

# Introduction

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The papers for this issue of the *Ohio State Journal of Criminal Law* originated in a workshop on “Criminal Responsibility” that I convened at the 2003 World Congress of the *Internationale Vereinigung für Rechts und Sozialphilosophie*—the International Association for Legal and Social Philosophy, or IVR—in Lund, Sweden. I chose this topic partly, and selfishly, because it is central to my own interests; but also, more respectably, because it captures a wide range of issues that must be central to any discussion of the grounds and principles of criminal liability, and because recent years have seen an exciting growth of interesting work on these issues from both philosophical lawyers and legal philosophers. By bringing together a group of authors and commentators from different countries and from different academic backgrounds, I hoped to provoke some fruitful interdisciplinary and international discussions at the workshop, and also to obtain a set of papers that would display the lively condition of contemporary philosophy of criminal law. The first aim was certainly achieved, over four intensive and stimulating afternoons in Lund; the second aim is also, I believe, achieved by these papers—but that is something that readers will be able to judge for themselves.

Authors were given a free hand as to what questions they should address within the broad topic of Criminal Responsibility; the issues that their papers address can be roughly grouped under three headings—headings that pick out three central sets of questions about the nature of criminal responsibility.

## I. WHAT IS IT TO BE A RESPONSIBLE AGENT?

Criminal responsibility requires a responsible agent, who is and can be held responsible for her actions. The first set of questions therefore concern the characteristics and capacities that are necessary for responsible agency (questions that clearly bring philosophical issues about freedom of the will in their train).

David Hodgson’s paper,<sup>1</sup> and the first part of my paper,<sup>2</sup> directly address these questions. We both appeal to versions of the “reasons” view of responsibility as consisting essentially in the agent’s capacity to grasp and be guided by good reasons, although we differ in how we fill that view out, and about how far determinism constitutes a threat to responsibility as thus understood. Hodgson

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<sup>1</sup> David Hodgson, *Responsibility and Good Reasons*, 2 OHIO ST. J. CRIM. L. 471 (2005).

<sup>2</sup> R.A. Duff, *Who is Responsible, for What, to Whom?*, 2 OHIO ST. J. CRIM. L. 441 (2005).

argues that the exercise of the relevant capacity involves conscious and “informal” reasoning, in contexts in which the reasons to which the agent must attend do not compel any particular conclusion, and that the truth of determinism (a truth that we certainly have as yet no good reason to accept) would undermine our conception of ourselves as responsible agents. I suggest that an understanding of that capacity in terms of the agent’s responsiveness to reasons can defuse the apparent threat of determinism. In response, Brenda Baker queries the adequacy of the criteria of responsibility that Hodgson offers,<sup>3</sup> while Leo Katz argues that it is a mistake to think that we need a “capacity” requirement for responsibility at all.<sup>4</sup>

Gerry Maher’s paper also bears on this question, since it concerns the reasons why we should not hold children criminally responsible.<sup>5</sup> It brings out an important aspect not just of criminal responsibility, but of responsibility in general: that to be a responsible agent is to be one who can be called to *answer* for his actions. We therefore need to attend not only to the agent’s condition and capacities at the time of, and in relation to, the alleged crime, but also to the question of whether we can properly call him to answer for that crime before a criminal court. Maher, drawing on his work with the Scottish Law Commission, suggests that it is this second aspect of responsibility that is crucial to the treatment of children who offend. Kimmo Nuotio, who brings a continental European perspective to his response, argues that we must still recognize the “foundational” importance of the capacity for responsible agency, and its relation to the child’s status as a person.<sup>6</sup>

## II. WHAT ARE WE RESPONSIBLE, AND LIABLE, FOR?

To be responsible is to be responsible *for* something: we must therefore ask both what we can in general be properly held responsible for, and what the criminal law can properly hold us criminally responsible for. An important aspect of the first of these questions is directly addressed in Claire Finkelstein’s paper:<sup>7</sup> she argues, against much of the prevailing orthodoxy, that criminal liability for merely negligent conduct is unjust, since criminal liability should be grounded in moral responsibility, and we are not morally responsible for effects of our acts that we do not foresee as being at least likely. Andrew Simester’s response defends the orthodox view:<sup>8</sup> while the negligent agent’s inadvertence as to the risk she creates

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<sup>3</sup> Brenda M. Baker, *In Support of the Good Reasons Approach to Understanding Responsibility*, 2 OHIO ST. J. CRIM. L. 485 (2005).

<sup>4</sup> Leo Katz, *The Prerequisites of Responsibility: Comments on Antony Duff*, 2 OHIO ST. J. CRIM. L. 463 (2005).

<sup>5</sup> Gerry Maher, *Age and Criminal Responsibility*, 2 OHIO ST. J. CRIM. L. 493 (2005).

<sup>6</sup> Kimmo Nuotio, *On Becoming a Responsible Person*, 2 OHIO ST. J. CRIM. L. 513 (2005).

<sup>7</sup> Claire Finkelstein, *Responsibility for Unintended Consequences*, 2 OHIO ST. J. CRIM. L. 579 (2005).

<sup>8</sup> A.P. Simester, *Responsibility for Inadvertent Acts*, 2 OHIO ST. J. CRIM. L. 601 (2005).

or the harm she causes might mitigate her culpability, it does not render her non-responsible or non-culpable for that risk or harm.

The second part of my paper addresses both the question of what we can be responsible for in general, and that of what we should be criminally responsible for, which I take to be a question about the proper scope of the criminal law (though Leo Katz argues that we should distinguish questions of criminalization from questions of responsibility). The latter question is central to Nils Jareborg's paper,<sup>9</sup> in which he explores the meaning and significance of the familiar principle (or slogan) that the criminal law should only be used as a "last resort." He argues that it actually has no independent significance; at best, it represents considerations that are more clearly captured by a "principle of penal value." Douglas Husak, in his response, is perhaps even more doubtful of the principle's value:<sup>10</sup> using the criminalization of drug possession as his example, he argues that the "last resort" slogan cannot help us to resist the tendency to extend the criminal law too far.

Three of the other papers address issues that fall under this general heading, since they are concerned with the step from responsibility to liability. To hold an agent responsible for a criminal act is not yet to hold him criminally liable, since he might be able to offer a legally recognized justification or excuse: a defense that admits responsibility, but denies culpability. Marcia Baron's paper tackles some persistent problems about the nature of justification, and the distinction between justifications and excuses.<sup>11</sup> She defends the view that justification is best understood in terms of the reasonable beliefs on the basis of which the agent acts—from which it follows that someone who acts on the basis of a reasonable but mistaken belief in the existence of justificatory facts is justified in, rather than excused for, acting as she does, while one who acts in ignorance of facts that would justify his action cannot claim a justification defense. Joachim Hruschka, in response, sketches a systematic account of prospective and retrospective norms (norms of action and norms of imputation), from which a contrary view of the case of mistaken belief in the existence of justificatory facts flows.<sup>12</sup>

Arthur Ripstein is concerned with excuse rather than with justification, since he argues (on the basis of a careful reading of Kant's account of the famous case of two shipwrecked sailors and a plank that can only sustain one of them) that necessity must be understood as an excuse rather than as a justification:<sup>13</sup> the law must acquit a person who, *in extremis*, commits a crime to avert some great evil,

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<sup>9</sup> Nils Jareborg, *Criminalization as Last Resort* (Ultima Ratio), 2 OHIO ST. J. CRIM. L. 521 (2005).

<sup>10</sup> Douglas Husak, *Applying Ultima Ratio: A Skeptical Assessment*, 2 OHIO ST. J. CRIM. L. 535 (2005).

<sup>11</sup> Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387 (2005).

<sup>12</sup> Joachim Hruschka, *Justifications and Excuses: A Systematic Approach*, 2 OHIO ST. J. CRIM. L. 407 (2005).

<sup>13</sup> Arthur Ripstein, *In Extremis*, 2 OHIO ST. J. CRIM. L. 415 (2005).

not because she is justified in acting as she does, but because the law cannot threaten the agent who is *in extremis* with a punishment that would deter her, and therefore cannot guide her conduct in the distinctive way that criminal law aims to guide. In her response, Sandra Marshall questions the account of practical reason and motivation that underpins Ripstein's argument, and his argument that a hiker who breaks into a cabin to save his life in a storm needs an excuse; she suggests that necessity as Ripstein portrays it constitutes not an excuse, but a limit on the criminal law's jurisdiction.<sup>14</sup>

Finally, Orit Kamir uses a controversial case from Israel (in which the defendant was a young homosexual Palestinian) to illuminate the problems that arise from using a "reasonable person" test for provocation as a partial defense to murder.<sup>15</sup> Her detailed analysis of the case, and of its treatment by the appellate courts, supports her more general theoretical argument that the "reasonable person" test allows courts to exercise a covertly "normalizing" power; her solution is not to abandon the provocation defense, but to recast it in a way that makes no use of the figure of the "reasonable person." Sharon Byrd shares her ambition to get rid of the reasonable person, and offers her own account of how the provocation defense could best be recast to achieve this.<sup>16</sup>

### III. TO WHOM ARE WE RESPONSIBLE?

To be responsible is to be responsible for something *to* some person or body who has the standing to call one to account or to answer: we must therefore ask to whom, or to what, we are criminally responsible for our criminal conduct, and what conditions must be satisfied if they or it are to have the right to call us to account for such conduct. At the end of my paper I gesture towards some of the questions that are raised if we say, plausibly enough, that we are answerable to our fellow citizens for the crimes that we commit under what claims to be our common law. I had also hoped to include a paper from the workshop that discussed some of these problems in more detail, in connection with the idea of the criminal process as one that calls wrongdoers to account, and with the question of how (if at all) criminal punishment could be justified from such a perspective—but that proved not to be possible. Several of the other papers do, however, bear on the question "To whom are we responsible?"

Maher's paper, as noted above, highlights the question of whether and by whom children should be called to answer for their criminal conduct: they can, we

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<sup>14</sup> S.E. Marshall, *Life or Death on a Plank—Ripstein and Kant*, 2 OHIO ST. J. CRIM. L. 435 (2005).

<sup>15</sup> Orit Kamir, *Responsibility Determination as a Smokescreen: Provocation and the Reasonable Person in the Israeli Supreme Court*, 2 OHIO ST. J. CRIM. L. 547 (2005).

<sup>16</sup> B. Sharon Byrd, *On Getting the Reasonable Person out of the Courtroom*, 2 OHIO ST. J. CRIM. L. 571 (2005).

might say, be properly called to account by someone—by their parents, by their teachers, perhaps by some official body like a Scottish Children’s Panel; but we might doubt whether they should be called to answer for it before a criminal court. Ripstein’s argument also seems to raise the question of whether someone who acted *in extremis* is really answerable to or before the law for what he did: if the law cannot threaten a deterrent punishment, and therefore cannot guide, can it then call one to answer for what one did? And Kamir’s discussion of the case of the young Palestinian homosexual shows all too clearly how difficult it can be for a court, or the polity in whose name the court claims to act, to call to account a defendant whose cultural identity is so radically different from that of those who would judge him.

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It is a great pleasure to see these papers published in an early volume of the *Ohio State Journal of Criminal Law*, and grateful thanks are due to a number of people and organizations who made it possible: to the IVR, for inviting me to organize the workshop from which these papers emerged, and especially to Christoffer Wong of the University of Lund for all his help with its organization; to those who have contributed papers or commentaries to the workshop and to this special issue, for their participation in the stimulating and friendly discussions that we had in Lund, and for the work they have done since then (and for their patience in dealing with editorial queries and suggestions); to all the other participants in the workshop, for their comments and questions; to Joshua Dressler, for his encouragement, support, and patiently thorough editorial work; and to the rest of the editorial staff of the journal, for all their work—and especially for their supererogatory work over the holiday period, which made it possible to keep the production process on schedule.