which I will quote in full to explicitly demonstrate their breadth:

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments.

It was, thus, the broad reading of the interstate commerce clause that enabled and shaped the federal law that established the very category of ‘hate crime’ as we have come to know it today, though not yet official statutory language. While then we would have spoken of these as “Civil

Rights violations,” this laid the groundwork for the development of the more current understanding of hate crimes, particularly with the advent of the laws that followed later.

The most significant law since then was the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 (18 USC §249), primarily in response to two murders in 1998. While the Civil Rights Act set the groundwork for hate crimes, it is this later act that shaped hate crime prosecutions today. That and proposed forms of this act drove most of the debate and literature on hate crimes that this chapter has discussed thus far. The 2009 Act fully removed the requirement that the victim was engaged in specific federally protected activities in the cases in which the case was motivated by animus against a protected group (more on the certification requirement later) and empowered the federal government to proactively pursue such prosecutions. It was a massive expansion of federal investigative and prosecutorial power into this area of criminal law and is the legal basis of most famous hate crime prosecution cases in recent years and is thus the more precise heart of modern hate crime law.

The most recent major piece of legislation was significant more on symbolic grounds than practical, prosecutorial grounds: the 2022 Emmett Till Antilynching Act, which introduced new and severe penalties for, specifically, lynching (now 18 USC §249(a)(5)) and conspiracy to commit a hate crime (now 18 USC §249(a)(6)). ‘Lynching’, in this sense, is intended to track *mob* violence on the basis of a protected characteristic by extending special culpability to all willing participants in a mob, even if they did not all individually intend to kill or seriously injure.⁴³ This was heralded by its proponents as a massive *symbolic* victory, mainly as a

⁴³ This is similar to felon-murder laws. If you participate in a mob attack, even if just intending to jump and intimidate, but the person dies, you are guilty *as if* you had committed murder (or, in this case, a lynching).

vindication of the rights of historical victims of lynchings, and was largely unopposed.⁴⁴ This law, while symbolic significant, has not significantly reshaped federal hate crime law or prosecution to date.

Having reviewed the three most significant pieces of legislation that shaped modern federal hate crime law, we turn now to what makes such law special beyond what has already been summarized. One particular aspect stands out the most and, I argue, supports my claim that hate crime law serves an important, additional role beyond usual criminal law by seeking particularly symbolic ends.

In the United States, one especially important feature of present hate crime law is usually glossed over: federal supremacy. This is not to say *only* the federal government has hate crime statutes—that is simply false given that nearly all states have hate crime statutes of their own—rather, what is interesting is how the federal government (1) may *express* jurisdiction over some hate crimes and (2) the *symbolic importance* of federal intervention in such cases. As part of federal prosecutorial procedure, the Attorney General’s offense must grant certification, as specified by law in 18 USC §249(b)(1), adopted in the Shepard and Byrd Jr. Act (2009). This certification requirement reads as follows:

In general.—No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or designee, that—

- (A) the State does not have jurisdiction;
- (B) the State has requested that the Federal Government assume jurisdiction;
- (C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or
- (D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

⁴⁴ Senator Rand Paul did argue that the definition of lynching was *too* broad, as engaging in a mob attack and only intended to cause a minor bruise could still result in the very serious penalty of murder (or serious bodily injury, as ‘lynching’ under this statute includes both). His argument did not win the day and the statute remained unamended but likewise resembles the controversy around felony-murder laws, as mentioned in the previous footnote.

The disjunctive nature of this requirement is important: the certification must *only* make a claim about one of these 4 avenues (A)-(D). While the federal government may simply assert, by (A), that the State does not have jurisdiction, it is not necessary to take that route in certifying federal prosecution. Transferring jurisdiction by the assent of the State also is not required as in (B); that is, again, one of four possible options. Most interestingly, contrary to the two just mentioned, the federal government, by statute, may *take* jurisdiction on grounds of unvindicated interest, as in (C), or on grounds of necessity for the securing of justice, as in (D). These are the avenues of particular interest here.

While not a feature of the debate about hate crime statutes back in the 1990s and 2000s, as this legislation did not yet exist back then, it is a striking feature of the federal law itself and is informative as to what the government itself “thinks” of the reasons to pursue hate crime prosecutions. (C) and (D) are explicitly political assertions: these are deep concerns and the type of federal concern that is taken to *supersede* the sovereignty of the individual states. Putting aside questions of Constitutional law, the assertion of the superseding value is stark: hate crime prosecution by the federal government, at least in some cases, is explicitly a concern that vitally overrides other political commitments around federal deference to the state governments in the criminal law, as the vast majority of criminal law prosecutions are at the state level. It is a rare example of a prosecution that is *explicitly* motivated by a greater concern about social justice.

When we put the statutory history and text together, the normative, societal purposes of hate crime statutes become clearer. Penalty enhancement remains but should be seen as a crudely designed tool that should likely be reformed, as already granted. But a poor tool does not undermine rightful ends of the symbolic use of criminal law as to track that there is something special about hate crimes. That is, the objective of hate crime statutes should be seen as the

promotion of justice in non-ideal circumstances, as the legislative history gives us evidence of but that still has to be *justified* here. What remains, then, is to justify having hate crime laws and specify when such statutes are appropriate means to greater symbolic ends.

2.2. Hate Crimes, the Construction of Protected Classes, and the Special Status

Here, I want to first defend the special status of hate crimes without reference to the special treatment of individual hate crimes, as will come later. To begin, it is *contingent* that the groups who receive special protection are the ones that do so. There is nothing out in the world that makes these categories relevant beyond historical-social context. There are reasons, yes, but those reasons *could be* true about *any* group. Consider Reidy's (2002) discussion of nondiscrimination and tolerance: "Crimes committed against persons because they are from the South or because they are tattooed or because they are opera enthusiasts would seem also to violate liberal democratic values so understood." (pg. 282). This is correct but it just so happens to be the case that in our world, those groups are not generally, specially, or systematically targeted. People are not, in actuality, targeted on the basis of their musical preferences. *That* is what makes the difference. This is why the story of Matthew Shepard is telling: his murder was a *catalyst* for the discussion of the especially poor treatment of gay Americans across the country. Gay, lesbian, trans, and otherwise queer folk remain significantly more likely to be the victims of crimes in general. The question is, fundamentally, when should the state intervene in such group differences? Hate crime prosecution is one avenue, albeit an important one, for that intervention.

Given this, the *actual* marks of race and sexual orientation are telling. They are the ones that capture the relevant set of people we wish to include in the protections of the given legislation. That is because of the actual situations those groups face. As said earlier, that is what

it means to be *marginalized* in the first place. We could, one could imagine fairly easily, live in a world in which people are targeted in an atypical way simply for their music taste. As a matter of fact, this is not particularly hard to imagine given how commentators often talk about genres like rap and hip hop. If it got to the point that people were being assaulted for being hip hop fans, perhaps we would reach a time in which it became reasonable to offer people special protections on the basis of aesthetic tastes. That is what it would mean for them to be marginalized and based upon the marginalization of some people, that a new protection is adopted. In such a world, that would make sense.

Thus, what is most important about hate crime laws is the explanation of *why* which groups are selected for in the law. We need not look terribly far to see this type of justification.

Consider, for example, the following:

Hate crimes challenge us to recognize the dignity of each individual at the most basic level. When victims are selected for violence because of who they are—because of the color of their skin or sexual orientation—it is a crime that wounds all of us. Each person’s life is valuable, and even one life lost is too many. No member of our society—no one—should be the victim of hate crimes. Today we can send a message that no one—no one—should be a victim of a hate crime because of their disability, their sexual orientation, their gender, or gender identity.

Hate crimes are especially heinous because they deny the dignity, the humanity, and the worth of whole segments of our society. They inflict terror not only on the immediate victims but on all their families, their societies, and, in some cases, an entire Nation. **A hate crime against one member of another group shouts to the other members: You are next. You better watch your step when you leave your home, when you go to work, when you travel.** This is domestic terrorism, plain and simple, and it is unacceptable as an assault from our enemies abroad who hate us just as irrationally.

At bottom, hate crimes strike out at our most fundamental, moral values. They deny the teaching that we are all—even those viewed as outcasts among us—members of the human family. They seek to divide that family by labeling some so unworthy that they should become objects of violence.

Senator “Ted” Kennedy, September 27th, 2007. 110 Cong. Rec. 153 (145). Bold added.

Two things to pull from Ted Kennedy’s defense of a version of the Shepard and Byrd Jr. Act. Firstly, see that there is a neutral claim (discussed in the next section)—that *nobody* should be a victim of these types of offenses. This claim is grounded in a second one, particularly concerning what hate crime *signals*, as we will defend in more detail shortly in §2.3. The bold-faced does that work: “Watch out, you will be next!” This is precisely the type of justification that was offered, too, for the 1968 Civil Rights protections: prominent cases of domestic, racially motivated terrorism. Hate crimes, properly identified, intend to send a *double* signal and thus a double harm: firstly, the material harm of the individual deed, but secondly, too, the further realized social harms that come from projecting a *threat* to all others of the same intentionally targeted group.

I defend the special treatment of individual hate crime perpetrators on these grounds shortly, but here I first want to justify the special status of hate crime law more generally first. Consider what must already be the case for Congress to be debating such a matter like this—persistent, on-going, real patterns yet uncorrected. *Things are not working*. In some cases, our usual criminal processes are not just inadequately addressing these patterns but are in some distinctive way *failing* to address. In this case, to the point Congress pass such a law on top of prior, existing legislation passed for similar reason and after a whole decade of political debate.

2.3. The Double Will (or Intention) of the Most Serious of Hate Crimes

Here, I want to provide some justification for treating *individual* hate crime perpetrators as having done something deserving of special treatment, leaving open what that special treatment should amount to. At minimum, special treatment may simply involve speaking of these as unique and adopting unique procedures. I will here leave up what “special treatment” should

amount to beyond my loose skepticism of penalty enhancement. Here, I am interested in what *inculcates*, or ties, the individual hate crimes to the special status of hate crime law already defended thus far. Alternatively, what makes at least some hate crime offenses *special*? My answer here: how hate crime perpetrators act upon a *double will*.

First, an overview of what I mean by this *double will*.⁴⁵ Consider the recent 2015 Charleston Church Shooting. In the 2015 Church shooting case, the perpetrator desired and did kill a number of victims, nine black church goers, and further desired but did not successfully bring about a race war, per his own manifesto (which I leave intentionally uncited here out of a desire to not immortalize such people). The central detail is in what explains why the perpetrator did what he did: in this case, there were *two* desires. The direct, material harm to the direct victims, and the indirect but still significant harm involved in the community reaction—even without bringing about a race war, the racially motivated mass shooting *hurt* others through, primarily, *fear*.

Importantly, the typical line between *material* harm and merely *social* harm becomes unclear in cases like these, as the willful denouncement of justice is central to understanding the motive behind the offense. It goes beyond a mere threat, as someone indeed did something terrible. This is why we speak of *terrorism* in the first place. The threat is intended to be made real in a way that a spoken threat alone is not, in turn, producing real, salient reason for people to go about their lives differently. In other words, it harms them insofar as they can no longer enjoy their freedom as they otherwise would. This additional type of harm is in conflict with greater

⁴⁵ I would prefer to call this double intention, but I do worry that may generate confusion with the intention involved in cases where the *doctrine of double effect* may be considered, a debate I do not wish to weigh in on here. All I will say as it may be relevant to my point is that one may dispute my claim on the grounds that further harming is only obliquely intended. This, in my view, would be erroneous—if anything, the direct crime is only instrumental in some cases as a means to bring about the indirect harm, such as the racist mass shooter who wishes to bring about a race war. But I need not commitment myself on such here, I only mention it here as to clarify a possible question.

social commitment, and that greater social commitment we thereby defend with something more: as in, the additional, symbolic function of criminal law. The federal government may, in some cases, certify on the basis of vindication or justice for exactly this reason. It ties the offense to its special treatment under criminal law, here leaving open what precisely such should involve.

Having clarified the central idea here, let us tie this double will to the symbolic use of criminal law more generally. Recall the earlier testimony by Ted Kennedy in defense of the Shepard and Byrd Jr. Act. Kennedy's testimony highlights this central symbolic function that hate crime law is intended to serve. Notice that this symbolic function is not merely free-floating: it is intended to attach to a particular way some hate crimes project a culpable threat. In the case of an imagined, willful hate crime, the Neo-Nazi who assaults a Jewish person does not *merely* assault a Jew (unless by mere coincidence), rather the *intentional* assaulting of *a Jew* with the *further willing* to threaten others in a way to actually make them fear for their safety. It is murder *and* a symbol, like how cross-burning is not *just* a burning of a cross. Cross-burning can only be understood with reference to the intention to signal something further, a threat, as is the case for at least the central form of hate crimes under this picture of what hate crime statutes are aimed at addressing. This intention to threaten, to project something beyond the victims that are materially harmed by the initial deed, is the essential inculcating feature present in the most central of hate crimes, and so offer us some justification of their special, individual treatment. While this does not justify all of present hate crime law, it gives us the core of the offenses we wish to capture: the most terrible, harmful ones. To what degree *all* hate crimes exhibit a similarly double will I will open to speculation, in part because it is part of what actual prosecutions of real hate crimes already dispute.

2.4. Hate Crime Statutes as Symbolic Commitments with “Bite”

Let us summarize my view and point out some strengths of this view and some restrictions on how far this view goes. Drawing from the statutory history and certification requirement, I have argued so far that the history and text of federal hate crime law is uniquely, symbolically weighty. In the second section, I gave an account of how hate crime law seeks to construct politically protected classes in legitimate response to non-ideal circumstances as explaining and justifying the special status of hate crime statutes—that is, the existence and use of this very category, regardless of what it practically amounts to. Thereafter, I defended a narrow justification of the special treatment of at least some hate crime perpetrators with reference to a unique double willing: the direct will to harm victims and the indirect will to further harm others of the same group. Before turning to objections to this view taken together, I here seek to sketch this account within the context of my greater view about what the criminal law is up to when it comes to the setting of standards more generally (See: chapter 2).

The main point of the earlier part of this section was to *reframe* the dispute about hate crime legislation in the United States (particularly in the federal context) and to weigh in on what I take to be the more important question. Most telling is that when we look at the major federal laws themselves, we see a consistent and central concern with *justice* in a way that is deeply unusual for a criminal statute. These laws are clearly intended to address not just the particular injustices involved in particular, individual crimes, but also the complex, interconnected harm involved in prominent, ongoing, acted-upon prejudices. Rather than arguing about whether or not particular offenses deserve additional punishment—static, inflexible penalty enhancement is indefensible—we should instead seek to explain what justifies these types of laws, the form they take, and what they are trying to do *beyond* the usual concerns of criminal law.

Given that reframing, my main view is as follows: historically inherited societal inequalities remain salient insofar as people continue to have and to act upon various prejudices. This poses a collective problem. As a collective problem we can, through a just and fair process, dedicate ourselves to addressing these problems through more collective means. We adopt, simply put, a *symbolic* measure. This symbolic measure tracks this additional concern. These laws, then, are justified in their persistence by the fact that on-going, willful deeds continue to contribute to these systemic patterns. The individual hate crime, then, is inculcated to the special treatment of “hate crime” by reference to their unique *double will*: to what degree then have some desire to project a threat to further others. By using *criminal* law in this way, we give our symbolic commitment some “bite” in spite of those who act upon this detestable double will, allowing us to act in a way that makes these problems additionally salient to, hopefully with time, everyone.

Some strengths of this view. Firstly, I think this view successfully explains what makes the hatred of hate crimes special compared to other culpable mental states: this double will. This also, then, explains how we tie the individual hate crime perpetrator to some form of special treatment, punting on what that should look like. My view also emphasizes why the present law is as it presently is, perhaps better informing ways for improvement, which I leave to others; this is in-part because I have intentionally left room for real, non-ideal deliberators, such as the weighty amount of real debate that went into the passage of the present federal law. Importantly, too, I have avoided having to settle the debate about penalty enhancement, though I admit that penalty enhancement would be more easily defended if not for background overpunishment. The special status and treatment of hate crimes need not be penalty enhancement. Indeed, even

having and speaking of the category already is doing a substantial amount of work in making these patterns of injustice known and acted upon.

Some restrictions on how far my view goes. Firstly, I do not justify penalty enhancement, as just said. Also, my view most clearly applies to especially publicly salient cases: the ones we see and talk about, not the wide number of hate crimes that nobody usually hears about such as intimidation. This is because I have only sought to justify the very idea of hate crimes and their special treatment, so I have only sought to give the best argument for *some*, not *all*, cases of such. However, my view does require more than the present law actually does. The double will is key to my account but is not actually required under federal statute—perhaps this should be changed. Lastly, my view is only responsive, and I leave open the justifiability of “proactive” applications of hate crime law to address emerging patterns of prejudice and harm, work I also leave to others to consider.

Having addressed strengths and restrictions, now compare this sketch of hate crime statutes as symbolic commitments with bite to more typical thinking about criminal law like those discussed back in chapter 1. Placing these offenses into the category of *crime* at all gives them bite, even if we are internally distinguishing some crimes from others without, *yet*, settling on how to treat them with regard to punishment. We might follow with a range of views, both academic and popular, which think that something has gone terribly wrong in criminal law. Somehow, somehow, too much is criminalized. This may be a problem in its own right; it is certainly problematic *if* it contributes to the problems of overpunishment and overincarceration. In response to one problem or another, we might say that we should restrict criminal law—we might decide that hate crime statutes, for example, should be on the chopping block, especially if we think they *contribute to* overpunishment, overcriminalization, or whatever else one takes to

be “the” problem of criminal law. But hate crime statutes do not clearly contribute to these problems and, further, are doing something *else* that is additionally important (even if penalty enhancement should be reformed, that I grant). If we try to explain hate crime statutes by reference to our more ordinary standards for criminal law, then it should be no surprise when we have difficulty understanding what these laws are up to. Because they are not typical criminal statutes, they are instead identifying some *additional* that is happening in some particularly difficult cases. Those additional impacts are dispersed and collective in a way that contributes to societal harm, both in the relevant individual cases and in terms of how our society is changing. If we genuinely hope to ever try to eradicate these terrible prejudices and their real-world impacts, we need to have standards that we can actually enforce when things go as terribly wrong as they possible can. When one chooses to act upon these terrible prejudices, we are indeed justified in treating them differently, for their crime stands apart from even other terrible offenses—for the hate crime rejects *change*. Having now sketched my view here and in the context of this larger dissertation, let us now consider some possible concerns.

3. Anticipating Objections

In this section, I consider some possible objections to the view, drawing on earlier discussions from this chapter. I consider three concerns here. Firstly, I consider a concern about privilege and preferential treatment, stemming from the actual debate prior to the passage of the 2009 act. Secondly, I consider Hurd’s objection to hate crime law as requiring illiberal and thus unjust character-based analysis, applying such concern to my symbolic picture of hate crimes and hate crime law particularly. Lastly, I consider a version of Claudia Card’s objection about hate crimes’

special status and treatment when compared to other, seemingly equally detestable forms of crime which also seem to target and harm in a similarly systemic manner.

3.1. Privilege and the Importance of Neutral Language

One concern to flag about the protection of hate crime statutes is that they could be seen as violating the equal protection of the law by being an unjustifiable privilege. If a statute says, “Any crime perpetrated against a queer individual shall be punished with 5 additional years,” then the law would seem to give additional protections to such group. If such protections amount to a privilege, then that privilege would seem to favor one group over others and could disincentivize people from being critical of practices such as gay marriage, as they may then, later, be accused of having sought to do a hate crime.

It is important to note that some of the real opposition to hate crime statutes stemmed from concerns that it would interfere with the lawful criticism of others’ lives, *regardless* of if such concern was reasonable. For example, evangelical leader James Dobson explicitly argued that such legislation would “muzzle people of faith who dare to express their moral and biblical concerns about homosexuality,”⁴⁶ widely quoted across coverage of the 2007 version of the Matthew Shepard Act through the House which it subsequently died in Senate Committee (For more, see: Stout 2007).

⁴⁶ One *could* charitably read this as a concern about evidence, though I think the following reading of the worry is too charitable to Dobson himself. Consider someone is accused of murder as a hate crime. They are on the stand and, as evidence that the murder was indeed a hate crime, the prosecutor produced documentation of the accused murderer’s “biblical concerns about homosexuality.” The prosecutor argues that, given this evidence of homophobia, that indeed the accused murderer in question was particularly motivated *by his homophobia*. The concern here is that one’s prior and separable beliefs may be taken as evidence of a hate crime when, indeed, the particular crime was not actually particularly motivated in that moment by such prejudice. Such a case would indeed be concerning, but I think it is best to understand this type of concern as a concern about prosecutorial burdens of proof—in this case, there is some room for doubt, so we should require prosecutors to give evidence that actually ties those prior beliefs to the particular crime. I believe hate crime prosecutions since this initial debate have done so successfully, though I will leave it to others to debate this in particular cases, past, present, or future.

Of course, hate crime statutes do not actually operate this way in the first place. It is not “any crime against queer folk.” It is not, in the context of the United States at least, “any crime motivated by animus toward queer folk” either. Rather, the language is, “Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability,” (18 USC §249(a)(2) which is the broader set which specifies only under certain circumstances such as while engaged in interstate commerce). The statute does not say ‘*Black*’ or ‘*queer*’ or ‘*Catholic*’ or anything like that, it says ‘race’, ‘orientation’, ‘religion’, so on.

The key point that is easy to gloss over is that the language *includes* the privileged social groups. White people, for example, *do* receive the same protections as their marginalized counterparts, as do straight folk *if* they were targeted on the *basis of* their heterosexuality. This is what prevents hate crime statutes from violating some commitment to neutrality. Even if a protection explicitly only including “queer” or “Black” or “Jewish” would indeed constitute a violation of neutrality (a line I think is dubious in the first place, as discussed above in this section), that is simply not the language of any hate crime statute in the United States, let alone the federal one. There are two different things being example: (1) the historical reason why certain categories receive special protection, such as ‘race’ being used to track, at least in part, the plights of Black Americans, and (2) the broad protections, in turn, offered to *everyone* by the federal statute. The worry about violating neutrality or promoting certain lifestyles conflates these two lines in the first place.

A democratic society seeks to protect an especially targeted group and establishes a remedy that everyone is entitled to, even if it disproportionately ends up being allocated to the initial marginalized groups. That is just an expected consequence of what it means to be marginalized. It would not make sense for it to go any other way: hate crime prosecutions most

often involved Black victims, that is why we started enhancing those penalties in the first place. That is a result of the underlying systemic issues that the hate crimes statutes seek to address; if that was no longer the empirical case, perhaps then we would decide, as a free society, to no longer treat race as special. Race, however, remains materially real insofar as people continue to be, sometimes, motivated by racial hatred. Nothing about hate crime statutes in the United States precludes everyone from having the same principled protections: we do not want to be victims of crimes and we especially do not want to be victims of crimes on the basis of the color of our skin, the people we are attracted to, or the physical ailments we face in our already complicated lives. Instead, these statutes offer some protection to certain groups by offering certain kinds of protection to *everyone*. So even if one thinks that there is a concern about political neutrality when it comes to hate crime statutes, that concern is plainly dismissible upon scrutiny.

3.2. Character, Causality, and Punishment

For this second consideration, consider another point made by Heidi Hurd. Is there something special about hatred and prejudice compared to the range of other emotions that are often tied to terrible crimes?

[H]atred and bias towards particular groups are but two of many culpable dispositions. Are they the worst of the bunch? Are they so rotten as to justify special criminal attention? How does hate compare to greed, jealousy, revenge, sadism, or cowardliness? If hate and bias crimes are going to remain unique among crimes in picking out emotional and dispositional motivations as bases for increased punishment, then it must be possible either (1) to defend the claim that, say, racial hatred or gender bias is morally worse than greed, jealousy, and revenge, or (2) to advance some reason to think that such hatred and bias are uniquely responsive to criminal sanctions in a way that greed, jealousy, and vengeance are not.

Hurd 2001, pg. 226

This view depends upon treating hatred and bias as dispositions, as discussed earlier. Putting that point aside, as I have offered separate reason to be skeptical of that, let's focus on a different question here. Is *hatred* of the type present that special compared to hatred or any other range of other especially repulsive attitudes? Some criminals are motivated by exceptionally evil desires, such as the wholly depraved person who sincerely does not care about the harm he inflicts on others. Such perpetration signals a denouncement of society as a *whole*, such as the fear generated by the Manson Family murders. Yet hate crime law selects for *one particular set of attitudes* and adds an uncritical punishment via required enhancement; in doing so we punish the bigot *simply for* their bigot, in a way we otherwise would not, in spite of other terribly, motivating attitudes like those.

My first response to this is that we do punish for all kinds of bad attitudes, just ordinarily in criminal procedure in considering aggravating circumstances. We do consider malice, evil, heinousness, depravity, wickedness, or any other range of terms across jurisdictions, but often within the deliberations of *sentencing* or in making *distinction between types of offenses*. This says little about the special status of hate crimes, it is just a different mechanism. The special status of hate crimes is not just the hateful attitude, as plenty of hate is not oriented in the relevant way. The special status is grounded in the way that the attitude directs the intention behind the deed both to a particular victim and to that victim's protected class more generally. It is not that hate is a worse attitude and motivator and that straightforwardly generates additional blame; it is that hatred of a certain type produces a distinctive type of further, willed harm.

This being said, this is insufficient to defend hate crime penalty enhancement as Hurd had in mind. This I have already straightforwardly granted. I only seek to defend the special status of hate crimes, which need not take that route—nor have laws adopted since the earlier literature

been as inflexible as a linear, static penalty addition. However, penalty enhancement of *some form* would be a more defensible option as *part* of hate crimes' special status *if* we addressed overpunishment more generally first (See: Husak 2008). If we were not in a country where sentences are already seen as generally excessive and harsh, we would have less reason to think that additional penalty was unjustifiable given the additional, willed harm that exists in at least some cases of greater hate crime offenses like mass shootings.

Which brings me to my second response: *perhaps* we should revisit the moral language we use across criminal law, in spite of the Model Penal Code's less moralistic four-tiered culpable mental states schema discussed much earlier. Perhaps hate crime statutes stand out to us so much because they are resisting a *mistake* we have been making in getting rid of those rich *moral* terms. This, too, I punt on here, but I think is an interesting possibility worthy of further exploration in future work by myself or others.

3.3. Arbitrariness and Accidents of Law

A last consideration. Consider Claudia Card's objections to hate crime penalty enhancement in the context of other systemic offenses (See: Card 2001). Hate crime laws select for a range of special offenses because of the disproportionate burdens that some patterns of offense impose. Yet, some offenses are excluded from the category of hate crime. For example, sexual violence. Such violence overwhelmingly selects for women. Women are indeed a protected class! We may even say that sexual violence usually stems from a prejudice: *misogyny*. Yet these offenses are not automatically a hate crime. There is a puzzle here: hate crime laws select a special set of offenses based upon disproportionate burdens yet seem to arbitrarily deny some set of offenses—in this case, the disproportionate burdens that sexual offenses place on women.

The first of two responses: how the law has changed. Card's initial concern was before the 2009 Act, so gender and sexuality were excluded from consideration in federal law (state law varied). Part of this concern is largely an accident of law: there is a *separate* Violence Against Women Act (VAWA, 1994) which was passed well before Shepard & Byrd Jr (2009). VAWA took a different approach to address these disproportionate burdens though: VAWA allocates resources to supporting surviving victims more than prosecuting offenders.⁴⁷ This makes sense especially when we consider that in cases of domestic violence, women are disproportionately reliant (financially and/or by force) on their abusers and so take on further costs in reporting their victimization. Different approaches to overlapping problems are not the same as a contradiction in approach or a reason to think we should favor only one strategy over another.

Further, there is overlap between hate crimes and violence against women. For example, aggravated sexual assault counts as a greater offense under federal hate crime law (Though that was a change that occurred after Card's piece, it should be noted). Sexual offenses are a category of hate crime that indeed gets reported, as required by law. *Some* cases of violence against women are counted and treated as hate crimes; some cases are not. Why is this?

Hence, the second response: what is the difference between *misogyny* and *hatred* against women? This is where I am less sure of what to say. The common use of "prejudice" is vaguer than the type of hatred that is required for a hate crime, especially in the nebulous ways that prejudice is unclear to a prejudiced person who has never had their judgments questioned or resisted. As discussed in response to Hurd, simply having a bias is insufficient. In this case: *being a misogynist* in such a way that one could commit sexual violence does not *automatically*

⁴⁷ One might argue that this is a *better* approach than criminalization, special treatment, or penalty enhancement. I am open to that but inclined more toward a pluralistic approach that both identifies special areas of harm and wronging *and* provides victim resources. But this is a different line of thought than the one I am advancing here.

entail it was a hate crime by the federal standard. What is required is that the misogyny was indeed what was willfully acted upon. But what would it mean to willfully act upon misogyny? This is tricky given the unique type of violation that a *sexual* assault entails. But we can see differences if we look at, for example, uniquely upsetting offenses with a public humiliation element. Sexual assault material is publicly posted and passed around in some cases, sometimes including things like “slut shaming.” These types of offenses strike me as possibly meriting the treatment of hate crimes, yes. Or think of common cases of rapists bragging about what they have done, often including disparaging remarks about women as objects to abuse and “conquer.” But my point here is that while some cases of sexual violence clearly call into the category of being a hate crime, it is less clear of what to make of the misogyny that is arguably always present in sexual violence against women.⁴⁸ Perhaps *those* further acts clearly constitute evidence of the relevant difference, but I am unsure of where best to draw the lines, if to draw them at all.

Maybe we should treat all sexual violence as a hate crime. Maybe all sexual offenders are, indeed, motivated by some prejudice in a way sufficient to count as a willful act in the way I have described and defended as a defensible aspect of the present law. While I have given some reasons for skepticism here, I find this to be the most plausible of the three objections I have considered in this paper. But I do not think this is decisive against the special status of hate crimes—perhaps sexual violence should receive stronger symbolic treatment, maybe even falling into the same category as hate crimes in the future. I leave this as a massive open question.

⁴⁸ Sexual violence against members of the queer community easier to identify one way or another in this specific regard, as often the sexual violence against those individuals is more often *explicitly* perpetrated out of *directed* hatred toward those groups. This puzzle is most profound here given how broad the category of sexual violence is compared to how narrow the category of hate crimes is, in spite of this tempting line to include all sexual violence under the category of hate crimes on the basis of some underlying misogyny.

Conclusion. Five Comments

The condemnation expressed by the prosecution of a hate crime is central. Symbolic acts are part of what goes on with punishment in criminal law in general. This is especially important to hate crimes. This is especially true given the history and nature of the federal legislation previously discussed. In the United States, the concern can supervene upon state sovereignty, and the reasons for that are no secret: they are clearly stated within the law itself, as previously discussed. Vindicated federal interest and concerns about substantial justice in the criminal context are fundamentally part of the picture; the history of civil rights legislation already shows us this. Even this does not exhaust what there is to say about the political concerns involved in hate crime legislation. It is the establishment of protected groups and the standards of violations that deserve our focus. To conclude, I would like to repeat five conclusions that follow from this inquiry.

(1) Hate crime statutes seek a justifiable goal even if penalty enhancement is presently unjustifiable.

This grants a major point of contention in earlier literature while simultaneously defending the importance of hate crime statutes. Penalty enhancement is objectionable primarily because of the greater context of overpunishment. Even if we think hate crime perpetrators deserve additional punishments otherwise, as I do but have left mostly undefended here, it would still be objectionable to punish additionally an already harsh punishment.

(2) The problem of penalty enhancement should not lead us to abandon hate crime statutes as a special class of offenses.

Perhaps even if we think hate crime statutes are justifiable, we might want to say that penalty enhancement is *so* problematic that the present law is indefensible. I reject this. We should not

reject the entirety of criminal law because of the serious problems of criminal justice such as overpunishment.

(3) Hate crime laws are as a non-ideal, collective endeavor justified by the living legacies of injustice and on-going, willful actions done in spite of such.

This is the most significant claim of this chapter, so I shall spare excessive repetition. The most important claim is that upon the recognition of injustice generates a social obligation to act upon it, in this case through the establishment of and recognition of protected classes. Hate crimes do not just injury against an isolated individual, they act in contempt of a recognized, collective endeavor to do better.

(4) The legacy of these laws is not just their context of adoption or how they enforce protections, but also in how these laws make real problems salient.

Similar to the previous discussion, but a further point. These laws seek to do something legally, but they also shape *us* in some way. We can speak of these laws. We can speak of why these laws were adopted. In doing so, hate crime laws are also important *symbolic standards* by which we can evaluate and educate ourselves.

(5) We cannot be completely sure that we are making meaningful progress, particularly with such difficult problems as hatred; we must try nonetheless.

Perhaps one day such measures will be unnecessary. That day is not now. As long as we continue to live through such violence, we bear witness to the living, salient legacy of the injustices of history. In witnessing such prosecutions, hopefully the reprobation serves to properly condemn.

We can point to the law. We can point to the wrongdoers. We can point to the trials of justice. Hate crime statutes enable all of this and without such statutes everything we do in these cases would be fundamentally different. We should continue in this direction, even if we reject

penalty enhancement in the rigid form used by the federal government. What is more important is how these laws *guide* us and our successors. In this regard hate crime statutes are an important part of how criminal law seeks out difficult symbolic ends by *setting a standard* for us all. The language of hate crimes has entered into our everyday vocabulary, and this is not by mistake. Even if people use the term imprecisely, the adoption of these laws and their subsequent enforcement have continued to shape how people think and talk about these exceptionally terrible offenses. Even if one thinks that present hate crime law ought to be wholly reformed, we should preserve the good that this conceptual category offers even if merely to *communicate* about the special nature of such wrongs.

References

110 Cong. Rec. 153 (145). (2007).

18 USC §245 (Adopted 1968)

18 USC §249 (Adopted 2009, amended 2022)

42 USC 136 (Adopted 1994, reauthorized 2022)

538 US 343 (*Virginia v. Black*, 2003)

Baron, Marcia. 2016. "Hate Crime Legislation Reconsidered." *Metaphilosophy* 47 (4-5): 504-525.

Brogaard, Berit. 2020. *Hatred: Understanding Our Most Dangerous Emotion*. Oxford, New York: Oxford University Press.

Brudholm, Thomas. 2015. "Hate Crimes and Human Rights Violations." *Journal of Applied Philosophy* 32 (1): 82-97.

Card, Claudia. 2001. "Is Penalty Enhancement a Sound Idea?" *Law and Philosophy* 20 (2): 195-214.

———. 1991. "Rape as a Terrorist Institution." In *Violence, Terrorism, and Justice*, edited by R. G. Frey and Christopher W. Morris, 296–319. Cambridge: Cambridge University Press.

Feinberg, Joel. 1988. *The Moral Limits of the Criminal Law, Volume 4, Harmless Wrongdoing*. New York, NY: Oxford University Press.

Harel, Alon and Gideon Parchemovsky. 1999. "On Hate and Equality." *The Yale Law Journal* 109 (507): 507-539.

Human Rights Campaign. 2007. "Religious Right's Desperate Last Attempts To Stop Hate Crimes Bill" Press Release, May 2. <https://www.hrc.org/press-releases/religious-rights-desperate-last-attempts-to-stop-hate-crimes-bill>

Hurd, Heidi M. 2001. "Why Liberals Should Hate 'Hate Crime Legislation'." *Law and Philosophy* 20 (2): 215–232.

Kahan, Dan M. 2001. "Two liberal fallacies in the hate crimes debate." *Law and Philosophy* 20, (2): 175-193.

Keller, Paula. 2021. Book review of Berit Brogaard's *Hatred: Understanding Our Most Dangerous Emotion* (2020). *Ethics* 132 (1): 232-238.

Lawrence, Frederick. 1999. *Punishing Hate: Bias Crimes under American Law*. Cambridge, Massachusetts: Harvard University Press.

Manne, Kate. 2017. *Down Girl: The Logic of Misogyny*. New York, New York: Oxford University Press.

Mogensen, Andreas. 2019. "Racial Profiling and Cumulative Injustice" *Philosophy and Phenomenological Research* 2: 452-477.

Reidy, David A. 2002. "Hate Crimes, Oppression, and Legal Theory." *Public Affairs Quarterly* 16 (3): 259-285.

Stout, David. 2007. "House Voted to Expand 'Hate Crime' Protections" *The New York Times*, May 3, 2007. <https://www.nytimes.com/2007/05/03/washington/03cnd-hate.html>

Conclusion. Summary, Reflections, and Future Directions

If one is to take away one and only one thing away from this dissertation, what should it be? Even in the context of overincarceration and the criminal justice crisis in the United States, we should be hesitant about explaining away the broad and plural considerations that shape criminal law. If we seek to restrict the scope of criminal law on principled grounds, those principled grounds should connect, in some way, with the actual, causal explanations for what has caused the present crisis—not, instead, targeting other areas of criminal law which aimed toward something else, something less unusual and obvious compared to the typical *mala in se* of assault, theft, arson, murder, so on. This is why I have chosen to focus on criminal negligence and hate crime statutes in the latter half of this work: while we might target them as a possible overreaching of the scope of criminal law, in both cases we have *further* reason to insist upon their importance. In reforming criminal law, we must be careful not to cast away that which matters morally, especially in cases where some *standard* is being set and enforced.

In the first chapter, we began with the set of views I refer to as minimalism about criminal law. A liberty restricting principle is some principle which serves as a justification for the restriction of freedom—a *principled ground* for restricting the scope of criminal law. *Minimalism* understood most broadly refers to views motivated to restrict on various principled grounds the liberty restricting principle to something quite restrictive: to minimize the set of actions which are criminalized. From there, we have a divergence: some forms of minimalism seem to track the background criminal justice crisis; others do not. This disconnect or *misdiagnosis* was my principal target to identify and object to in chapter 1. There, I offered two main criticisms against the objectionable form of minimalism about criminal law so identified: that their background moral outlook was too *atomistic* and too *short-sighted*, to simplify. In

claiming that criminal law should be interested in a particular doctrine of, for example, liberty or choice, a range of views dismisses the complexities of the moral relations we stand in and likewise demand too little from moral agents and their self-agency. That is, first, they imagine individuals as atoms instead of socially situated, excluding any conception of *role* from their moral outlook, thereby distorting their picture of what criminal law is and should be about. Secondly, in isolating decisions to particular moments, they exclude considerations of explanations of all the complex matters that led up to a particular decision or failure—in other words, how one *conducts oneself* more generally. Both are objectionable and contribute to some central mistakes discussed in the later chapters as well.

The second chapter, then, sketched an account of three further functions of the criminal law: signaling, symbolizing, and disciplining. By no means do I propose these as exhaustive or the sole possible framing but, rather, to sketch a pluralist view that explains how certain ends of the criminal law are not cleanly explained by narrower outlooks on the criminal law like those discussed in chapter 1. Put differently, what *else* is criminal law sometimes up to beyond the usual rectification of serious violations of rights? Generally, sometimes we are *setting and enforcing standards* via criminal law. But what does that look like? Sometimes it looks like giving force to a system of coordination, such as punishing people for violating traffic signals, even in cases where no one actually ends up harmed. Sometimes it looks like creating a new category of offense to give salience to a certain pattern of harm that goes beyond the individual victims. Sometimes it looks like demanding more of certain people who find themselves held to certain further standards, even in cases where they may have made a genuine mistake. But all of these ‘sometimes’ are meant to track cases where *something more is going on* in the practical

deliberations behind these laws than simply the defense of individual rights: everything else is offered as examples of that claim, anticipating later discussions as well.

Turning to the topics of the latter chapters, the third chapter grappled with the debate around criminal negligence. Commonly, critics of criminal negligence worry that to punish for something that one lacked an intention to do or to risk is unjust. Throughout the third chapter, I gave special attention to matters of special obligation, mostly by looking at doctors and parents. My core example was a comparison between two cases of supposed medical negligence, *Akerele* and *Adomako*, and an analysis of the kind of mistake each of those doctors made for the purposes of archetype. Akerele, while his mistake was devastating insofar as it resulted in the death of many children, he had been diligent, even when working under intense conditions; Adomako, on the other hand, seems to have been *misoriented* toward his responsibilities as a doctor. There is a difference between the mere *magnitude* of an error versus the *conditions that brought about the error*. How one carries themselves matters, even if they do not have the distinct counterfactual thought of “What if?” Sometimes, we are justified in making some higher demand, especially of doctors (and parents, and supervisors, and perhaps others). While I acknowledge that my view does not sufficiently settle the negligence debate generally, what matters is that there are cases in which criminal negligence is indeed doing something important: tracking a commitment to higher *standards of care* in certain, role-dependent contexts.

What is the central implication of chapter 3? This discussion serves as evidence of two points. Firstly, it is an example of moral reasoning that is more causally rich in a way that goes beyond the short-sighted attitude that motivates some objectionable views. We are interested not just in the moment of error but in *why* the moment of error happened, leaving open all of the real scrutiny that goes into actual criminal procedure in cases like this in making those difficult

determinations. Secondly, it is an example of criminal law serving what I have called a disciplinary function, wording I am not wholly committed to. The core idea is that in demanding some higher standard from some of us who occupy certain roles, we are also constructing what it even means in the first place to serve in that role. It is not just that the moral convictions shape our law, it is that the law plays some rightful role in deciding what it even means to be, for example, a doctor or a parent. An example of one form of how law sets a standard.

In the fourth and final chapter, we turned to the most serious of cases this dissertation discussed: hate crimes. Critics of hate crime statutes are usually focused on a particular feature of the U.S. federal statute: automatic penalty enhancement. The main point of emphasis within the body of the fourth chapter was that those statutes are about more than just additional penalty: hate crime statutes involve granting a *special status* to a certain type of offense. Pointing back to the amount of attention such offenses receive, the legislation is specifically designed to be, in a sense, interventionist in the name of justice. These laws are not just about putting additional blame on particular perpetrators; it is a commitment of the greater society to address these particular harms. This, however, is contingent on historical and political circumstances. In principle, while unobvious, everyone does have a right to these protections, *it just happens* to be the case that these are the groups that we have decided deserve this elevated status in our prosecutorial practices. If we lived in a world where opera fans were systematically targeted disproportionately (in the past or in the present), then, yes, perhaps we would classify them as a protected class. What matters is the signifying of the special status, while leaving open what, precisely, that special status and special treatment may amount to.

What is so important about the discussion of chapter 4, especially as the final substantial piece of this larger dissertation? Again, this discussion serves to show two things beyond the

discussion of hate crimes themselves. Firstly, we have an example of moral reasoning that requires us to see a complex intention, what I there called a *double will*. What is relevant here is that this type of willful hatred goes beyond how we ordinarily think of *mens rea*: the desire to harm in at least some cases of hate crime goes beyond the direct victim in a way that more ordinary offenses simply do not. Secondly, we have again an example of the law setting and enforcing a standard of some kind: in this case, a symbolic, normative commitment. Assuming that commitment has been fairly arrived at as a means to address some injustice, then we have an example of criminal law doing something more than usual that we should not dismiss lightly.

Now, to turn away from the chapters to some more general discussion and reflection. So, first some comments on standard setting, the relationship between law and morality, and the role of criminal law in a just society. Then some comments on future work to be done.

One still may be unconvinced of my overall goal in demonstrating the plurality of interests in criminal law as a means of setting standards. Perhaps we are still unconvinced that the criminal law should be up to more than punishing for the strict, direct violation of individual rights. Very well if so. Even if one thinks this, I still think this dissertation has accomplished something. I hope to have elucidated the particularly tricky domains of discussion, negligence and hate crimes, and better informed on why those disputes are difficult. The third and fourth chapters can stand on their own feet without the more general picture of standard setting I have sketched.

Now, I wish to end off with some brief discussion of future direction for this, or others', work. Future work could focus more on the moral features of criminal law as a *whole*, not just the moral concerns that go into particular pieces of legislation. As is present in the criticisms of minimalism in chapter 1 and in the resistance to skepticism about criminal negligence in chapter

3, the practical steps and features of the criminal law help explain much of what we are and should be up to within criminal law broadly. More work should be done on the role of prosecutorial discretion and procedure; more work should be done on the curia and the importance of “taking the stand,” so on, especially insofar as such work could help explain what we want out of our *substantive* criminal law, as this dissertation has focused on. As for the narrower areas of dispute, I suspect that negligence and hate crime statutes will always remain controversial. Negligence, in my view, is better reframed as a dispute about the *limits* of where negligence should play *some* role in our criminal law—strong skepticism which seeks to reject it wholly seems simply indefensible given some specific contexts of extremely demanding obligations such as in medicine or parentage. This still leaves much room for skepticism, even to the point that we may say negligence is wholly inappropriate to criminalize in ordinary circumstances, though I resist such a view, as discussed in chapter 3. The dispute around hate crime statutes, too, is better reframed, especially given such now has an established place in our criminal legal practices. Penalty enhancements should be considered problematic insofar as they perpetuate overpunishment generally and remove flexibility and thus moral sensitivity from sentencing, under the assumption that indeed we can have just, fair judges and empower them to make such difficult judgments in such difficult cases. But the objective of hate crime statutes—to address through criminal law some collective, inherited, non-ideal circumstance of a society seeking justice—should be defended further than I have been able to here. I hope to be able to do more of this work in the future, and if not, hope others will take up this work.

Joshua Paschal

Indiana University, 2026

Appendices. Overincarceration, Overpunishment, and

Overcriminalization: By the Numbers

These appendices are intended to provide further background on the principal concerns of criminal justice and its reform, following the terminology established by Doug Husak's work as discussed throughout this dissertation. While this dissertation is not itself an endeavor in practical criminal justice *per se*, these appendices will speak to disagreements as to what, precisely, the various problems are and provide some statistical background as to motivate the claim that these are problems at all. I have separated them out into three different appendices, with each appendix dedicated to one of the major accusations roughly in order of the degree to which they are controversial. The first appendix pertains to *overincarceration*, which I consider to be largely uncontroversial, and that appendix (Appendix A) explains (1) the domestic situation of incarceration in the United States at the federal and state levels and (2) how the situation in the United States compares to international counterparts. The second appendix pertains to *overpunishment*, the central claim of which is only somewhat controversial, and that appendix (Appendix B) explains (1) the domestic pressures that legislation puts on judges to punish more harshly than those judges would otherwise, with the controversy around the Federal Sentencing Guidelines given as an example, (2) how punishments in the United States tend to be harsher than our international counterparts, and (3) the attitudes of Americans as motivating a uniquely strong tendency of politicians to want to be "Tough on Crime." The third appendix pertains to

overcriminalization, which is more controversial of a claim than the previous two, and that appendix (Appendix C) explains (1) the sheer numbers of criminal laws, including laws that remain on the books but unenforced (i.e. dead laws), (2) the reach of the criminal law in ordinary life, with analysis of how often ordinary individuals violate a criminal statute in their everyday live, and (3) the practical scope that law enforcement has in our ordinary lives, which is not about substantial overcriminalization *per se* but both related and the subject of much criticism.

Appendix A. Overincarceration by the Numbers

The least controversial of the three background accusations is *overincarceration*. Everywhere in the United States, we incarcerate, with even our least-incarceral states still incarcerating on the higher end compared to our rich peer countries (A.1.). As this appendix will show, this is the single most distinguishing feature of the United States criminal justice system; compared to our economic peer group, we imprison the most, and it is not close: our closest incarceral-peer countries are all poorer and less stable (A.2.).

A.1. Incarceration in and Across the United States

Incarceration does not look the same everywhere in the country. Some places have more prisons and prisoners than others, with the rate of incarceration being weakly correlated with the wealth of those states and more strongly correlated with the political inclinations of those states.

Highest 10	Rate/100k	GDP/capita	Lowest 10	Rate/100k	GDP/capita
#1. Mississippi	661	\$39,103 (#50)	#1. Mass.	94	\$87,861 (#2)
#2. Louisiana	596	\$52,079 (#40)	#2. Maine	107	\$52,862 (#39)
#3. Arkansas	574	\$45,892 (#48)	#3. Rh. Island	124	\$57,641 (#32)
#4. Oklahoma	563	\$49,745 (#43)	#4. Vermont	126	\$54,171 (#38)
#5. Idaho	460	\$48,309 (#46)	#5. New Jersey	137	\$70,659 (#11)
#6. Texas	452	\$66,646 (#17)	#6. N. Hamp.	149	\$65,086 (#18)
#7. Arizona	446	\$55,747 (#35)	#7. Minnesota	151	\$66,857 (#16)
#8. Kentucky	437	\$49,763 (#42)	#8. New York	159	\$90,731 (#1)
#9. Georgia	435	\$59,942 (#27)	#9. Connecticut	170	\$78,094 (#5)
#10. Montana	414	\$48,722 (#44)	#10. Hawaii	174	\$60,543 (#25)

Fig. 1. U.S. States Incarceration Rates, 10 Highest Compared to 10 Lowest, compared to their GDP per capita. Data from the Bureau of Justice Statistics (2022) as compiled by the [Sentencing Project](#) and from The Bureau of Economic Analysis (2023) and the U.S. Census as compiled by [Statista](#) (in terms of 2017 dollars, accounting for inflation).

The numbers above are the more cautious estimates, as they are tracking those *sentenced* to their incarceration. They do not, for example, include those being held in jail awaiting trial. So, these lower-bound estimates are, alone, incomplete. More inclusive estimates, such as those compiled by *Prison Policy Initiative* (cited below, see: Appendix C.2), go much higher: for example, they estimate Louisiana’s total rate of confinement to be around 1,067 per 100,000 (#1 on their estimates). It is also worth highlighting that even the least carceral state, Massachusetts, would be roughly equivalent to the average of our NATO peers, meaning our *best* state is only *average* compared to our peer groups (See A.2 below).

A.2. Incarceration in the United States and International Comparison

The United States is the single greatest carceral state of all major powers and it is not close, *but* the United States also is not a *sole* international outlier when it comes to *all* countries.

Highest 10	Rate/100k	GDP/capita	NATO	Rate/100k	GDP/capita
#1. El Salv.	1,086	\$5,391	#1. U.S.A.	614	\$82,769
#2. Cuba	794	\$9,605	#2. U. Kingdom	144	\$49,464
#3. Rwanda	637	\$1,010	#3. Portugal	116	\$27,331
#4. U.S.A.	614	\$82,769	#4. Canada	109	\$53,431
#5. Turkmen.	576	\$8,233	#5. France	107	\$44,691
#6. Panama	499	\$18,686	#6. Belgium	105	\$54,701
#7. Uruguay	424	\$22,798	#7. Italy	97	\$39,003
#8. Brazil	390	\$10,295	#8. Luxem.	88	\$128,678
#9. Thailand	377	\$7,182	#9. Denmark	69	\$68,454
#10. C. Verde	366	\$4,851	#10. Nether.	65	\$64,572

Fig. 2. International Incarceration Rates, 10 Highest and NATO peers, compared to their GDP per capita. Data compiled from [Prison Policy Initiative](#) (Widra, 2024) and the World Bank’s most recent estimates (2022-24).

We can compare the United States to all countries, similarly wealthy countries, or our NATO allies (or any other defined international organization). Here, we see the United States is an outlier in terms of wealth when compared to the other most carceral states and is an outlier in terms of incarceration when compared to NATO allies. The principal reason for this? Why does

the United States stand out from its peers? The causal story is part of the dispute, so an appendix is not exactly the best place to go through the various competing explanations. What we can say here is the minimal explanation. The mechanical answer, without addressing *why* this is the case: the United States uses *imprisonment* as a punishment far more often than our peer counterparts.

	U.S.A.	Canada	England	Finland	Germany
Imprisonment	69.9%	33.8%	9.2%	7.2%	7.5%
Control	30.1%	27.5%	8.0%	N/A	15.3%
Warning	N/A	3.3%	9.4%	13.4%	N/A
Fine	20.5%	33.5%	69.0%	75.8%	77.2%
Service	6.5%	N/A	N/A	3.6%	N/A

Fig 3. Comparison of Types of Punishment of Selected Countries (by percentage of all sentences in those countries), with data from [The Justice Policy Institute](#) (2011). ‘Control’ refers to control of freedom, which refers to probation (physical restriction to a region) or house arrest. ‘Service’ refers to official community service sentences, which are also unusually American, though also used by Finland. The sum of percentages exceeds 100% due to some sentences including multiple forms of punishment, such as “10 years and \$1,000 of fines.”

Our criminal system prefers to throw people in prison. We throw people in prison for crimes as our *default*. This is part of the public consciousness around crimes in the United States (See: Appendix B.3). If the average, ordinary person hears about a notable crime, such as an assault, the desire to throw them into prison is the default, uncritical attitude. This would be foreign to our European counterparts, who heavily prefer monetary punishments for lesser, more common crimes, as the above chart implies. We incarcerate the most and, thus, we have normalized the use of the prison in the moral hearts of ordinary people.

Appendix B. Overpunishment by the Numbers

We have already covered the carceral state and overincarceration. But does the United States really punish more harshly in general? It is also fully possible that the United States suffers from simply having more or worse crimes. This is plausible, so we cannot just assume that there is problematic overpunishment just from the problematic overincarceration alone. How does sentencing for *comparable* crimes compare across countries? What is clear is that the United States punishes more harshly for at least some particularly serious crimes (B.1.), the legislature imposes significant pressures on sentencing judges to sentence harshly (B.2.), and that this harsh or tough treatment is popular across the U.S. general population (B.3.).

B.1. Sentencing and Punishment in the United States and International Comparison

Typically, *punishment* in the context of the 21st century refers to *incarceration*, but the claims of overincarceration and overpunishment are slightly different. Overincarceration, as discussed before, is about how many people relative to a given population are incarcerated. As established in appendix A, it is hard to deny that this is the case for the United States. Overpunishment, on the other hand, refers to a conditional claim: when people are to be punished, they are being punished unjustly harshly. To establish this claim, let us again look to some international comparison, drawing principally on the work of Lila Kazemian and the Council on Criminal Justice ([2022](#)).

Average for <i>All</i> Convictions	Average for Homicides	Average for Sexual Assaults
#1. El Salvador (14.7)	#1. United States (40.6)	#1. United States (12.2)
#2. Mexico (11.4)	#2. Mexico (34.1)	#2. Hungary (6.0)
#3. Peru (8.5)	#3. El Salvador (33.5)	#3. Scotland (5.6)
#4. Honduras (7.4)	#4. Peru (18.0)	#4. England and Wales (5.2)
#5. Costa Rica (6.6)	#5. Honduras (15.9)	#5. Czechia (5.0)
#6. United States (6.4)	#6. Costa Rica (14.5)	#6. Belgium (4.4)
#7. Argentina (5.7)	#7. Argentina (13.4)	#7. France (3.9)
#8. Chile (5.0)	#8. Hungary (9.3)	#8. Switzerland (3.4)
#9. Hungary (2.5)	#9. Switzerland (9.0)	#9. Finland (2.9)
#10. Czechia (1.7)	#10. Chile (6.9)	#10. Netherlands (0.9)

Fig 4. Average Sentence Rank and Length in Years of Selected Peer Countries, Top 10s of Countries Sampled (Compiled from Figures 3a to 3c of Kazemian, 2022, who compiled data from various government databases). Important note: this data is not exhaustive but, rather, was from a sample of American (U.S. and Latin) and European countries, so does not include data from Asia or Africa. Data on Brazil excluded here due to being restricted to only Sao Paulo. Lastly: the United States data converted life sentences and death sentences to a fixed 100 years for the purposes of calculating an average (More on life sentences in Fig. 5).

As the figure description notes, the CCJ data here is not complete: rather, this data is intended to show that compared to our Latin American and European counterparts, the United States tends to sentence people to longer sentences. While of the countries sampled the United States is not an explicit outlier for sentence lengths in general, the United States is the harshest sentencers of homicides and sexual assaults (Also: Latin American countries tend to sentence homicides more harshly compared to European countries, while Europeans tend to sentence sexual assaults more harshly compared to Latin American countries).

Fig. 4 excludes life sentence data. When it comes to life sentences, compared to our peers, the United States is again a standout: though not an outright outlier when compared to the greater international community.

Highest 10	%life sentences	Lowest 10	%life sentences
#1. India	53.66	#1. Switzerland	1.01
#2. Liberia	53.42	#2. Tajikistan	1.04
#3. Nepal	33.04	#3. Ghana	1.10
#4. Bangladesh	26.65	#4. Uganda	1.11
#5. Burundi	17.59	#5. Nigeria	1.20
#6. Canada	14.41	#6. Macedonia	1.27
#7. Bermuda	12.02	#7. Thailand	1.31
#8. Cayman Islands	11.76	#8. Malawi	1.33
#9. Greece	11.45	#9. Chile	1.38
#10. Kenya	11.39	#10. Azerbaijan	1.42
#16. United States	9.47	-	-

Fig 5. Highest 10 and Lowest 10 Countries by Percentage of Prisoners Serving a Life Sentence. Sentencing data from CCJ 2022 data (Incl. their inclusion of the Cayman Islands). Data excludes all countries that do not use life sentences.

Additionally, *no* state of the United States exceeds Bangladesh’s 4th-place rate: Utah (the highest life sentencing state), if included as a country of its own, would be fifth at 26.49%. These numbers are high, certainly, but to say that life sentencing is a uniquely American phenomenon would be misleading (Though, again, we do *incarcerate* far more people in general than our peers, as discussed in Appendix A). The lowest ten countries list should also be taken with a grain of salt, as various other factors influence this particular statistic for countries with, for example, higher rates of extrajudicial violence and killings.⁴⁹ But, again, compared to our economic peers, the United States is indeed an outlier, as many of our economic peers do not even impose life sentences by law.

The main rejoinder to the accusation of overpunishment, then, would be to question whether or not the United States *in general* punishes more than other countries; this rejoinder is dubious at best. The numbers above demonstrate (1) that the United States does punish more harshly in general, though not as clear outlier, and that (2) the United States does specifically punish more harshly for the violent offenses of homicide and sexual assault. It is harder to find

⁴⁹ For an example, see: Amnesty International’s 2009 report on Nigeria, though the situation has been improving since then. <https://www.amnesty.org/fr/wp-content/uploads/2021/06/afr440372009en.pdf>

comparative data on sentencing for *lesser* crimes, as how countries handle crimes like assault, robbery, burglary, and motor vehicle crimes varies more heavily than differences in imprisonment length. What is known, however, is that the United States property crime rate has continuously dropped since 2014.⁵⁰ Also, while the United States is not *uniquely* harsh punishers for crimes in general, it is certainly a clear outlier among economic peer nations like those focused on in Appendix A. Mass incarceration, then, is best understood as the primary target of criticism of the claim of overpunishment, too.

B.2. Legislative Pressures to Punish Harshly

The Federal Sentencing Guidelines, as adopted in 1987, give us a clear picture of how legislators and judges differ on their approach to sentencing. For every type of crime under the FSG, the actual average sentence imposed was *less* than the average guideline minimum (As, following *United States v. Booker* in 2005, the FSC are *not* binding on judges) for cases of that kind, according to the United States Sentencing Commission 2020 Report: “The influence of the Guidelines on Federal Sentencing.” Assuming that federal sentencing judges are generally reasonable (or, at least more reasonable in sentencing than the legislators are), we could assume that this reflects a general and measurable judicial dissatisfaction with the severity of punishments recommended by the FSC.

⁵⁰ <https://www.prisonpolicy.org/reports/pie2025.html> Figure 3.

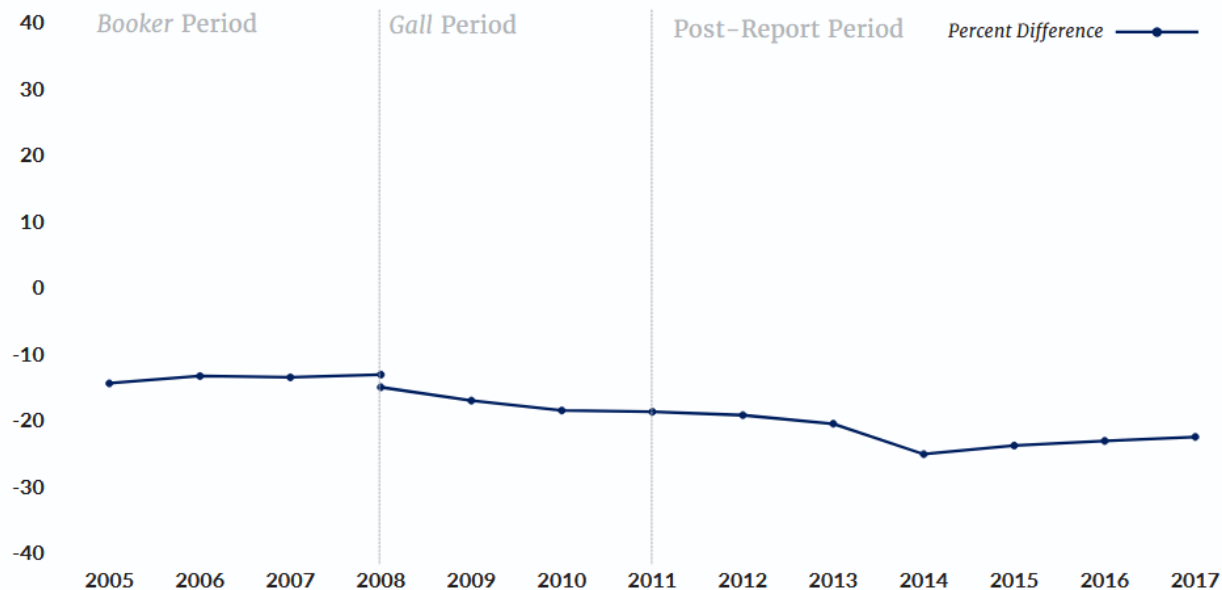


Fig 6. The Percentage Difference of Actual Federal Sentences Compared to the Minimums Recommended by the Federal Sentencing Guidelines 2005-2017, including assistance crimes, as found in the USSC 2020 report (page 64).

Judges consistently sentence less than the minimum suggested by Congress. Beyond the Federal Sentencing Guidelines, there are also a number of mandatory minimum laws which contribute the explicit and specifically legislative pressure to punish crimes harshly. A particularly infamous version of a mandatory minimum sentencing law was California’s 1994 “Three Strikes” law, where a third conviction for a qualified crime would result in a minimum sentence of 25 years. For some vivid examples, consider The Three Strikes Project, who defends individuals facing a third strike prosecution: “Project clients have been given life sentences for offenses including stealing one dollar in loose change from a parked car, possessing less than a gram of narcotics, and attempting to break into a soup kitchen.” ([link](#)).⁵¹ Laws like these certainly contribute to the

⁵¹ Should those individuals face punishment of some kind? Probably. Should those individuals face prison time? I think that is dubious given possible alternatives, though I think that is something reasonable people could dispute. But what I do not think reasonable people would dispute is that all three of those examples, even in face of a criminal past, should face *life* imprisonment. I am unsure if there is a number of times in which somebody could commit a crime so minor that I think life imprisonment would be warranted! Breaking into a soup kitchen is certainly detestable, but I struggle to see the grounds upon which we would cast someone’s entire life away for it. If anything, I think mandatory community service (which has its own moral hazards) would be the most poetic punishment, *especially* if it is a repeat offense.

tendency to overpunish, even if mandatory minimum laws still have a place in our society—in at least some cases, they get things wrong.

B.3. American Attitudes and Political Pressure to be “Tough on Crime”

Part of the reason why specifically the legislature seeks harsher punishment is that it is politically beneficial. Americans want their politicians to be “tough on crime.” As recently as 2023, per Gallup, 58% of Americans say that the criminal system is not tough enough, a sharp increase from 2020. Even among the Democrats, who tend to be “softer” on crime, that number is 42%, far greater than the 20% of Democrats who say that the criminal system is too tough.

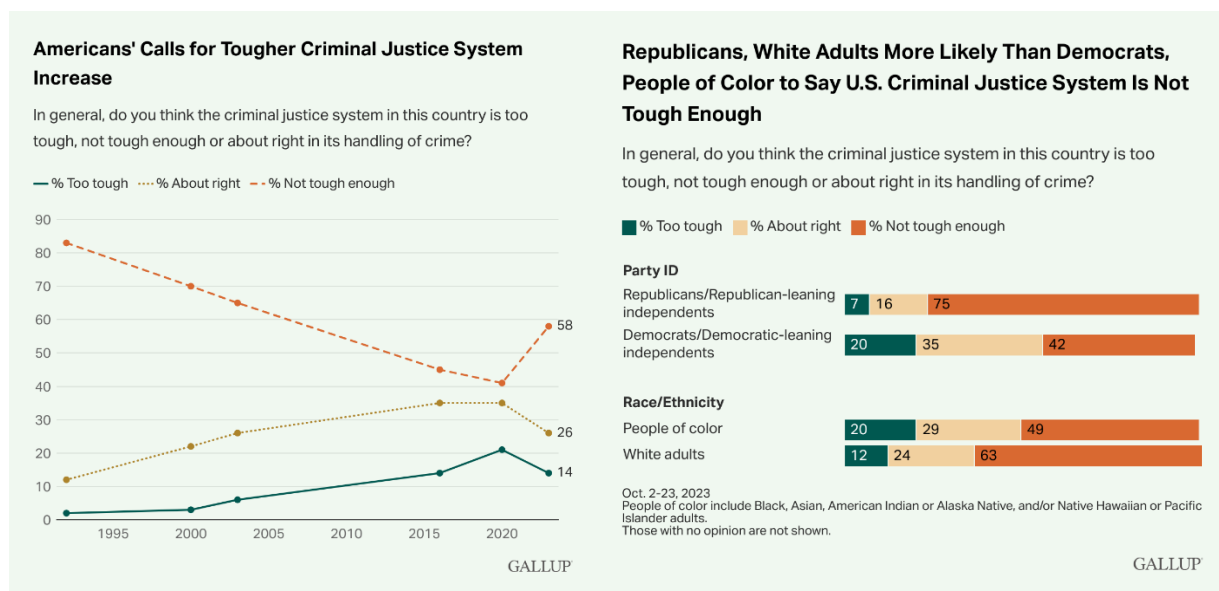


Fig 7. Two Gallup Polls on American’s Perceptions of the Country Being “Tough on Crime”
Note the sharp change in trend post-2020, likely shaped by political discourse of that election cycle and after.

Cursorily, this has little to do with the actual numbers but, rather, with the *perceptions* of Americans. Reported crime rates have consistently fallen, though there is some controversy as to why this is. Why might have perspectives shifted so sharply regardless? What changed? Why the sharp change, contrary to the trend, post-2020? For one: the political climate, particularly in

reaction to the pandemic and the criticisms of Joe Biden as being soft compared to Donald Trump, which I will not go into further here. Another thing that specifically changed was how much crime became publicly visible and discussed. The death of George Floyd resulted in a bit of inversion of the expected: “Tough on Crime” came to include, to some, crimes committed by cops. Thus, the phrase “Tough on Crime” has a new ambiguity: the phrase can also now channel images of being tough on *police brutality* to some being polled. Further, social media has propagated the visibility of crimes-for-entertainment, such as the “Kia Boys” phenomenon in 2021-2023,⁵² which, I speculate, also contributed to the change in the trend in the numbers above. This combination, among other factors, I think is the best explanation for the change in the trend—some may, alternatively, point to conservative media’s hawkishness on crime (such as Fox News’ coverage of crime), but I do *not* think this is a uniquely post-2020 phenomenon and thus does not explain the change in the trend above.

⁵² See: <https://www.theverge.com/2023/5/18/23729229/hyundai-kia-settlement-car-theft-challenge-tiktok>

Appendix C. Overcriminalization by the Numbers

We have covered in these appendices overincarceration and overpunishment. This appendix covers overcriminalization in two distinct senses: (1) that the substantial criminal law somehow goes too far, and (2) that the criminal law has too great of a presence in the life of ordinary people. It is the first sense in which the philosophical literature usually uses the word, though it is easy to fall into equivocation of the two senses. Thus, this appendix covers the number of criminal laws (C.1.), the reach of those laws (C.2.), and the social problem of *overpolicing* as ‘overcriminalization’.

C.1. The Number of Criminal Laws

When people speak of overcriminalization, or the more general claim that the criminal law has grown, they usually are thinking about the number of statutes or the length of those statutes. “There is too much law!” This kind of claim gets thrown around in casual conversation, legal education, and political discourse, somewhat without question usually. The Heritage Foundation’s 2022 study has been influential on this topic and helps paint the picture.

U.S. Code Sections that Create a Federal Crime

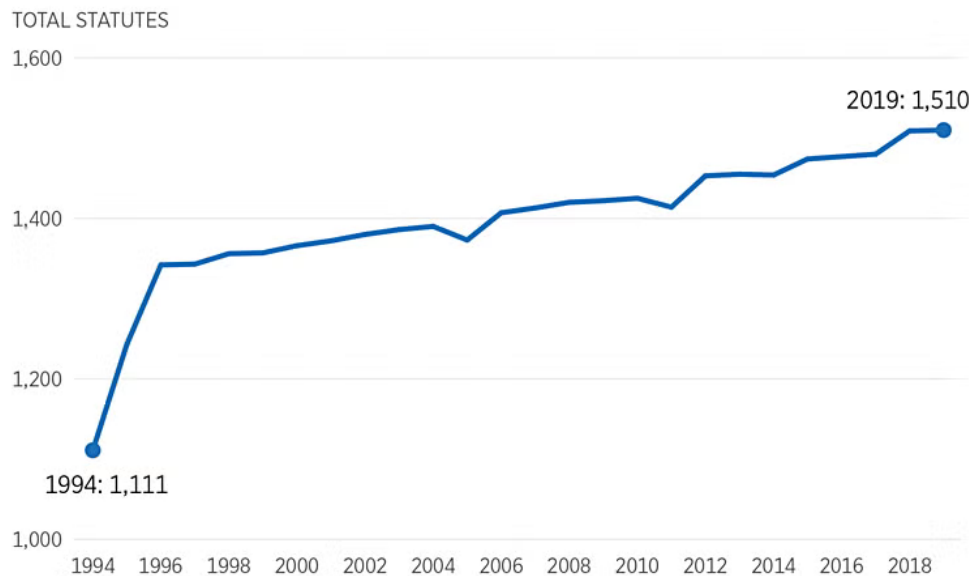


Fig. 8. Heritage Foundation Chart on U.S. Code Creating Federal Crimes (2022)

While a common sentiment, there are reasons to be skeptical of this basic picture. Most obviously, this particular chart only goes back to the Clinton Presidency and The Heritage Foundation is an explicitly conservative organization, contrary to the liberal former President Bill Clinton. But even if we accept the numbers on their face value, *many of the laws are fairly uncontroversial*. For example, the Sex Crimes Against Children Prevention Act of 1995 accounted for 40% of the increase from 1994 to 1995, according to their own study. Thus, it is unclear if such statutes actually created any *new* crimes or, rather, specified *subtypes* of already established crimes—such a method is not uncommon as a means to empower prosecutors, especially with the advent of new technologies like the internet. The World Wide Web was popularized in the 1990s, which alone undermines the main finding of the Heritage Foundation study cited above. Child sexual abuse has always been a crime, so should we treat *internet*-based involvement in child sexual abuse as *new* crimes? That is dubious yet seems to be at least part of the findings of the Heritage Foundation as cited above. So, while the initial picture is tempting,

this basic claim strikes me more as a conservative talking point than an analysis of what the accusation overcriminalization is best understood as being about. The methodology of such findings is dubious at best.

C.2. The Reach of the Criminal Law

Compared to the number of people *incarcerated*, the unusual offenses make up incredibly small percentages. Consider the “Whole Pie” of incarceration in the United States:

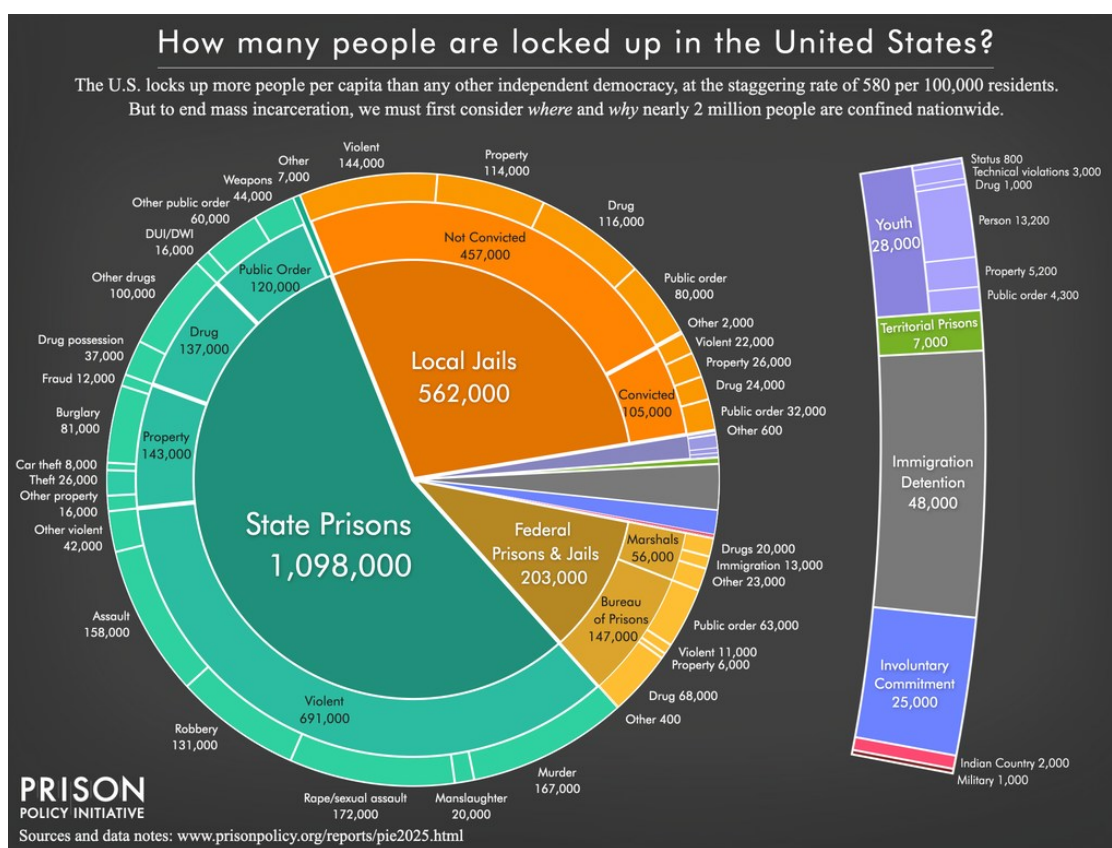


Fig. 9. The Locations and Offenses of People Confined in Prisons and Jails in the United States, also called “The Whole Pie” of Prison Policy Initiative (2025)

Of all state prisons, only 7,000 of 1,098,000 of those “locked up” are estimated to be “other” non-violent offenses. This is statistically insignificant if we are talking about prisoners-in-general. What is significant, and what work like Doug Husak’s rightfully focuses on, are the

number of people incarcerated for drug offenses, immigration offenses, and public order offenses. *Over 1 in 10 prisoners are incarcerated for a drug offense.* But that, too, is simplifying: *Prison Policy Initiative* themselves advocate for abolishing pre-trial confinement, which accounts, at any given point, over 450,000 of all people confined in the United States. What would be the best strategy to address overincarceration I leave open here; this is a discussion about overcriminalization.

However, trends of confinement and incarceration are not the same as trends of offenses. While most state prisoners are violent offenders, most offenses are *not* violent offenses. The most common type of offense, by far, are property offenses. The ratio between property offenses and violent crimes, roughly, is 6:1. If one wanted to merely minimize the number of token offenses counted as criminal offenses, they could simply endorse decriminalizing larceny. Of the 6,419,149 property crimes reported to the FBI in 2023, 4,512,064 were larceny-thefts. But this would be missing the point behind the accusation overcriminalization. We should not care about overcriminalization just because of the arbitrary label of ‘crime’ but, rather, the types of crime we treat as serious enough to pose a threat to freedom. To give a contrast from the aforementioned larceny: the *motor vehicle theft rate* has been going up rapidly in recent years (See the discussion of “Kia Boys” in Appendix B.3), rising about 50% over the last decade alone. Again: that is the *rate*, not the count, so in 2023, 1,067,522 motor vehicle thefts were reported. To reiterate the point made in Appendix B.3, while these offenses are less common, they take up more of the public consciousness around crime (Mainly because they are more impactful) and, thus, influence discourse (Both public and academic) more. Perhaps some of these property offenses should not be criminal at all; I am inclined to be unconvinced of such though.

C.3. Overpolicing as Overcriminalization

The number of criminal laws is relevant to our lives only insofar as they reach into our lives, and the way law reaches into our lives is not just through the substantial definition of crimes but also by the patterns of enforcement. There is no crime without prosecution. Thus, *overpolicing* is tied to overcriminalization in terms of how those problems come to impact actual lives. It is one thing if, say, certain drugs are illegal, it is another thing if then the drug trade becomes a reason for serious state intervention in *your* life. Or if, in the name of immigration enforcement, Immigration and Customs Enforcement is empowered anywhere with 100 miles of a border, coastline, or major airport, thereby making it a *domestic* federal enforcement agency. The police, of all kinds, is increasingly present in the lives of all Americans, especially post 9/11 and the Patriot Act. This leads to criminal law being used to empower the police to abuse. For example:

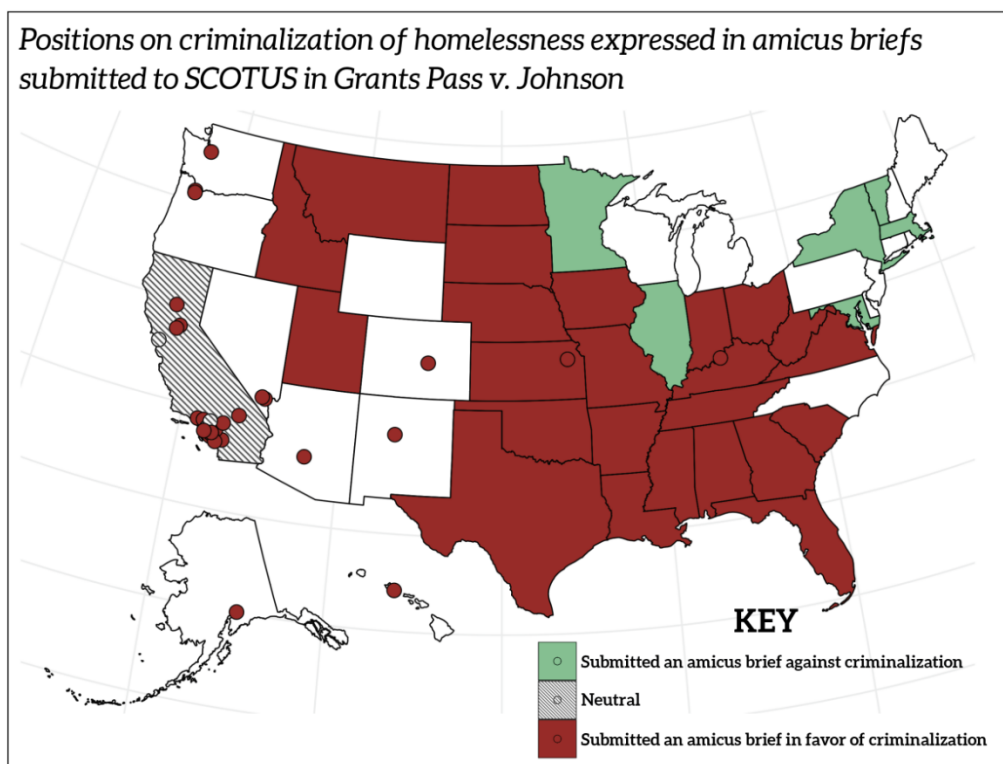


Fig. 10. Amicii brief map for *Grants Pass v. Johnson* made by Guy Oron of *Real Change News*, 2024.

The criminalization of homelessness is a particularly grim and timely example of the policing of actions that seem to lack any kind of culpability. An example of an anti-homeless provision is the ability of the police to ticket and/or forcibly remove people sleeping in public places. Such was the main question in the case of the recent *Grants Pass* ruling, where the Supreme Court upheld such laws, in no small part because of how popular such ordinances are across the country, as the *amici* to the court showed.

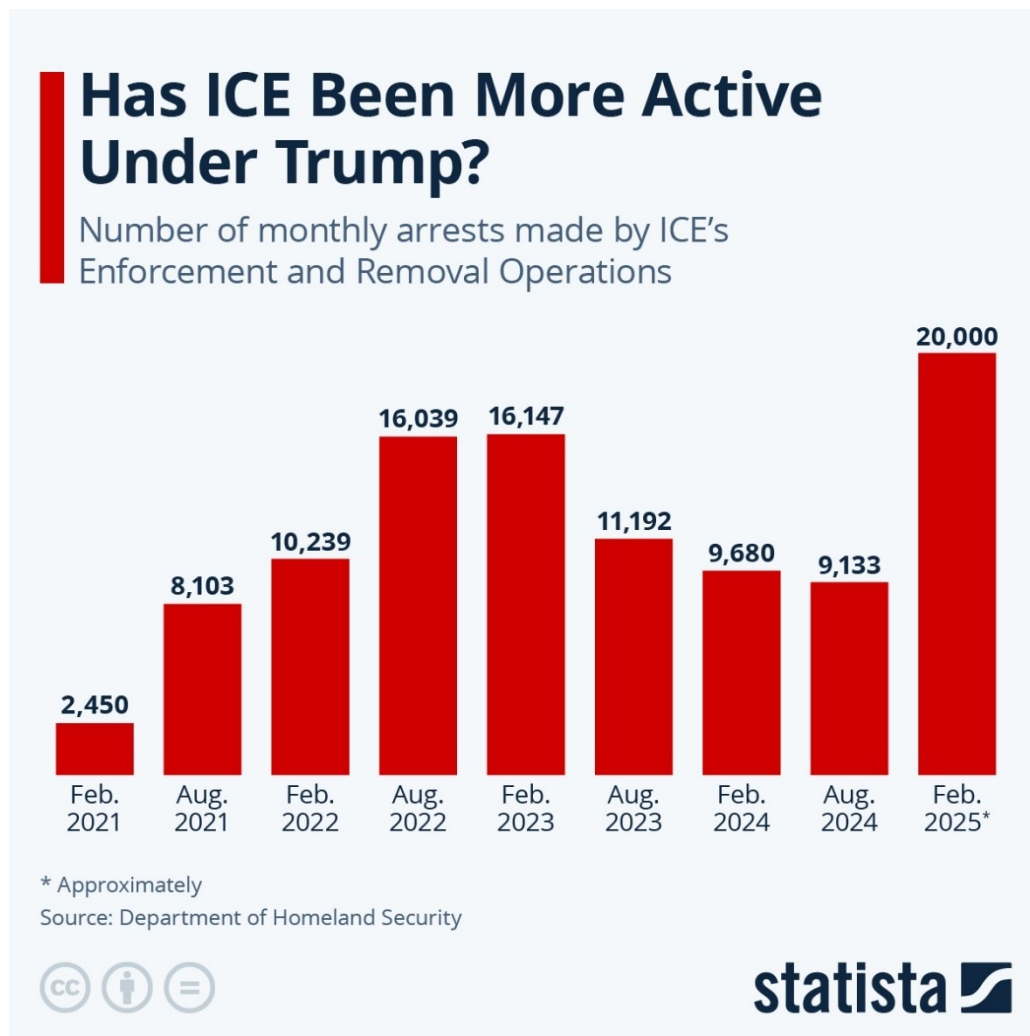


Fig. 11. Immigration and Customs Enforcement Arrests Since 2021, as compiled by Statista (2025).

Immigration and Customs Enforcement is particularly controversial, especially given the recent wave of arrests in early 2025 (This appendix was written before ICE shootings in later 2025 and

early 2026). ICE has always faced criticism, too, for its targeting of some U.S. citizens: according to reporting by Melissa Cruz of *Immigration Impact*, at least seven U.S. citizens were detained by ICE in early 2025 alone ([Link](#)). That same story also mentions a 2020 Government Accountability Office (GAO) claiming that potentially 70 U.S. citizens were wrongly deported between 2015 and 2020, and ICE and Customs and Border Protection (CBP) internal records are questionable and, thus, that number may be much higher. U.S. citizens, especially those who are Hispanic presenting, may face wrongful persecutive policing by federal agencies, because immigration violations are treated as a *crime* that is *prosecuted*. The criminalization of immigration brings about a real and present concern in the lives of ordinary people, thereby highlighting a core connection between what motivates simultaneously some claims of overcriminalization and overpolicing.

Another example is the use of “no-knock” warrants: an infamously dangerous practice which has resulted in the deaths of innocent citizens and various police officers, killed by lawful gunowners, alike (For more on this, see [Legal Defense Fund’s 2022 report](#)). This type of police raid, as it is best understood, was largely nonexistent before the War on Drugs under the Nixon presidency, as they were adopted mainly to prevent the destruction of evidence: think of the common trope of “flushing the drugs” common in Hollywood depictions of such raids to this day. Special Weapons and Tactics police squads (S.W.A.T., usually those who execute no-knock raids) did not even *exist* until the mid-1960s, when such types of squads were established in cities like Philadelphia and Los Angeles. *Now*, as a result of the very existence of such teams and practices, we now have to be worried about ‘SWATing’, where a malicious actor calls in a lie to get a S.W.A.T. team to raid an innocent target’s house on a false accusation. The very existence of the war on drugs and the use of special tactics raids imposes a direct threat to the lives and

freedoms of real, innocent people, often simply because they are publicly known as an option for malicious parties to exploit. Again, an example of how overcriminalization and overpunishment are tied together and produce a social problem that comes to effect ordinary, even uninvolved, people.

Which brings us to the final point that this appendix will address: the consequences of the militarization of the police. The militarization of the police is a broad phenomenon but includes changes such as the increased use of lethal force, the use of military-grade weapons for crowd control (Such as tear gas on protestors), the use of armored vehicles, and so on. Often these tools, weapons, and gear, come straight from the U.S. military itself, often old materials being domestically resold. The result? By far, the police in the United States kills more people than any of our peer countries.

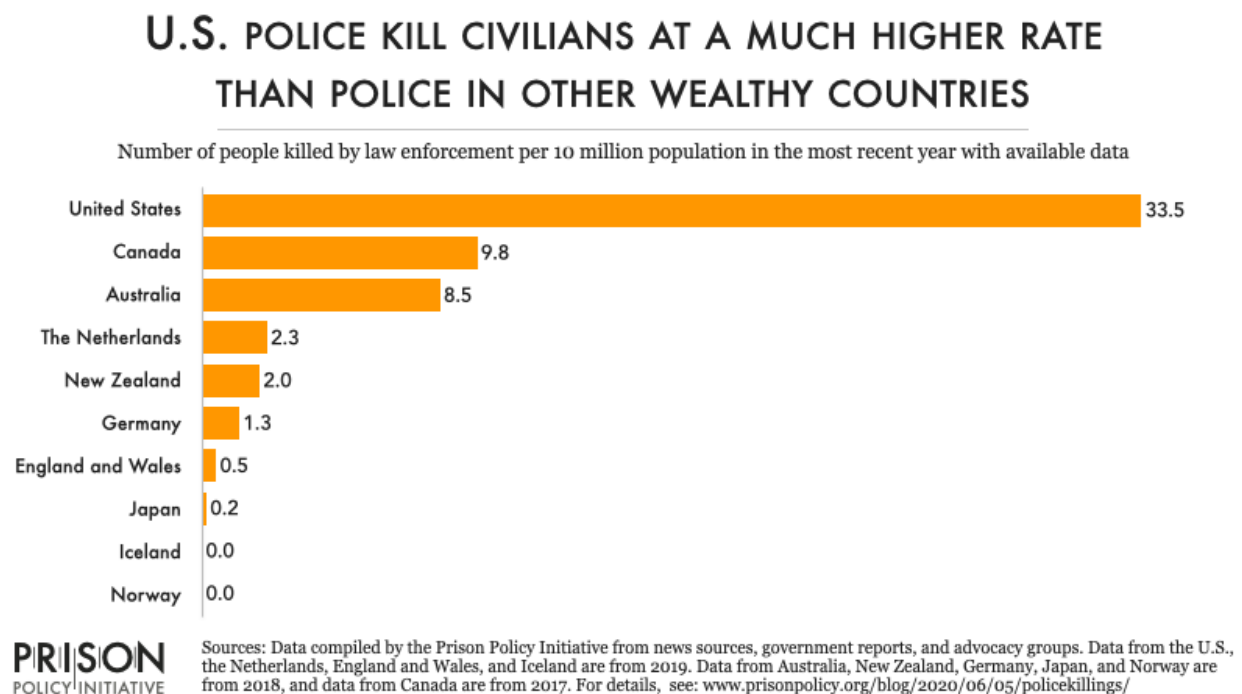


Fig. 12. Police Killings of Civilians, Rate per 10 million, International Comparison of U.S. to Peer Countries, with data compiled by Prison Policy Initiative (2020).

While not the focus of this dissertation, as here I seek to write about the *substantive criminal law*, the militarization of the police and of *American life more generally* is a deep concern. It would simply be too much for me to tackle both problems in the same project, nor do I consider myself, as a philosopher, particularly well-suited to address such a massive social problem. But it is worth highlighting and keeping in mind, especially when it comes to understanding the accusation of overcriminalization charitably.

All of this being said, we still must be careful to distinguish the claim that (1) the problem called ‘overcriminalization’ is that there are too many criminal laws or the criminal laws capture too many activities versus (2) the claim that the problem called ‘overcriminalization’ is that the criminal law is used as a justification for unjust overpolicing, lest we equivocate and led ourselves astray about the important problems.