

“I Might Be Guilty, But You Can’t Try Me”: Estoppel and Other Bars to Trial

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I. INTRODUCTION: SUBSTANCE AND PROCEDURE

Both teaching and research in criminal law often separate substantive “criminal law” sharply from “criminal procedure.” Many who write and teach about “criminal law” would, I suspect, share the view with which Markus Dubber begins his book on the Model Penal Code—“*The criminal law . . . comes down to a single, basic, question: who is liable for what?*”¹ They would assign to the separate subject of “criminal procedure” the question of just how liability gets to be assigned to those who are liable. Now there are of course benefits to be gained from such a division of theoretical labor: there are different questions to be asked about the content of the substantive criminal law (about its definitions of offenses and defenses, about the conditions of criminal liability that it specifies), and about the procedures by which the applications of those definitions and the satisfaction of those conditions are determined. However, there are also losses to be incurred from making this division too sharp, and benefits to be gained from thinking more broadly about the criminal law as a single, practical enterprise of defining and allocating criminal liability—especially if one is embarking, as I am, on the ambitious project of critically analyzing “the principles of criminal liability.”

If we separate substantive criminal law from criminal procedure, we will suppose that those principles should determine “who is liable for what”—and that this is indeed the “single, basic question” of criminal law. We might do better, however, to change the question, and to ask instead “*Who can be held liable for what by whom?*” We should be looking, that is, not for principles that will determine who *is* in some abstract or impersonal sense liable for what, as if criminal liability was a state or condition that we acquire purely by our own efforts; but rather for principles that will help us determine when it is legitimate for some person or body to *hold* someone liable, thus properly portraying criminal liability as a process or activity, not merely as a condition or state.

This suggestion depends on a conception of the criminal trial as (in normative aspiration, albeit admittedly not often in empirical fact) a process by which the polity holds its citizens accountable: not just a process by which the truth of an

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¹ MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 5 (2002).

accusation, or the defendant's penal fate, is determined, but a process through which a defendant is called, as a citizen, to answer a charge of wrongdoing, and to accept the judgment, and if proved guilty, the condemnation of her fellow citizens.² For the criminal law claims the authority not just to define conduct as criminal, but to call citizens to account for such conduct: to require them to answer the charge that they engaged in such conduct, and to judge, condemn, and punish them for doing so. Our responsibilities or obligations as citizens under the law include not just refraining from crime, but answering for our alleged crimes, and accepting liability for our proved crimes.

Given such a conception of criminal liability as a process or an activity, the principles of criminal liability should be the principles governing the activity of holding people criminally liable; they must therefore concern not only what we can call the direct conditions of criminal liability (i.e. the conditions determined by the substantive criminal law), but also what we can call the conditions of accountability, or the *preconditions* of liability. These are the conditions that must first be satisfied before the question of whether the direct conditions of liability are satisfied can be properly raised, let alone decided, in a criminal trial. The question for the trial is whether this defendant should be convicted or acquitted of the charge he has been called to answer. Before that question can even be properly raised, however, we must ask whether the conditions of accountability are satisfied, i.e. whether this court can properly call this person to answer this charge of criminal wrongdoing, and judge his guilt or innocence: unless those conditions are satisfied, the court cannot legitimately deal with the question of guilt.³

Legal versions of some of these "conditions of accountability" figure amongst what Paul Robinson classifies as "non-exculpatory defenses."⁴ Robinson himself rightly notes "just how inappropriate it is to use this single term [defense] to refer to so many different matters"⁵—although I don't think that he follows through the implications of that comment consistently enough or seriously enough: for whereas "defenses" properly speaking constitute answers to a criminal charge, and justify acquitting a defendant who was properly tried, most of the pleas that figure in this category of "non-exculpatory defenses" serve rather to bar the defendant's trial. Two examples will illustrate this general point.

First, a successful insanity defense, which is focused on the defendant's condition at the time of the killing, justifies his acquittal: he answers this charge of culpable wrongdoing by denying culpability. By contrast, a successful plea of incompetency, or of unfitness to plead, which focuses on the defendant's condition at the time of the trial, does not offer an answer to the charge of wrongdoing, but shows instead that this defendant cannot be properly called to answer that charge,

² See generally R. A. DUFF, TRIALS AND PUNISHMENTS 99–145 (1986).

³ See R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 179–97 (2001).

⁴ 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 55–57, 102–14, 179–87, 460–543 (1984).

⁵ *Id.* at 1.

because he lacks the capacities necessary to understand it or to answer it: the claim is not that he did not culpably commit the crime charged, or that the prosecution cannot prove his guilt, but that he cannot be tried for it.⁶

Second, someone might answer a charge by arguing that she was authorized to engage in the conduct in question, conduct that would otherwise have been criminal; for instance, under English law a parent could rebut a charge of assault on her child by arguing that what she was doing constituted nothing more than “lawful chastisement.”⁷ By contrast someone who claims diplomatic immunity when charged with an offense is not claiming that she was authorized to engage in that conduct, or that her conduct was legally permissible—indeed, she might admit that what she did was culpably criminal: but she is denying that this court has the authority to call her to account for her conduct.

In each of these cases, the defendant does not answer the accusation by arguing that she is not guilty of the offense (or that the prosecution cannot prove her guilt); she argues instead that it is not an accusation that she should have to answer in this court. We must, therefore, distinguish “defenses,” which constitute answers to the charge (thus admitting that the charge is one that I can be required to answer), from “bars to trial”—pleas that pre-empt prosecution by showing the trial itself to be illegitimate.

II. BARS TO TRIAL—AN INITIAL TYPOLOGY

If “the principles of criminal liability” are understood, as I am suggesting they should be, as principles governing the institutional activity of *holding* people criminally liable, they must deal with the conditions of accountability—the conditions that must be satisfied if a criminal trial, as a process through which a citizen is called to account for his alleged wrongdoing, is to be legitimate; the non-satisfaction of any of those conditions constitutes a bar to trial. We can make progress in understanding those conditions (and in critically evaluating our criminal processes) by developing a typology of bars to trial: by getting clearer about the various kinds of factors that render trials illegitimate, and about why they do so, we can get clearer about the conditions that a legitimate trial must satisfy. What follows is an attempt at a preliminary, and so far very rough, typology.

We can identify four central types of bar to trial. The first focuses on the condition of the defendant—on whether he is fit to be called to answer any charge. The second focuses on the conduct that is alleged to constitute his crime—on whether it is something he can be called to answer for. The third focuses on the evidence against him—on whether there is a case that he must answer. The fourth focuses on the authority or standing of those who call him to answer—on whether

⁶ 2 ROBINSON, *supra* note 4, at 501–08 (commenting on incompetency); *see also* JOHN SPRACK, EMMINS ON CRIMINAL PROCEDURE 252–54 (9th ed. 2002) (commenting on English law).

⁷ *See* JOHN C. SMITH & BRIAN HOGAN, CRIMINAL LAW 424–25 (10th ed. 2002). This parental right is now under attack in the light of the European Convention on Human Rights.

the polity, in whose name both the prosecutor and the court claim to act, has the right to call this defendant to account.⁸

A. *The Defendant's Condition*

A defendant who is to be legitimately called to answer a charge of wrongdoing must be *capable* of answering it; otherwise his trial becomes a travesty. A defendant who is incompetent or unfit to plead at the time of his trial, i.e. one who is not capable of understanding and responding to the charge against him, should not be tried: not because his guilt could not be proven, but because his trial could not then be what it is supposed to be—a process through which he answers the charge of wrongdoing.

B. *The Alleged Conduct*

A defendant who is fit to be tried can bar her trial by showing that the prosecution has not alleged anything for which she can be tried or for which she must answer. So she might show that the alleged offense was committed outside the jurisdiction of this legal system, or so long ago that its prosecution is barred by a statute of limitations; or that she has already been tried, and has already answered for, this conduct, so that to try her now on this charge would constitute double jeopardy; or that the conduct she is alleged to have engaged in does not constitute an offense, so that even if the prosecution proved every fact it alleged, it would not prove her to be guilty of an offense.⁹

C. *The Prosecution's Case*

A defendant can be legitimately required to answer a charge only when there is sufficient evidence to constitute a case to answer: citizens should not be required to subject themselves to the burden of a trial unless the prosecution can adduce credible evidence of their guilt. This is a key function of various kinds of pre-trial hearings—of preliminary hearings and grand jury proceedings under American law, for instance, which must decide whether there is “probable cause to believe” that the defendant committed the offense charged; and of committal proceedings

⁸ I will not consider here the various rules about the exclusion of evidence: although such exclusions can constitute *de facto* bars to trial when they exclude evidence that was vital to the prosecution's case, and although the grounds of exclusion can overlap interestingly with grounds for barring the trial when they involve serious misconduct by the police or the prosecution, the exclusion even of vital prosecution evidence is not formally a bar to trial, and does not render the trial itself illegitimate.

⁹ This is the (very infrequently used) plea of “demurrer” in English law. See CELIA HAMPTON, CRIMINAL PROCEDURE 188 (3d ed. 1982). Such pleas have been more frequent in Scottish courts, in light of the High Court's supposed “declaratory power” to create new crimes. See I GERALD H. GORDON, THE CRIMINAL LAW OF SCOTLAND 15–40 (3d ed. 2000).

under English law, which must decide whether the prosecution has made out at least a *prima facie* case for the defendant to answer.¹⁰

D. *The Polity's Standing*

Finally, even if the prosecution could adduce legitimately acquired evidence sufficient to prove that a competent defendant committed the crime charged, the defendant might secure a bar to trial by arguing that the polity in whose name both prosecutor and court must claim to act lacks the authority or the right to call her to account in this way. She might, for instance, be able to claim diplomatic immunity, which is understood as immunity from prosecution.¹¹ Or she might be able to argue that the prosecution's or the state's prior conduct towards her makes it improper for her to be tried on this charge: perhaps she was promised immunity in relation to this charge, as part of a plea bargain, or to avoid Fifth Amendment obstacles to her testifying against others;¹² or perhaps she can argue that some type of outrageous misconduct by the police or prosecution undermines the legitimacy of her trial. I will return to this kind of case in section III.

There is of course much more to be said about the procedures by which such pleas in bar of trial should be decided. They should, in principle, be dealt with before the trial itself, since they concern the legitimacy of the criminal trial, as a process in which a polity (which figures in American cases variously as the state, the people, or the commonwealth) calls a defendant to answer a charge of wrongdoing.¹³ (In England defendants are accused and called to answer by the sovereign, and in Scotland by "Her Majesty's Advocate"; that is because we are still in the law's eyes subjects, not fully citizens.) This is not to say, however, that such pleas should be decided by a judge rather than by a jury; and it leaves open a range of important questions about who should bear the evidential or probative burdens, and about the appropriate standard of proof. I cannot tackle such questions here, nor can I discuss the equally important question of what the effect

¹⁰ See WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 714–19, 737–45 (3d ed. 2000) (commenting on American law); see also SPRACK, *supra* note 6, at 188–89 (commenting on English law).

¹¹ See SPRACK, *supra* note 6, at 73.

¹² See, e.g., LAFAVE ET AL., *supra* note 10, at 453–59, 973–80. However, the issue in relation to plea bargaining more usually concerns the sentence to be sought for the offense to which the defendant agreed to plead guilty; prosecutors do not typically try to pursue charges that they agreed to drop.

¹³ The distinction between issues that should be decided before the trial, and those that are properly dealt with as part of the trial, is obviously not always clear-cut; for instance, the defense can ask for a finding that there is no case to answer during the trial, at the end of the prosecution's presentation of its case. See SPRACK, *supra* note 6, at 293–95 (commenting on English law); LAFAVE ET AL., *supra* note 10, at 1128–29 (commenting on American law). There is still, however, a significant difference between a pre-trial claim that there is not enough evidence even to warrant a trial, and a claim during the trial that the prosecution, having been given the chance to make out its case, has utterly failed to do so.

of a successful plea in bar of trial should be—though I do not suppose that there is one answer to this question; different pleas leave different avenues open.

We should, however, be cautious of Robinson's suggestion that, when a "non-exculpatory defense" succeeds, courts should still be able to impose some of the "collateral consequences" of conviction on the defendant—if necessary (when there has been no trial) after a process of "culpability determination" that results in a special verdict of "guilty but not punishable." Thus the court might order preventive or protective detention for someone found unfit to plead, or order that this offense should figure in the defendant's criminal record, even though he could not be formally convicted for it.¹⁴ This suggestion reflects his view that these "defenses" are to be justified in consequentialist terms, as a matter of balancing "societal interests"; even if those interests are not served by holding a proper trial, they might be served by subjecting the (guilty) defendant to at least some of the consequences that could attach to conviction. But he does not take seriously enough the ways in which a trial might be barred as a matter of justice (of the polity's right to call this person to answer or to judge her), not of utility, and the extent to which the justification of such "collateral consequences" can depend not simply on the fact that the defendant was guilty, but on the fact that she is *found* guilty by a legitimate criminal trial. There might be another, non-criminal process to which a defendant who cannot be tried can properly be subjected, or another body that can call her to account: someone found unfit to plead can be subjected to the non-criminal process of civil psychiatric detention; someone who cannot be called to account by this court or by this criminal law might be answerable to some other institution or body. But if a trial is barred, no disposal whose justification depends on such a criminal process can be justified.

III. ESTOPPEL AS A BAR TO TRIAL

The various trial-barring pleas can illuminate the nature and purposes of the criminal trial: by asking whether and why they are justified, we can get clearer about what a trial is supposed to be, what ends it should serve, and what values should inform it. So by understanding why fitness to plead matters, for instance, and what makes a person fit or unfit, we can get clear about the way in which the criminal trial is meant to be a procedure through which a responsible citizen is called to answer a charge of wrongdoing (and we can also recognize more sharply the ways in which our own practice of criminal trials is a travesty). To illustrate this general point, and the fruitfulness of the approach I am suggesting, I will look in a little more detail at just one kind of trial-barring plea, which claims that the polity's prior conduct towards the defendant undercuts its standing to try him. (It is in this context that we might talk of "estoppel.")

Estoppel finds its more natural home in the civil law, rather than in the criminal law, as a doctrine, or set of doctrines, which fills some of the gaps left by

¹⁴ See 1 ROBINSON, *supra* note 4, at 179–87.

the law of contracts. It is “a mechanism for enforcing consistency; when I have said or done something that leads you to believe in a particular state of affairs, I may be obliged to stand by what I have said or done, even though I am not contractually bound to do so.”¹⁵

In its strict or narrow sense, estoppel prevents a party who has induced or allowed another to rely, to her potential detriment, on some explicit or implicit assurance or commitment, from going back on that assurance or commitment to the other’s detriment. For example, if I promise my tenant that I will accept just part of the rent she owes me for a given year, rather than demanding the full rent, and the tenant relies on that promise, the doctrine of promissory estoppel precludes me from going back on that promise, and suing for the full rent, even if the promise was not legally binding as a matter of contract.¹⁶ The tenant still owes the rent, since a promise not to enforce a debt does not cancel the debt; but I am estopped from demanding it.¹⁷ However, we could see behind this narrow doctrine a broader moral idea: that one’s prior conduct towards another person can undercut one’s right to make what would otherwise have been a legitimate demand on them, or to enforce duties that are nonetheless still binding on them. For instance, if I constantly (and unrepentantly) lie to you, I cannot complain when you lie to me: this need not be because my lying to you justifies or excuses your lie to me—we could think that duties of honesty are not thus conditional on reciprocity, and insist that *we* have the standing to condemn you; the point is, rather, that my own prior dishonest behavior towards you morally estops me from complaining about your dishonest conduct towards me. So too, if I set out to provoke you into attacking me, we might say that your attack is neither justified nor excused, but that I can hardly complain about it: my provocation does not legitimize your attack, but it estops me from complaining about it.

The notion of estoppel is sometimes also applied in criminal law, to cases in which what bars trial is the prior conduct of the prosecution or some other official towards the defendant. Here are four examples of what might be counted as criminal estoppel.

A. *Promises of Immunity*

The prosecutor promises the defendant immunity in relation to a particular charge, as part of a plea bargain or to remove Fifth Amendment barriers to his giving evidence. She is bound by her promise, at least or especially if the defendant relied on it to his potential detriment, by pleading guilty on the agreed charge, or by giving self-incriminating evidence; she is, we can say, estopped from

¹⁵ ELIZABETH COOKE, *THE MODERN LAW OF ESTOPPEL* 1 (2000).

¹⁶ See *Central London Property Trust Ltd. v. High Trees House Ltd.*, 1947 K. B. 130.

¹⁷ This is, I should admit, a radically oversimplified statement of the doctrine of promissory estoppel. For a very clear statement of some of the complications, see PAUL RICHARDS, *LAW OF CONTRACT* 65–70 (5th ed. 2002).

breaking it. The defendant might be guilty; indeed, it might be possible to prove his guilt by admissible evidence: but the prosecutor must keep her word, and the polity in whose name she speaks must keep its word. We could of course find pragmatic reasons for holding the prosecutor to such promises: if defendants could not be confident that they would be kept, they would cease to be effective. However, the basic reason is one of justice: a polity should not break its word to its citizens.

B. *Entrapment*

Despite all the controversy that still surrounds the “defense” of entrapment, it seems clear that it cannot be a defense which exculpates the defendant by showing either that his conduct was justified or that he was non-culpable or less culpable. The police officers who entrap him do not thereby authorize or legitimate his commission of the offense, whilst the mere fact that they are, unknown to him, police officers cannot render him less culpable than he would have been had the inducers been, as he thought, private citizens (in which case he would not have been able to plead entrapment). The facts that constituted the entrapment might also establish a defense, for instance if the inducement amounted to duress; but the entrapment per se does not look like a defense. Nor is it enough to say that entrapment should bar conviction because this is an effective way of deterring police misconduct: for—apart from the fact that there are better ways of achieving that—this does not explain why the trial and conviction of someone who was entrapped should seem *intrinsically* improper, as it does and should seem. The point is rather that the hypocrisy and moral inconsistency involved in a polity prosecuting someone for a crime that its officials induced, in order to be able to prosecute this person, renders the trial illegitimate. “You urged me to do it” does not exculpate me, but it does undermine your standing to condemn me for doing it. That is why it is appropriate to talk of “estoppel” in such cases,¹⁸ and why entrapment should be a bar to trial rather than a defense at trial.¹⁹

The previous paragraph admittedly plays fast and loose with some complex and difficult issues about entrapment, including the questions of what should count as entrapment and of what relevance, if any, the defendant’s predisposition to commit such crimes should have to his plea of entrapment (though my remarks imply that it should have no relevance); it adopts what has been called the “objective” approach favored by the minority on the Supreme Court in *Sorrels*, *Sherman* and *Russell*,²⁰ focusing on the conduct of the entrappers, rather than the

¹⁸ See, e.g., 1 ROBINSON, *supra* note 4, at 112; Andrew Ashworth, *Testing Fidelity to Legal Values: Official Involvement and Criminal Justice*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 299, 310–22 (Stephen Shute & A. P. Simester eds., 2002).

¹⁹ See Ashworth, *supra* note 18, at 321; see also *R. v. Looseley* 2001 U.K.H.L. 53.

²⁰ *Sorrels v. United States*, 287 U.S. 435 (1932); *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Russell*, 411 U.S. 423 (1973).

subjective approach that focuses on the conduct, intentions and predisposition of the person who is entrapped: but much more argument is needed to show why that is the right approach. All I have tried to do here is to show that, if we take seriously the idea that an agent's prior conduct can undermine her right or her standing to call another to account for his admittedly culpably wrongful conduct, we can plausibly see entrapment as a bar to trial that is based on the same moral idea.

There is another possible way of understanding the implications of entrapment, which is perhaps hinted at in the majority view in *Sorrels* that conduct which is induced in a way that constitutes entrapment "lies outside the purview" of the relevant criminal statute.²¹ If someone is entrapped into supplying an illegal drug to a police undercover agent, for instance, he is no less culpable than someone who supplied the drug to a genuine purchaser, but we might take a different view of the objective wrongfulness of his action: if the whole interaction was part of a carefully controlled police operation, it did not seriously threaten or make more likely the kind of mischief at which the drug laws are aimed. From this perspective, cases of entrapment—at least when they involve no victim and no harm—are rather like impossible attempts to handle stolen goods when the goods are not actually stolen, but are part of a "sting" operation by the police, and we might be tempted to say that, culpable though the defendant might have been, he did not commit a genuinely criminal wrong.²² However, this is yet another issue that I cannot pursue here.

C. Discriminatory or Vindictive Prosecution

A defendant might argue, as a bar to trial, that even if she was provably guilty as charged, the decision to prosecute her was grounded in a vindictive motive,²³ or that her selection for prosecution, from among the many who could have been prosecuted, was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."²⁴ Here again the point is not that the

²¹ *Sorrels*, 287 U.S. at 448, 451.

²² See *People v. Jaffe*, 78 N.E. 169 (N.Y. 1906) and, more complicatedly, *Haughton v. Smith*, A.C. 476 (1975); see also R. A. DUFF, CRIMINAL ATTEMPTS 101–06, 207–11 (1996).

²³ See, e.g., *Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968); see also LAFAVE ET AL., *supra* note 10, at 686–88.

²⁴ *Oyler v. Boles*, 368 U.S. 448, 456 (1962); see also LAFAVE ET AL., *supra* note 10, at 679–86. Such claims are of course notoriously hard to prove, given what the Supreme Court has declared must be established (it is a further question whether such a burden of proof is fair); sometimes the alleged discrimination infects not the decision to prosecute, but prior official decisions—for instance about which applications for licenses to approve (see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)), or about which cars to stop for traffic violations, with a view to searching them for drugs (see *New Jersey v. Soto* 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996)); sometimes the remedy sought is not a direct bar to trial, but the exclusion of the evidence improperly obtained (*Id.*). But my interest here is in the point of principle that is raised most directly by the simple case of discriminatory decisions to prosecute.

defendant is not or might not be guilty, or that she could not be called to account for her alleged wrongdoing by someone, but that the manner or motivation of her prosecution renders it illegitimate. She is not being prosecuted to serve the proper aims of justice; the injustice of the prosecutor's treatment of her undermines the right of the polity (for whom the prosecutor is acting) to call her to account—at least on this occasion. “You're picking on me unfairly” does not exculpate me, but it does (if true) undermine your standing to demand that I answer to you.

(One might think that an even more egregious kind of official misconduct, which should bar the trial as an abuse of process, is found when the defendant is brought to trial by being kidnapped from abroad by or at the instigation of government agents: but whereas in England the House of Lords has held that this should indeed bar trial, in America the Supreme Court has refused to do so—although the argument in the case was focused on the issue of whether the kidnapping violated the extradition treaty between the United States and the country from which the defendant was kidnapped.²⁵)

D. *Reliance on Official Advice about the Law*

An agent's reasonable reliance on mistaken official advice that his contemplated course of action was not criminal is sometimes said to ground a plea of “entrapment by estoppel”—and given the unwarranted persistence of the doctrine that even reasonable mistake of law is not a defense, one can see why some such provision is necessary. If, however, we abandoned that doctrine, as we should, we could distinguish two kinds of cases of reasonable reliance. In one, the official who gives the advice acts in good faith, without malice; in the other she acts in bad faith, intending to induce the commission of the crime. In the former case, reasonable reliance should constitute a defense: the defendant's culpability is negated by the fact that he made reasonable efforts to conform his conduct to the law's demands; this should not be seen as a matter of estoppel. In the latter case, we should still talk of estoppel, since it involves one kind of entrapment: the fact the official, acting in the polity's name, induced the commission of the crime, by deliberately misinforming the defendant, undermines the polity's standing to call him to account for his crime.²⁶

We should notice two features of all these cases: both are important, and the second points to a serious problem about estoppel in the criminal context. First, provisions such as these depend on a conception of what a polity owes its citizens, and of what counts as fair dealing between polity and citizens, in the context of the investigation and prosecution of crimes (and a conception of the implications of the polity's failure to deal fairly and honestly). Aspects of that conception are of

²⁵ See *R. v. Horseferry Road Magistrates' Court, ex parte Bennett*, [1994] 1 A.C. 42; *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

²⁶ See generally John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 *AM. J. CRIM. L.* 1 (1997); Ashworth, *supra* note 18, at 302–10.

course controversial: for instance, what kinds of inducement or encouragement of crime count as legitimate police tactics, and which constitute illegitimate entrapment; what other kinds of deception can the police properly use and what kinds are illegitimate; what constitutes an improperly discriminatory prosecution, given that prosecutors must retain a wide discretion about whom they prosecute? However, what is not controversial is that there are some limits (moral limits, which should also be legal limits) on police and prosecutorial tactics; that if those limits are flouted the legitimacy of the trial is undermined; *and* that those limits apply to the treatment of the guilty as well as to that of the innocent. Promises made to guilty defendants are still binding, and their discriminatory or vindictive prosecution is still improper: which is to say that they must still be seen as citizens to whom the polity owes civic respect and justice.²⁷ This point might seem too obvious to be worth stating: but the ease with which criminals (at least those who commit certain kinds of crime, crimes that “we” do not commit) are portrayed in rhetoric and practice as the enemy against whom “we” must protect ourselves makes it well worth emphasizing. To call someone to account or to answer for her wrongdoing is to address her as a member of the polity whose essential values (as expressed in the criminal law) she is accused of violating; it is to treat her as a fellow citizen. But we must then ask more carefully what else is demanded by such a recognition of citizenship: what tactics may the state or its officials use in detecting and prosecuting crime; what kinds of misconduct by the state or its officials would undermine its standing to prosecute, judge, condemn and punish an offender? I will discuss a disturbing expansion of this question in section IV.

Second, the notion of estoppel in the criminal context presupposes a strong conception of the unity of a polity and its officials. A prosecutor promises immunity to a defendant, and that promise binds the polity. This might not disturb us if the prosecutor acts within the legitimate bounds of her authority: since she is authorized to make such a promise on behalf, and in the name, of the polity, of course it is binding on the polity. The other grounds of estoppel might be more worrying, however, since they involve *misconduct* by officials. If two police officers entrap a criminal, *their* standing to pursue him is undermined, and if an individual prosecutor mounts a vindictive prosecution, *her* standing to pursue it is undermined: but why should this bar others, whose individual hands are clean, from taking up the prosecution? The argument against prosecuting those who have been entrapped is often put in terms of the impropriety of the state, or the polity, prosecuting crimes that it induced: but is it clear that the *misconduct* of an official should be thus ascribed to the polity? These bars to prosecution do, admittedly, depend on the fact that the official was misperforming her official duties, rather

²⁷ The doctrine that someone who has a “predisposition” to commit the kind of crime that he is induced to commit cannot plead entrapment seems to be inconsistent with this view: in dealing with a dispositionally “guilty” citizen, the police may use tactics that they should not use on dispositionally “innocent” defendants. But that is what is objectionable about that doctrine. *See* United States v. Russell, 411 U. S. 423, 443–44 (1973) (Stewart, J., dissenting).

than acting wholly outside them (if a police officer induces a drug deal for his own private profit, that is not entrapment): but why should it not be possible to disown those individuals' misconduct, and still prosecute the offender?

It might seem that the problem I am trying to raise here is not a real one. Surely the most that we could expect is that the prosecution could go ahead without relying on the officials' misconduct or on its fruits (as happens when improperly obtained evidence is excluded, and the prosecution cannot make use of the fruit of the poisoned tree). But in cases of entrapment, there would have been no crime without the officials' misconduct; and in cases of vindictive or discriminatory prosecution the assumption is presumably that properly motivated officials would not have seen good reason to prosecute this defendant. The reason why prosecution is barred is therefore not merely that there was this serious misconduct by officials, but also that without that misconduct there would have been either nothing to prosecute or no good reason to prosecute. (To which we might add that in entrapment cases there is also the suspicion that the officials' misconduct was not so sharply distinguishable from official misconduct: that the entrapment was, if not officially sanctioned, still too close for comfort to officially sanctioned tactics.)

This response has obvious force, at least when (as is typically true in entrapment cases) there is no victim who has suffered wrongful harm. But suppose there was a victim: imagine that police officers entrap a burglar into committing a burglary so that they can catch him red-handed, without the consent or cooperation of the victim. (I do not know how fanciful this is.) Now in civil law contexts, the party who is estopped is the one who would otherwise benefit, for instance from breaking a prior promise: estoppel simply prevents him profiting from his own wrongdoing. If we could see crimes simply as wrongs against the state, we could say the same thing in criminal contexts: a polity should not be allowed to benefit (by convicting and punishing this defendant) from its own wrongdoing (and the victim of the burglary could still bring a civil suit for damages against both the burglar and those who entrapped him). But this is an inadequate conception of crime, because it ignores the victim's wrong; a civil suit would deal with the harm, but not with the wrong. The criminal law defines certain kinds of conduct as public rather than merely private wrongs, but this is not to identify them as, *qua* crimes, wrongs against the public rather than against their individual victims. It is rather to identify them as wrongs in which we should all share, as the victim's fellow citizens: we should see the wrong that was done to him as one that was also done to us collectively, in virtue of our identification with him as a fellow citizen, and with those values that the crime violated; we will then also see it as a wrong that we should collectively vindicate on his, and our, behalf, by seeking to call the wrongdoer to account for it.

We owe it to the victim of what is properly defined as a crime to recognize and vindicate the wrong he has suffered by calling the wrongdoer to account, *i.e.* by prosecuting him. If we then allow the prosecution to be estopped by the officials' misconduct, it appears that we are not merely (and properly) denying the

polity the profits of its officials' misconduct, but also (and improperly) denying the victim the vindication that is her due. Nor would it be enough to prosecute the officials for their misconduct, or to assist the victim in a civil suit; this would not sufficiently address the wrong she has suffered at the hands of the direct offender.²⁸

IV. REFINING AND EXTENDING ESTOPPEL

The problem that I raised at the end of section III might be resolved by refining the role of estoppel in criminal contexts. First, when what bars trial is the legitimate, authorized conduct of an official carrying out her duties, as with a legitimate grant of immunity, the victim (when there is one) has not been unjustifiably denied his due. He might still secure vindication, if the defendant who receives immunity still pleads guilty to a wrong against the victim, or gives evidence that helps secure the conviction of others who were more centrally involved in the wrong. In harder cases, the victim might indeed receive no direct vindication—as when the defendant bargains a plea of guilty only to crimes against other victims, or gives evidence only against the perpetrators of crimes against other victims. But in such cases this victim's claims are weighed against those of other victims, and we must surely accept that some such weighing (and outweighing) can be justified. Furthermore, as a citizen this victim shares in the vindication that the polity as a whole gains from the conviction of the guilty.

Second, when what *prima facie* bars trial is the *misconduct* of an official, the trial should normally be barred if there would have been nothing, or no good reason, to prosecute absent the misconduct. But if there is a victim with a claim to vindication that would be unjustifiably frustrated if there was no prosecution, the trial should not be barred; the official's misconduct should instead be formally disavowed, and the official should be prosecuted along with the direct perpetrator.

Such a solution might be viable, so long as it is possible for the polity, for those in whose name the polity and its officials supposedly act, to disown the official's misconduct, and thus to pursue the prosecution with clean hands when a prosecution is required: so long, that is, as there is a "we" who can collectively say that our hands are clean in the relevant respects. But if we think in broader terms about just how clean the hands must be of those who would call offenders to account, claiming the right to judge and punish them; if we think about the kinds of misconduct towards offenders that might undermine the legitimacy of the trial, we will see that there is a deeper problem here, concerning the implications of misconduct that we cannot so easily disown.

Consider, in this light, the persistently vexed problem of whether penal justice

²⁸ The previous two paragraphs clearly presuppose a particular conception of crime, and of what is due to the victims of crime. See S. E. Marshall & R. A. Duff, *Criminalization and Sharing Wrongs*, 11 CAN. J. L. & JURISPRUDENCE 7 (1998); R. A. Duff, *Restoration and Retribution*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE 82 (Andrew von Hirsch et al. eds., 2003).

is possible in contexts of serious political and social injustice. We feel (we *should* feel) uneasy when we realize how many of those who are convicted and sentenced in our courts, receiving what are supposed to be their just deserts, have themselves been the victims of persisting and systemic injustice at the hands of the polity of which they are supposedly citizens (and so at our hands as their fellow citizens). That unease sometimes motivates suggestions that serious (unjust) social disadvantage should be recognized as providing either a partial or a complete defense: perhaps an excuse of “duress of circumstances,” for instance, or of lack of fair opportunity to gain ordinarily available goods by non-criminal means; or even a (partial) justification, if the crime can be seen as a response to, or as an attempt to remedy, the injustice.²⁹ But they might be more plausibly understood as grounding moral, justice-based bars to trial, when offenders’ disadvantage can be attributed to serious, persisting, and systemic injustice at the hands of the polity. If we fail to treat a person or group with the minimal respect or concern due to them as citizens, we might lose the moral standing to call them to account, to judge them or condemn them, for the wrongs that they commit as citizens.

One way to see the point here is to imagine ourselves as jurors and ask ourselves whether we could honestly look this person, or a member of this disadvantaged group, in the eyes and condemn him for his crime.³⁰ What we have to ask ourselves in that imagined situation is not merely whether the evidence we have heard suffices to prove his guilt, but whether we, as the jurors who are supposed to judge this defendant as our fellow citizen, have the right or moral standing to do so; and the answer to that question depends partly on whether we, as members of the polity of which we and he are supposedly fellow citizens, have treated him as a citizen.

Suppose, however, we come to think that we lack the moral standing to call a defendant to account in this way for her wrongdoing—that, having collectively failed to accord her the respect and concern due to her as a fellow citizen, we cannot in all honesty now judge her as a fellow citizen. Where then, in the case of victimizing crimes, does this leave the victim: in particular, where does it leave victims who have not been complicit in those serious injustices that undercut the legitimacy of the offender’s prosecution, and who might indeed themselves be victims of them (as is true of all too many victims of crime)? It seems that they are owed vindication by the criminal law, but that the law, the polity’s legal institutions, cannot provide that vindication, since it lacks (we lack) the moral standing to call those who wronged them to account.

²⁹ See, e.g., David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985); Barbara A. Hudson, *Beyond Proportionate Punishment: Difficult Cases and the 1991 Criminal Justice Act*, 22 CRIME, L. & SOC. CHANGE 59 (1995). For a useful general, and critical, set of discussions, see FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE (William C. Heffernan & John Kleinig eds., 2000).

³⁰ Cf. Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381 (1999).

I suspect that that might be precisely the moral position we are in, the moral dilemma that we face, in relation to all too many of those who appear in our criminal courts. If that is right, we cannot hope to do adequate penal justice, penal justice to both victims and offenders, until we come closer to achieving political and social justice. Meanwhile, and in a properly humble and cautious spirit which recognizes how far from clean our collective hands and consciences are in this context, we must seek to develop more nuanced and complex legal procedures that could at least recognize, even if they cannot do adequate justice to, the claims and complaints of both victims and offenders. Some aspects of restorative justice might help us here, in the attempt to restore, or to (re)create, those civic relationships that are damaged both by social injustice and by crime—though we must resist the idea, which is prevalent among advocates and critics of restorative justice alike, that restorative justice cannot include punitive justice; but that is a topic for another day.³¹

³¹ See DUFF, *supra* note 3, at 197–201; Duff, *supra* note 28.