Criminal Law Theory: Introduction

Mark Dsouza, Alon Harel, and Re'em Segev

The papers in this special issue – on the theory of criminal law – were written in order to mark the retirement of Professor Miriam Gur-Arye from the Faculty of Law of the Hebrew University of Jerusalem, and relate to her work in various ways. Most of the papers were presented at a conference on criminal law theory that took place on May 18-20, 2022 in Jerusalem (the participants in the conference included, in addition to those whose papers are included in this special issue, also Professor Mordechai Kremnitzer, Professor Yoram Shachar, and Professor Thomas Wiegand). Professor Gur-Arye's response to the papers concludes the special issue.

The papers deal with various topics in criminal law theory. Several papers discuss the structure of the criminal law. Re'em Segev considers the view that criminal law should be structured in a way that distinguishes between different types of legal rules. Most notably, this view classifies some conditions as elements of offenses and others as (part of) justificatory defenses or of excusatory defenses. For instance, the fact that an action is harmful is usually assumed to belong to rules that define offenses, while the fact that a harmful action prevents a (much) greater harm is typically classified as an element of a justificatory defense, and the fact that a harmful and wrongful action is due to a threat that impeded the ability of the agent to consider the pertinent reasons is often assumed to belong to a rule that is an excusatory defense. Segev argues that this view should be rejected since it is incompatible with two plausible propositions about legal rules. The first is that foundational reasons (the most basic reasons) are not concerned with the structure of the law as such and that the implications of such reasons concerning the structure of the law are contingent. The second is that legal rules should be constructed in a way that reflects (the balance of) *all* the applicable reasons and not just some of them. Therefore, if there are pertinent reasons relating to the moral status of actions and to the moral status of agents, every legal rule should reflect both (along with any other pertinent concern, such as the consequences of alternative legal structures). Accordingly, no legal rule should constitute a pure justification or a pure excuse, that is, reflect only concerns regarding the moral status of actions or only concerns regarding the moral status of agents, respectively.

Mark Dsouza considers another distinction that relates to the structure of criminal law: the distinction between justifications and powers. He builds on Gur-Arye's argument[1] that we should distinguish between conduct that, while violating a prohibition that defines an offense, is justifiable (justification), and conduct that falls outside the prohibition and therefore does not require a justification (power). Dsouza argues that this conceptual claim about powers can be extended to all instances in which rights are displaced and that, in its expanded form, this claim highlights important and underappreciated points about the structure and classification of defensive claims in the criminal law. Specifically, he argues that distinguishing between true justifications and rights-displacements, namely, between cases in which a pro tanto offense has been committed and cases in which this is not the case, helps identify features of cases of the latter type that have dubiously been attributed to cases of the former type, and vice versa. This has implications, for example, for debates about what constraints apply with regard to using force in justified defense and how they should be applied.

Leora Dahan-Katz considers the category of exculpatory excuses, namely, defenses that concede wrongdoing and the unlawfulness of the act, but deny that the defendant is either responsible or culpable. She argues that many theorists tend to run together different explanations and justifications for the exculpation of defendants in cases of excuse although some of these explanations and justifications are inconsistent. In particular, there has been a tendency to conflate the idea that the excuses should be granted since and when the agent is not blameworthy and the idea that they should be granted if and when it is unfair to expect the agent to comply with the relevant prohibition – although these different organizing ideas may lead in different directions, depending on how we understand them.

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[1] Miriam Gur-Arye, "Justifying the Distinction Between Justifications and Power (Justifications vs. Power)", *Criminal Law and Philosophy* 5 (2011): 293-313; Miriam Gur-Arye, "Criminal Law Defences Divides", *Jerusalem Review of Legal Studies* 23 (2021): 167-183.

Two papers consider issues relating to the prevention of crimes. Anthony Duff and Sandra Marshall take as their starting point Gur-Arye's critical discussion of a legal duty to report crime, and sketch an idealizing conception of a democratic republic whose citizens could be expected to recognize a civic responsibility to report crime, in order to assist the enterprise of enforcing a criminal law that is their common law. Duff and Marshall explain why citizens should recognize such a responsibility, what its scope should be, and how it should be exercised, and note that civic responsibility must include a responsibility to report one's own crimes. They then argue that civic responsibility could ground at least a limited legal duty to report certain types of crime. Next, they consider whether the civic responsibility to assist the criminal law's enterprise of bringing wrongdoers to account could include a responsibility to arrest suspected or known offenders if the police cannot, or will not, do so.

Doron Teichman challenges the dichotomy between substantive criminal law and evidence law by suggesting that, at times, substantive criminal law is designed to relax the demanding evidential requirement of 'beyond reasonable doubt' by creating easy to prove evidentiary crimes. He then establishes that one crime that can be explained in these terms is the crime of failure to report a crime. While traditionally this crime is understood as applying to an innocent bystander who is exposed to information about a crime, in practice it is often used to prosecute accomplices whose guilt cannot be easily proven and thereby it mitigates the problems resulting from the strict evidential requirements dictated by evidence law.

Michelle Dempsey's paper wades into the lively debate between Gur-Arye and Duff about the extent to which the criminal law speaks in the voice of the polity, i.e. its citizens, when calling wrongdoers to account. While Duff thinks that criminal law always speaks in the voice of the polity, Gur-Arye argues that criminal law's voice depends on the kind of wrongdoing at issue. On her account, the criminal law speaks in the polity's name when calling citizens to account for wrongdoings involving the violation of duties we owe each other as citizens, and in the name of all humans in relation to wrongdoings involving the violation of duties we owe to each other as human beings. Dempsey clarifies Gur-Arye's account and defends it against Duff's response to it, arguing that the criminal law typically *claims* to speak in the voice of the polity, even if, in practice,

it often fails to do so. She then explains how, when the criminal law *does* manage to speak in the voice of the polity, it doing so can contribute (non-instrumentally) to its own justification. Dempsey argues that the very act of binding itself to the standards of its criminal law can allow the criminal law both to repudiate past wrongs of the polity, and to contribute towards reconstituting the polity's character in valuable ways.

Finally, Shachar Eldar argues that courts and commentators should differentiate between defendants who perpetrate crimes by means of inanimate weapons or trained animals and those who perpetrate crimes by means of other human beings used as innocent agents. He argues that this distinction, which is often overlooked, is important since in the latter case, the relevant actions violate the dignity of the person whom the perpetrator has turned into an instrument. Eldar further argues that we should consider the innocent agent as a second victim of the offense, alongside the intended victim. He points out that this suggestion raises several issues of both morality and law. First, the question of moral pertinence: do the scenarios that the law recognizes as cases of innocent agency involve a violation of the dignity of the innocent agent? Second, the question of criminalization: is it appropriate to invoke criminal law to protect the dignity of the innocent agent? Third, the question of the protected interest: assuming that both the dignity of the innocent agent and their autonomy are compromised, which of these violations is graver? He argues that there is a strong connection between the doctrine of innocent agency and the violation of the dignity of the innocent agent; that the violation of the innocent agent's dignity is severe enough to warrant criminalization; and that the injury to the innocent agent's dignity is more significant than the injury to their autonomy. His operative proposal is that the law should recognize perpetration by means of innocent agents as an aggravated mode of commission or an aggravating factor in punishment.