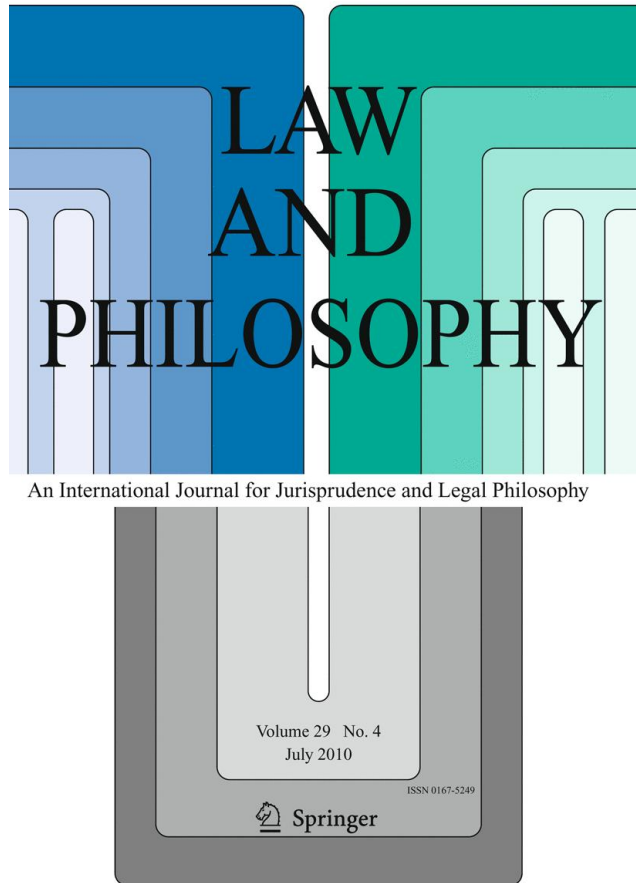


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ALEC WALEN*

CRIME, CULPABILITY AND MORAL LUCK

(Accepted 19 March 2010)

Crime and Culpability is a visionary work of moral and legal philosophy. It takes on the monumental task of finding a better way to conceive of criminal law as a whole, and does a remarkably good job of providing an alternative model that is morally appealing and in many ways more coherent than the system we now have. The book is certainly deserving of significant attention.

Nonetheless, while I respect the insight, effort, and creativity that went into this book, I think it is fundamentally morally misguided. In seeking to free criminal law from what the authors take to be the distorting influence of outcome luck, they arrive at a position that is overly exculpatory. It fails to hold actors liable for the harms they cause when they have taken less care than they should.

I argue, first, that the authors' attempt to strip criminal law of outcome luck is incoherent in its own terms, and that any attempt to follow through on their program would require a much more severe loss of accountability than the authors acknowledge. I then argue that outcome luck is pervasive in our moral lives, and that, given the choice of (a) not being able to hold agents accountable for much, or (b) holding them accountable for the results of their choices, including outcomes that result in part from moral luck, the right choice is (b). I wrap up with a concluding observation about the implausible

* I was unfortunately unable to attend the conference at which this book was discussed, so my paper does not benefit from the discussion that took place there. Nevertheless, I am grateful for the opportunity to share my thoughts on this important book.

moral psychology that underlies the authors' view of culpable action.

I. A STATEMENT OF THE AUTHORS' POSITION

The authors frame their position in two ways: in Chap. V, as a rejection of the claim that outcome luck, or results, are relevant to culpability, and in Chap. III as a rejection of negligence as a standard for culpability. These are deeply connected, but it is worth stating each separately.

The slogan for the rejection of outcome luck, or results, could be this: 'Choice is a desert basis. Causation is not'.¹ Though the authors think that the prevention of harm is the fundamental aim of the criminal law,² they take as seriously as possible the side-constraint that criminal defendants should 'receive no more punishment than they deserve'.³ According to the authors, the only way to reconcile these two constraints is to hold actors accountable for choosing in ways that tend to cause unjustifiable harms. Since actors cannot choose what actually results from their actions, but only what risks they take, the criminal law can hold them accountable only for imposing what they should recognize to be unacceptable risks on others. Thus, what ultimately should matter to the criminal law is that actors 'treat others with sufficient concern'.⁴

Putting this in Kantian terms – terms that I am happy to embrace as well – the authors base their position on the assumption that, at least for normal actors, no matter what circumstances they find themselves in, and no matter what influences they have been subjected to, they have control over their choices, or 'willings'.⁵ They do not, however, have the same kind of control over the results of their actions once they

¹ Larry Alexander and Kimberly Kessler Ferzan, with Stephen J. Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009), p. 172.

² *Id.* at 3.

³ *Id.* at 6.

⁴ *Id.* at 173.

⁵ *Id.* at 190.

have ‘unleashed a risk of harm and can no longer control it through ... acts of will’.⁶ Thus, the criminal law can try to limit unjust harms to others only with reference to culpable choices or willings.

The authors’ concern with agent control also leads them to say that the proper measure for the risk that an actor imposes on others – which is culpably chosen if it is too great – is the actor’s actual subjective evaluation of the risk. In other words, the actor cannot be held culpable for negligently failing to assess the risk as a more responsible, cautious person would have done. He is responsible only for the risks of which he was aware when he acted. The authors note that a person *might* be culpable for an earlier choice if it culpably ‘results in her later inadvertence’.⁷ But it is only the earlier choice that is culpable. If the actor didn’t assess the risks of a given action as being so high that his reasons for action could not justify imposing them, then he is not culpable for choosing to perform that act.

⁶ *Id.* at 198. I commented on an earlier version of Chap. VI, dealing with inchoate crime, at a conference in Krakow in the summer of 2007. I raised an objection to the position I just described – that an actor is not culpable until he has taken the final step in unleashing a risk of harm – which seems to me worth raising again in passing. What should be said about someone who chases another through a crowd, waving a gun, trying to get a clean shot, but ultimately losing his intended victim in the crowd? According to the authors, since he has not yet pulled the trigger, he cannot be culpable for trying to kill the other. He might, after all, if he gets a clean shot, decide not to take it. All he can be culpable for is ‘creating a risk of an apprehension of danger (causing fear) for no sufficient justification’. *Id.* at 218. This seems to me deeply mistaken. It is to treat this assailant as the moral equivalent of a practical joker who runs through the crowd with a realistic looking toy gun, seeking to cause fear but with no intent to kill. The latter may be guilty of a serious crime; that sort of practical joke could get someone – most likely the actor, but possibly an innocent bystander – killed if the intended victim acts in self-defense or a third-party acts in other-defense. Nevertheless, the crime of creating such risk should be much less than the crime of trying to murder another. And, adding insult to theoretical injury, if either the assailant or practical joker was naïve and didn’t think about the risk of someone using serious if not lethal force to stop him, then on the authors’ view, he cannot be held culpable for that risk, only for causing fear. In short, the authors’ theory treats at least some cases of attempted murder as a joke.

⁷ Alexander and Ferzan, *supra* note 1, at 80.

His acting with less awareness of risk than a more cautious person would have had is just more outcome luck, flowing from his earlier choice not to pay as much attention as we would want a person to pay to how his actions could harm others.

II. INCOHERENCE IN THE AUTHORS' POSITION

In substantial part, the authors' position derives from a concern related to the thought that 'ought' implies 'can'. If one cannot act differently, then it cannot be true that one ought to act differently. And if it is not the case that one ought to have acted differently, then one cannot have acted culpably in acting as one did.

In the context of negligence, this leads the authors to say: 'An injunction to note, remember, and be fully informed about anything that bears on risks to others is an injunction no human being can comply with, so violating this injunction reflects no moral defect'.⁸ The problem here is that this line of reasoning undermines culpability quite broadly. As the authors put it, the 'paradigmatic culpable choice' is a 'choice that reflects insufficient concern for others' interests'.⁹ But if one thinks, however mistakenly, that one has sufficient concern for others, then one will think one is doing what one ought to do. And one can no more choose to change that belief in the moment of action than one can choose to note, remember or be more fully informed.

This is a rather obvious point, but the authors somehow fail to come to terms with it. Rather, after stating what I quoted just now, they say, 'Callousness, cruelty, self-centeredness, avarice, and other vices that are revealed in unjustified risk impositions explain culpability rather than negate it'.¹⁰ True, but unhelpful. That is, it is true that these vices can explain why one acts in ways that reflect insufficient concern for others. But it is also true that one who is burdened with these vices is likely to believe that her concern for others is sufficient. And if she believes that her concern for others is sufficient, then it is no

⁸ *Id.* at 71.

⁹ *Id.* at 153.

¹⁰ *Id.*

more reasonable to demand that she nonetheless act as though she has more concern for others than it is to demand that one who thinks that he is not imposing a high risk act as though he is imposing a high risk. In other words, the authors simply assert that the vices they mention do not negate responsibility, when in fact, by their own lights, they seem to do just that.

The authors acknowledge in a footnote that the 'question[] of responsibility and culpability for normative beliefs is a deep one'.¹¹ They then say that they 'can do no more than merely assert [their] belief... that one is morally culpable for "mistakes" of justificatory strength but not for mistaken beliefs about factual matters'.¹² But this statement of faith does not help resolve the fact that their explanation of why one cannot be held culpable for a negligent choice also implies that their paradigmatic culpable choice is, in fact, not culpable.

One may speculate, on the authors' behalf, about how best to respond to this challenge. Perhaps they should say that those who are vicious in certain ways – callous, cruel, self-centered, avaricious – often knows that it is wrong to be that way, but they choose, out of weakness of will or insufficient concern with doing what is right and good, to engage their immoral desires. This is a tempting view for those who *do* care about doing what is right and good, but who are not pure of heart, and who feel the temptation to ignore the welfare of others, or even to hurt others for the perverse joy that can momentarily bring. A good person who is still tempted by vice would know that if she gives in to her vice she would not show others the concern they deserve. Thus, it is tempting to say that a vicious person who acts on the same vice must know that she too does not show others the concern that they deserve.

But this theory of the vicious person is, I believe, implausible as a matter of moral psychology. The vicious person may know what others think of her. She may know that they think that she shows others too little concern. But if she has reflected on her values and embraced them, then it is wrong to say that she either knows or believes that she shows others too little con-

¹¹ *Id.* at 153 n. 76.

¹² *Id.*

cern. She knows or believes only that others think so, but she presumably believes that these others are sanctimonious fools. I am not hereby embracing some sort of relativism, according to which there is no way to say that she is wrong. I am saying only that there is no reason to suppose that the truly vicious *know or believe* that they are wrong.

To be fair, the authors do address the worry that by not punishing people for negligence the criminal law would be 'breeding selfish actors'.¹³ But their response to this worry is inadequate. They claim that the objection is either about consequences or character. The latter is a red herring; I, at least, am not suggesting that people be punished for character alone. They dismiss the former, the consequentialist worry, as irrelevant if one is committed to punishing only the culpable. If one has a more capacious understanding of culpability, however, this move cannot go through. Those who culpably choose to attend less than they should to the welfare of others are culpable not only for that choice, but for what happens as a result of it, including their later negligent behavior. There seem to be good consequentialist reasons to hold them accountable for their culpable behavior in this way, and there is no deontological reason, having to do with punishing only the culpable, not to do so – or so I will argue in the next section of this comment.

Putting the argument up to this point in perspective, what I have done so far is simply extend the authors' argument from one context, negligence, to another, choices that reflect insufficient concern for others' interests because the actor mistakenly thinks his choices *do* reflect sufficient concern. But one man's modus ponens is another man's modus tollens. So, rather than insist that there can be very little culpable action, I want to push matters the other way and suggest that one can be culpable not only for choices that reflect mistaken beliefs about what constitutes sufficient concern for others' interests, but also for choices that reflect unreasonably low assessments of the risk one is imposing on others. And, as the latter is connected to the possibility of culpability for results – in particular, the result of

¹³ Alexander and Ferzan, *supra* note 1, at 78.

earlier choices not to develop a reasonable person's attention to the risks of harms to others – I want to push it all the way to the other side and defend culpability for results in general, as long as one was at least negligent in acting in a way that caused the results.

III. MORAL LUCK'S PERVASIVE ROLE

Our lives are full of outcome luck, both good and bad. Two people invest money with the same level of concern, one makes a profit, the other suffers a loss. The one who lost cannot turn to the one who gained and demand that the other split his winnings. Two couples try to conceive, one begets a child, the other remains childless. The childless couple cannot demand to co-parent the child of the couple that conceived. Two people go for a walk down the train tracks, one to the left, one to the right. A trolley's brakes fail and it hurtles out of control down the track to the left. The one on that track cannot demand that a bystander at a switch flip a coin to decide whether to redirect the trolley to the other track. Indeed, it would be clearly wrong for a bystander to run the roulette wheel one more time, given that the one on the track to the left has already turned out to be the unlucky one. His claim for help is now of a different nature, and weaker than the other one's claim not to be put at risk of harm.

Of course, in real life the luck that figures into determining who does well and who is harmed or threatened with harm does not normally allow pairwise comparisons. We are all part of large societies in which there are innumerable winners and losers at all times. Moreover, it is normally impossible to tell who has done more to assume the risk of a harm and who less, just as it is normally impossible to tell who has done more to deserve a benefit and who less. But those facts only go to strengthen the point that we have to live with our own luck.

I am not here staking out an extremist libertarian position. Those who generally fare well are responsible, in my opinion, to make some sacrifices for those who do not, especially insofar as those who do not can make out the case that they have not taken particularly irresponsible risks which did or might have

contributed to their being in a state of need. But at the same time I reject the consequentialist extreme at which all individual lives are dissolved into one pool of benefits and burdens to be distributed in whatever way maximizes the good. Rather, each has to lead his own life taking *primary* ownership for the bad as well as the good luck that comes his way.

It might seem that I would hereby justify too much, including strict liability crimes. But nothing so concrete can be inferred from the principle that we have to take primary ownership of our luck. We could say that those who harm others negligently, recklessly, or knowingly have ever greater duties to shoulder some of the burden for the harm they cause, while at the same time saying that those who faultlessly cause a harm to others have at most a moral duty to offer their regrets (as Bernard Williams called it, 'agent regret'). Once the harm is caused, if non-culpably caused, it may properly be the problem primarily of those who have been harmed. There may be no reason to shift the burden again or impose a new burden on the faultless actor who played a causal role in creating the harm.¹⁴

I would apply the idea that we have to take primary ownership of our luck to the criminal law in the following way: if one culpably chooses wrongly, one takes the risk not only of getting caught, but of being held liable for the harms one has caused. This gives criminal law a tort-like aspect. In tort law, when someone acts wrongly and causes a harm, the wrongful actor, or tortfeasor, should shoulder at least some of the burden. Of course, the aim of the criminal law, unlike tort law, is not primarily to make the victim whole. Nonetheless, there are

¹⁴ At the same time, it may also be true that those who innocently threaten the welfare of others are subject to suffering substantial harms if necessary to prevent them from unleashing a threat to others, even if it would be unjust to impose such harms on them once the threat has been unleashed or the harm caused. Compare a fat man who purposefully, knowingly, recklessly, negligently, or non-culpably caused a trolley to hurtle down the hill at five people below in such a way that they can be saved only if he is pushed in its path. I think he may be so pushed if he purposefully or knowingly (without adequate justification) caused that threat to bear down on the five below. I'm not sure about recklessness or negligence, and am solidly convinced that he may not be pushed if he non-culpably did something like step on a switch which caused the trolley to threaten the five.

reasons, both for the sake of the victim and for the sake of society writ large, to look to the causing of actual harms as a guide for punishment.

For the sake of the victim, there is reason to think that it at least makes the victim feel like she counts. The wrongful actor cannot cause harm to her and simply walk away from it. The thought that he should suffer too may seem merely vindictive, but it is not. Indeed, the root for the word vindictive suggests the other side of the coin: to vindicate. Punishment vindicates the victim. It shows her to have a status that counts. And the victim's having suffered a real harm is relevant to her needing to feel vindicated. Particularly when the wrongdoer was not intending to harm the victim, or not acting with gross disregard for her status as a person with the right not to be so harmed, the need to be vindicated is not nearly as great when no harm results. It is the harm that makes the victim. When others recklessly or negligently endanger us and no harm results, we are normally satisfied with a simple chastisement to use more care.

Society's interest in deterrence can also be served by punishment that is especially connected to harms. Society could try to punish all of those who choose culpably to put others at risk of harm. But we all make far too many culpable choices for this to be a practical strategy. The degree of intrusiveness necessary to police wrongful risk imposition would be unbearable, and the epistemic difficulties in sorting out who really believed what about the risks they were imposing on others would be insurmountable. But if an actor acts wrongfully and causes a harm, then society can extract from him the cost of bearing the punishment which serves to deter all from wrongful conduct. This is the risk one knows one takes when one acts wrongly: that one might be punished for the wrongful choice in itself, and that one will almost certainly be punished more severely if one is convicted of having wrongfully caused harm.

The authors might object that I am embracing the imposition of punishment on people out of proportion to their culpability, simply to serve the emotional needs of victims or the efficient deployment of a deterrence regime. They might object

that such a position unjustly undoes the connection they sought to forge between culpability and punishment. But my point is that they have not come to grips with how deeply our lives are pervaded by moral luck. Their image of true culpability for failure to show sufficient concern, and for that alone, is incoherent. But rather than conclude that few if any acts are culpable, I suggest that we take a more capacious view of culpability. We should embrace the standard practice of giving people notice that if they fail to live up to certain standards, then they risk being punished, and all the more severely if they cause unjustifiable harms.¹⁵ This is a straightforward extension of the idea that one has to take primary responsibility for one's moral luck.

¹⁵ The authors claim that there is no way to pick a reasonable standard for what a person should have attended to and known when judging whether his acts are culpably negligent. Either the reasonable person must be supposed to know what the agent knows, in which case he would act differently only if the real actor was willing to disregard risks that the reasonable actor would not disregard. In that case, negligence is culpable only when it also reflects recklessness. Alexander and Ferzan, *supra* note 1, at 82. Alternatively, the reasonable person must know all the facts relevant to making the right choice. But then the reasonable person would always avoid unjustifiably harming others, and it would be indefensible if the real actor, who faultlessly does not know what the 'reasonable' person would know, would nonetheless be held liable. The authors then claim that any standard between what the agent actually knows and what the omniscient agent knows is 'morally arbitrary'. *Id.*

The obvious rejoinder is that the right standard is what an agent in the actor's position would have noticed if he were reasonably attentive to the needs of others. The authors don't exactly miss this rejoinder, but by focusing on what the actor could have known at the time of his action, they miss the point. It's true that at the time of action it may be impossible to make sense of what the actor would know if he suddenly were 'reasonable'. But if we suppose that the actor had been reasonable all along, then there are things he would have attended to that would have put him either in a different epistemic position, or would have caused him to confront a different choice. A negligent actor may not realize that she endangers her child leaving him in the tub to answer the door. A reasonable actor would have become aware of the risks of a child drowning before confronting the choice either to leave the child in the tub and answer the door, or to risk missing the person at the door because she has a child in the tub.

IV. CONCLUSION

The authors assume that culpable action reflects insufficient care, but they lack a good account of why anyone would act in ways that manifest insufficient care. Given that one cannot, on their view, be held accountable for failure to act on beliefs one does not have at the time one acts, it seems that the explanations of culpable action would have to involve one knowing that what one is doing is wrong, and doing it anyway. This means that all culpable action must be either evil or weak willed.

I do not want to deny that some culpable action results *directly* from evil. Nor do I want to deny that weakness of will exists – though I think it is exculpatory, leaving the only fully culpable choices, on the authors' view, those that are evil. But I think that this presents too narrow a picture of culpable choices. In my estimation, most culpable action is performed by agents who take themselves to be justified at the time they act. The criminal law ought not to let these people go unpunished. Rather, its purpose is at least in part to set standards for people who often do not agree on what is a reasonable amount of care to take in particular circumstances, and who might not attend with sufficient care to the risks they impose on others. These are standards to which we must adhere, on pain of risking punishment. Even if, at the time of action, one cannot see a reason to obey the law, one can merit punishment if it can fairly be said that one's failure reflected a series of earlier choices – perhaps knowingly flouting morality, perhaps just being imprudent – not to cultivate a responsible concern for others.

These choices need not have been evil in the strong sense of knowingly choosing to do that which is wrong, but only in the weak sense of lazily indulging selfishness. One's failure at that time would then be as much insufficient prudence in failing to take seriously the risks of not cultivating a better character, as immorally failing to take the interests of others into account. This kind of imprudent and immoral choice is one that a reckless or negligent person makes repeatedly. But it is not his bad character that is punished; rather he is being punished for his bad acts that result from these choices to reinforce rather

than reform his character. These character-related choices bring in their wake the risk of being held accountable for choosing in a morally insensitive, irresponsible way. One's failure at the later time is then just one of the many ways in which one has to own the outcome luck that pervades all of our lives.

*Institute for Philosophy & Public Policy, University of Maryland,
3103 Van Munching Hall, College Park,
MD 20742, USA
E-mail: awalen@warppmail.net*