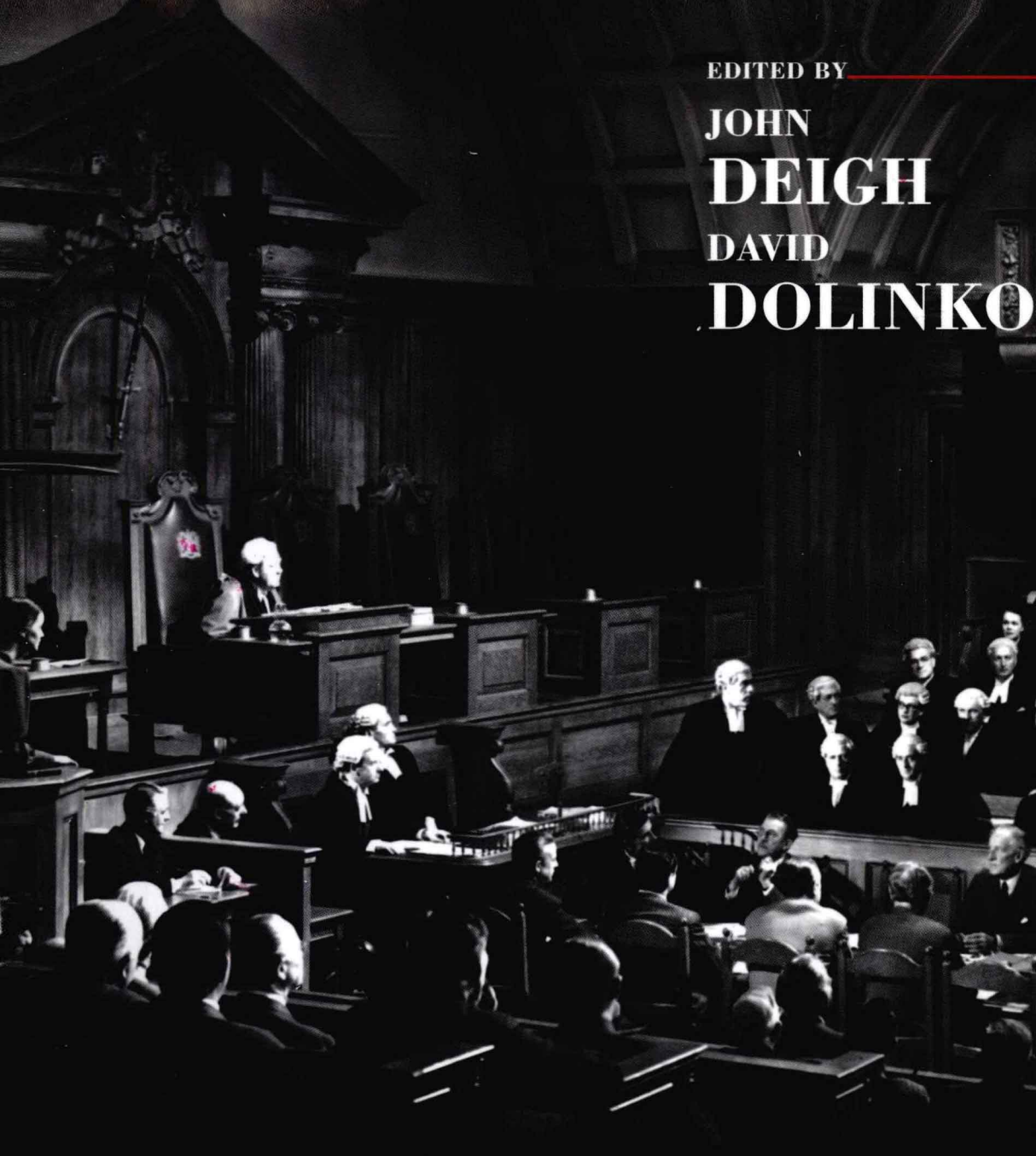

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The Oxford Handbook *of*

PHILOSOPHY OF CRIMINAL LAW

THE OXFORD HANDBOOK OF

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Edited by

JOHN DEIGH AND DAVID DOLINKO

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Introduction

Over the last sixty years scholarly work in legal philosophy has grown tremendously, generating a wealth of new ideas and spreading widely into new areas of research. Not only have there been major developments in the field's core area, jurisprudence, but different branches of law have also become burgeoning centers of significant philosophical study. The criminal law, being the branch with the longest tradition of writings on philosophical problems, has also been foremost, among the different branches, in producing a rich contemporary literature on both its traditional problems and new ones that have emerged as the work in this area has grown. Research on these problems has attracted the interest of philosophers, legal theorists, criminologists, and other students of the criminal law. Its originality and influence has created demand for an authoritative handbook that covers the different topics under which the problems fall. We have put together the volume before you to meet this demand.

The volume contains seventeen original essays by leading thinkers in the philosophy of the criminal law. These essays represent the state of current research on the major topics in the field that arise from issues in the substantive criminal law. We have not included essays dealing with topics generated by the law of criminal procedure. While a philosophical literature on the latter topics, particularly the criminal law's standard of proof, has begun to emerge, the range of such topics is still too narrow to warrant including a separate section of essays on them in a handbook. Thus, to preserve the coherence of the volume, we decided to restrict its essays to philosophical topics in substantive criminal law. In this way, since all of these topics are interrelated, we expected that each of the essays would be enriched and deepened by its connections to many of the others. We have not been disappointed.

The oldest of these topics is punishment. Indeed, until midway through the last century, work on philosophical topics in the criminal law was largely confined to the study of questions about the justification of punishment. That study boasts a long history that traces back to Plato's *Protagoras* and *Laws*. In the modern period, one can find some discussion of these questions in Hobbes's *Leviathan* and Locke's *Second Treatise of Government*, but sustained discussion of them did not begin until the second half of the eighteenth century with the work of Beccaria and Bentham. This discussion has continued and evolved into contemporary debates over the place of retribution, deterrence, and reform in a just penal system. The literature these debates comprise is now vast.

Unlike the study of punishment, the study of other topics in the criminal law was largely ignored by modern philosophers and left instead to writers who applied the traditional methods of legal scholarship: exposition of common law,

interpretation of statutes, harmonization of apparently conflicting elements in some branch of law, and the like. Things began to change, however, with the appearance, in the years following World War II, of H. L. A. Hart's essays on responsibility. Increasingly, philosophers took up Hart's questions about attributions of responsibility to criminal offenders and initiated studies of other related aspects of the criminal law. At the same time, scholars in the legal academy who specialized in criminal law began to incorporate these philosophical writings into their own works, to deal with the same questions philosophers were examining, and to adopt some of the philosophers' methods. George Fletcher's landmark book *Rethinking Criminal Law*, published in 1978, is a prime example of this latter development.

A third wave of philosophical writing concerning the criminal law began with the appearance in 1957 of the Wolfenden Report , which contained the recommendations of the Committee on Homosexual Offences and Prostitution for reforming British law governing sexual conduct. In making these recommendations, the Committee revived John Stuart Mill's argument in *On Liberty* and applied it to the criminal law's restrictions on individual liberty in the area of sexual relations. This application of Mill's argument sparked severe criticism from Lord Devlin, and Devlin's criticism in turn elicited a strong response from Hart in defense of the Report's appeal to Mill. The controversy between Devlin and Hart has led to extensive and searching discussion by moral philosophers, scholars of the criminal law, and legal and political theorists, among others, of the criminal law's scope and limits and the relevance of customary morality to the definition of criminal offenses. These issues received comprehensive and masterful treatment in Joel Feinberg's four-volume work *The Moral Limits of the Criminal Law*, published successively in 1984, 1985, 1986, and 1988. Unsurprisingly, though, they continue to stir debate.

Today the literature in the philosophy of the criminal law has expanded greatly. It now covers many questions beyond the three aforementioned mainstays of the field: (1) what justifies the infliction of harm, as punishment, on criminals; (2) on what basis are criminals properly held responsible for their unlawful actions; and (3) what are the proper limits to the criminal law. In addition, it deals, inter alia, with questions about prosecuting omissions (e.g., what can justify such prosecutions if an unlawful act is a necessary element of any crime?), puzzles about criminal attempts (e.g., what qualifies an attempt as criminal and why should punishment for an attempt be less than for the corresponding completed offense?), questions about accomplice liability (e.g., what constitutes complicity in another's crime and how severe should its punishment be in comparison with the punishment imposed on the principal offender?), and questions about the place, if any, of clemency and mercy in a just penal system (e.g., how can mercy be consistent with justice in the infliction of punishment?). All these questions and more are discussed in the essays collected in this volume.

The first three deal with questions concerning the justifiability of "the state's outlawing certain acts as criminal offenses. Gerald Dworkin, in his essay, "The Limits of the Criminal Law", takes up the general question of what must be true of an act to justify the state's outlawing it as a criminal offense. Wayne Sumner's essay "Criminalizing Expression: Hate Speech and Obscenity", examines the same

question as it applies specifically to certain acts of speech and against the background of the right to free speech that is granted by the Canadian Charter of Rights and Freedoms. The third of the initial essays, by Mitchell Berman, tackles the puzzling nature of blackmail. Why is it criminal, given that neither the act the blackmailer threatens to do (giving certain photos or documents that reveal information about the victim to others) nor the offer the blackmailer makes to the victim (to sell those photos or documents to him or her) is by itself a crime? In investigating this puzzle, Berman both explains its source and offers a solution.

The next three essays deal with issues concerning the general requirement in the criminal law of conduct as a necessary element of an offense. Douglas Husak, in his essay, "The Alleged Act Requirement in Criminal law", disputes the very existence of such a requirement. Andrew Ashworth, in in his essay "Attempts", considers the problems inherent in specifying what acts count as criminal attempts and what the rationale is for making such acts offenses when they are in themselves harmless. And Christopher Kutz's essay, "Complicity", examines the conditions of accomplice liability, how the criminal law conceives of assistance or encouragement someone gives another in the commission of a crime as itself a crime, what intentions the person giving assistance or encouragement must have to be liable as an accomplice, and under what conditions an accomplice's guilt is as great or even greater than that of the offender he assists or encourages.

Because the acts of someone who assists or encourages another in the commission of a crime do not directly cause whatever harms the crime results in, accomplice liability raises questions about the necessity of a causal connection between the assistance or encouragement and such harm and the criteria of causation the criminal law uses to establish this connection. Kutz deals with these questions in arguing for the greater importance to determining liability of the accomplice's intentions. General questions about the criteria of causation in the criminal law and how they compare to similar questions in tort law are then thoroughly discussed in the volume's seventh essay, Michael Moore's "Causation in the Criminal Law".

The next six essays cover different topics related to criminal responsibility. John Deigh's essay, "Responsibility" surveys the different theories of criminal responsibility against the background of the question whether universal determinism, if true, would vitiate such responsibility. Larry Alexander, in his essay "Culpability", expounds and argues for a theory of criminal responsibility that restricts the factors determining a person's culpability for wrongdoing, as much as possible, to ones that cannot be the result of mere chance. To believe that culpability may be due to factors that result from mere chance is to endorse the idea of moral luck, and for Alexander such luck is anathema to regarding people as responsible for their actions. Kimberly Ferzan focuses in her essay, "Justification and Excuse," on the distinction between defenses in which the defendant in a criminal trial offers reasons purporting to justify his act and defenses in which the defendant, while conceding that his act was wrong, offers reasons for excusing him from responsibility for it. The distinction has generated an important literature in criminal law theory and has been the site of several disputes among leading theorists over how to draw the distinction, which defenses qualify as justifications and

which qualify as excuses, and what the rationale is for drawing this distinction. Ferzan gives a rich account of this literature and the nature of these disputes. Joshua Dressler's essay, "Duress," examines many of the questions Ferzan considers as they apply to the defense of duress. His overall conclusion is that the defense is best understood as an excuse rather than a justification. And Walter Sinnott-Armstrong and Ken Levy, in their essay, 'Insanity Defenses', review the controversies that surround the plea of insanity as an exculpatory defense. The last of these six essays is Marcia Baron's "Gender Issues in the Criminal Law" critically discusses two defenses, provocation and self-defense, whose traditional requirements raise questions about gender bias in the criminal law and how best to remedy it. In addition, Baron discusses similar questions that the crime of rape, in light of its traditional definition, raises.

The volume's final four essays concern the topic of punishment. David Dolinko, in his essay "Punishment", comprehensively surveys the philosophical literature on this topic, clarifying the different problems about punishment discussed in this literature and explaining the different positions legal philosophers have taken in proposing solutions to them. Capital punishment is the topic of the next essay Carol Steiker's "The Death Penalty and Deontology". After a brief review of retributivist arguments in support of permitting, if not requiring, capital punishment for certain offenses, Steiker examines and evaluates various retributivist arguments for its abolition. Finding these inconclusive at best, Steiker examines additional abolitionist arguments that, like retributivist arguments, appeal to considerations besides the death penalty's record as a deterrent to lethally violent crimes. These, too, she argues, require further development. Anthony Duff, in his essay "Mercy", discusses the tension between doing justice and showing mercy in sentencing criminal offenders. And Steve Garvey, in his "Alternatives to Punishment", the volume's final essay first considers proposals for supplementing or replacing the practice of punishing criminal offenders with that of preventive detention of such offenders or others recognized as dangerous to others. Then, in the final section of his essay, Garvey takes up the controversial program of restorative justice, whose advocates have promoted it as a better alternative to punishment.

We have deliberately refrained from setting for our contributors the precise parameters of their essays. Rather, it seemed to us best to allow each to adopt the format he or she felt most comfortable with, and we have accordingly given each wide latitude in deciding the kind of essay to include in the volume. As a result, there is a good deal of variation in the formats of these essays. Some discuss the particular answers their authors give to the issues they raise, while others present overviews of the range of approaches one finds in the literature. Some address broad topics; others focus on narrower issues. All of them, we believe, will stimulate interest in, and reflection on, the intriguing conceptual and normative problems that abound in the field of criminal law.

John Deigh
David Dolinko

Austin, Texas and Los Angeles, California
May 2010

Notes on Contributors

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THE OXFORD HANDBOOK OF

PHILOSOPHY OF CRIMINAL LAW

CHAPTER 1

THE LIMITS OF THE CRIMINAL LAW

GERALD DWORKIN

It is obvious that the criminal law, like other normative systems for the regulation of behavior, has various kinds of limits. For example, it cannot affect the behavior of those who are not capable of understanding or conforming to its edicts. These include infants, the demented, the comatose. Even for those who are capable of understanding and conforming, the sanctions of the law may prove not to change potential conduct. It is very unlikely, for example, that those contemplating suicide would be affected by the knowledge that committing (or even attempting) suicide is punishable by a fine or imprisonment.

Even when the criminal law is capable of influencing conduct in one direction or another, it may carry with it other consequences that are sufficiently harmful that we would choose not to have such a law. The law may be efficacious but, on balance, bad.

Again, there are laws that while efficacious, and on balance beneficial, might involve means that violate rights that people have, and are rejected for that reason. So crimes that can only be detected by entrapment, that is, consensual corruption, might be rejected because it is thought that we ought not to be in the business of testing people's virtue.

Laws might be limited by constitutional provisions. Thus while we might want to prevent certain kinds of hate speech, and sanctions would deter such conduct, it might be a violation of the First Amendment.

Laws may pass through all the above filters but be too expensive (in terms of cost and time) to enforce.

Some limits are conceptual (laws forcing people to volunteer), some run up against limitations of human nature (laws forbidding self-defense), some run afoul

of requirements of rationality (a law against committing suicide), some are normative (laws requiring people to retreat when faced with home invaders). The limits I am going to consider are a special kind of normative limit. They are concerned with drawing a principled line between those actions that may be legitimately restricted by a democratic state and those that citizens must be left free to commit without fear of criminal sanctions.

It is important to note at the outset that there are two issues that should be kept distinct. The issue of legitimacy is the issue of what kinds of actions are within the legitimate scope of coercive action. This is the issue of *jurisdiction.* This is not the same as the question of what actions the state ought to require or forbid. This concerns which acts within the state's jurisdiction it ought to legislate about. This is the issue of the proper *exercise* of legitimate state power. Both of these are normative in character, but the former is the more fundamental. If the state is not entitled to coerce in some realm, the issue of whether it should is moot.

1

My first question is what it means to draw a *principled* line between those actions that are legitimately coercible and those that are not. The first thing to note is that any claim about the status of particular types of acts, for example, rape or drug selling, has to be true in virtue of some general property that these acts share. If the selling of drugs should be legally permissible, it will be in terms of some property such as "a voluntary transaction between consenting adults, which does not affect in a significant manner the rights or interests of others." And if this is the right characterization of the act (for the purpose of drawing the limits of the law) then we have a general principle that explains and justifies (if correct) the kinds of grounds that underlie a limit thesis.

The second thing to note is that as a principle, it governs the kinds of *reasons* a state must have in order to justify coercive restrictions. But does any normative position count, in this context, as a principled reason or line? When Devlin says: "The line that divides the criminal law from the moral is not determinable by the application of any clear-cut principle...the boundary is fixed by balancing in the case of each particular crime the pros and cons of legal enforcement in accordance with the sorts of considerations I have been outlining,"[1] he is arguing precisely that it is a matter not of principle but of balancing particular factors to arrive at a judgment about whether some conduct should be criminalized or not.

So the contrast we are looking for is not one with no line at all, but one with a line that is justified by some general rule or norm that precludes (in general) looking at the particular factors in the situation. Mill's harm principle is a clear case of a principled line. "If anyone does an act hurtful to others, there is a prima facie case for punishing him by law." It is important to see that this is compatible, for Mill, with actually not punishing him because, say, "it is a kind of case in which he is on

the whole likely to act better when left to his own discretion than when controlled in any way in which society have it in their power to control him; or because the attempt to exercise control would produce other evils, greater than those which it would prevent."[2] In these cases, it is still true that the act is of a type that is within the legitimate sphere of state coercion. Mill's principle is supposed to settle the issue of the state's jurisdiction, not the question of when the state should exercise its power within the jurisdiction.

Note also that both Mill and Devlin appeal to consequences. But Devlin thinks that we must balance the consequences for each proposed type of immoral conduct, whereas Mill thinks that we can set up general categories (e.g., harm to others) and draw a line permitting limiting such acts in advance. It is true that the argument for such a line is itself a consequentialist one "grounded on the permanent interests of man as a progressive being," but unless one is going to rule out as unprincipled any view that is founded on the balance of benefits over harms, this view draws a principled line.

There are other issues that could be addressed, for example, whether there are some constraints that ought to be placed on the kind of principle we are searching for. Liberal theorists have sometimes argued that the principles should be, in some sense, neutral. So, for example, the Rawlsian might argue for principles that "all citizens may reasonably be expected to endorse." A Scanlonian argues for principles that are "not reasonably rejectable." The idea is to avoid, if possible, appealing to any controversial conception of the good.

For our purposes, we shall only consider the controversy between those who might be called "particularists" and those who are "generalists," that is, between those who think we cannot in advance have general rules for what is legitimately coercible and those who think we can.

2

Let us begin by considering in very abstract terms what the possibilities for an argument for or against generalism might look like.

A Best Explanation of the Data

There might be a body of judgments widely shared in a community about what kinds of acts it is legitimate to restrict and what kinds it is not. We might agree that laws against certain kinds of force (murder and robbery), certain kinds of deception (fraudulent inducement), certain kinds of bodily infringement (rape and assault), certain kinds of speech (hate speech or blackmail), certain kinds of infringement of property rights (trespass and theft) are legitimately within the coercive power of the state. We might agree about this even if we thought that some of these acts ought