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BOOK REVIEW

Review of *The Criminal Law's Person*, edited by Claes Lernestedt and Matt Matravers. Oxford: Hart, 2022

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The edited volume covers reflections on the concept of the "person", written by criminal law theorists and philosophers. In the introduction, the editors sketch their general approach, which is uncommon in moral philosophy and criminal law theory. Instead of painting an idealistic, non-empirical, coherent picture of what it means to be a person, they remind us that the criminal law's person is a "multifaceted, semi-coherent" being (p. 14). They point out that different pictures are painted by different stakeholders. Furthermore, they argue that the law should not insulate itself against what the sciences outside law have to tell us; and they identify striking the balance between a backward-looking and a forward-looking perspective as an important question – a recurring theme in a number of chapters.

Matt Matravers, in his chapter "The criminal law's various persons", develops the central idea in more detail. He begins by outlining the still widely held conception of a person as an autonomous being that is reason-responsive, before going on to recount how this classical liberal idea is used for the normative justification of criminal law, as a source of criminal law, and as a constraint. His point is that this seemingly neat and coherent picture is incomplete. In the area of criminalisation, legislatures pursue much wider goals of risk control, beyond addressing autonomous human beings. For ex-post decisions, Matravers distinguishes between the thin, formal conception of the person that is applied for convictions and thicker concepts applied at the sentencing stage, which leave more room for positioning the individual in the real world. He concludes with the remark that criminal law theorists should pay more attention to the behavioural and explanatory sciences.

Kai Hamdorf focuses on the term "guilt" within German criminal law doctrine, including a brief outline of the framework provided by the German Federal Constitutional Court. Rulings of this court have been based on the assumption that a person is able to determine his or her own actions and take free decisions. The main part of

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this chapter describes rules in the German Criminal Code that focus on empirical facts and forensic expertise used to determine if – as a consequence of mental illness, serious abnormalities, and very severe intoxication – guilt was lacking. German law, as Hamdorf's description shows, allows for mitigating punishments or even acquitting defendants in a comparatively generous way in cases where offenders had been seriously drunk or under the influence of drugs.

Claes Lernestedt emphasises the two perspectives for describing responsibility: backward-looking and forward-looking. The forward-looking assessment serves preventive purposes. Lernestedt argues that these assessments can be shallow and rigid. His main point is that the rules for assigning responsibility for past offences must be tailored to the defendant as a concrete, unique individual. According to Lernestedt, rules for backward-looking responsibility should be guided by the idea of "profound blameworthiness"; preventive reasoning regarding the effects of excusing defendants should not be taken into account. Like his co-editor, Lernestedt asserts that criminal law and criminal law theory should give more space to the empirical sciences: psychology, psychiatry, and sociology. He is critical of judgments by Swedish courts that have applied forward-looking reasoning rather than taking the defendants as they were; for instance, as individuals with mental disorders, very agitated after an attack, or under stress. Lernestedt's arguments are clear and will convince many readers. However, I would like to raise one objection. The author assumes that the rationale for shallow judgments about blameworthiness must be future-oriented, that is, point to general prevention. A different argument could be proposed, rooted in political philosophy (which Lernestedt also takes to be the best starting point). Looking deeply into minds and souls is hardly compatible with the tasks of criminal law in modern, secular states. In my view, criminal law should consciously avoid God's perspective (who knows and judges everything) in favour of the much more superficial perspective of fellow citizens, and therefore not search for "profound blameworthiness".

Robin Zheng, a philosopher, takes a different approach to Lernestedt. She focuses on the normative, non-empirical notion of the person; or more precisely, the contrast between two normative concepts of the person. She works with a distinction that enables a better understanding of the complexity of criminal responsibility: that between attributability and accountability. The first concept, attributability, sees assessments in criminal law as a subcategory of moral appraisal. Criminal law theorists who focus on agency, reason-responsiveness, or character as the rationales for holding individuals responsible take the attributability route. The second concept, accountability, does not focus on moral appraisal as such, but integrates the notion of responsibility into a larger framework of citizens' mutual duties and the distribution of burdens. Accountability-first theories assume that the primary task of criminal law is not to morally assess persons, but to uphold the rule of law and the integrity of rights that persons have against each other. Zheng goes on to show what this means for conceptualising the criminal law's person. With a responsibility-as-attributability approach, the relevant moral assessments focus on the notion of a post-Kantian or metaphysical self (the familiar notion of a free, autonomous being). Accountability-first theories are relational and political. They focus on persons in their web of duties and rights, and they must presuppose the existence of a community and of social practices. In the last subsection, Zheng presents arguments in favour of the account-

ability route. She convincingly points out that it is a different question whether a person deserves moral appraisal (the focus of attributability theories) and whether (and how) to express blame. She briefly mentions the (in my opinion most important) argument that supports a strong preference for the accountability-first approach: Why should moral appraisal per se be the business of modern liberal states? In addition, Zheng sees it as an advantage that accountability theories need to be more attentive to real social conditions. If the normative theory presupposes fair terms of interactions and mutual rights and duties, then arguments that point to unfair distributions must be taken more seriously and challenges must be addressed. It is easier for normative theories that focus on the isolated self to brush away social injustice arguments.

Malcolm Thorburnis is also known for anchoring criminal law theory in political philosophy rather than moral philosophy. A central concept in his chapter is the legal person (in general, extending beyond criminal law). The question of who can have legal rights, duties, and powers is fundamental for every legal order. Thorburn analyses three different modes of defining the legal person. The first is an instrumentalist approach to law, which argues that the law can freely assign the status of persons to any entity if this is considered useful. The second approach requires backup from moral philosophy: A legal person must be a responsible agent, judged by the standards of an independent moral reality. Thorburn contrasts this with a third, a rule-of-law approach. From this point of view, the concept of the legal person must be drawn from "structural features of a legitimate, coercive legal order" (p. 106). The status of being a legal person means to be protected against interferences by others and the state. In a next step, Thorburn asks which groups of legal persons may be held criminally responsible. He points out that the answers depend on the conception of criminal justice – and here, again, he distinguishes between three approaches. The instrumentalist view could, in principle, subject all human beings to criminal punishment. Legal moralism argues that the central purpose of criminal justice is to condemn moral wrongdoing, which means to focus on responsible moral agents. Thorburn's sympathies lie with the third, the rule-of-law approach. He assumes that this leads to a particularly high standard of criminal responsibility, the consequences of which he puts as follows: "It includes only those who are capable of understanding the special nature of criminal wrongdoing and its relation to the state's exclusive authority to legislate" (p. 116). I am not sure if this is really as high a standard as Thorburn claims. While it does require cognitive abilities and a basic understanding of concepts such as "state" and "exclusive authority", it leads to a narrower scope for negating criminal responsibility compared to Lernestedt's "profound blameworthiness", which also pays attention to emotions.

The following chapter, by Alan Norrie, is entitled "Victims who victimise". Norrie points out that offenders often come from the most socially disadvantaged backgrounds and have been "victims of systematic and structural processes of social exclusion". He seems to assume that "social exclusion" is a standard condition in the lives of offenders – something one could challenge conceptually by discriminating between disadvantages and exclusion, or empirically by pointing to the increasing number of highly privileged persons convicted of white-collar crimes or sexual misconduct. Norrie sketches the tension between an idealist conception of personhood and the acknowledgement of real social conditions both in classical philosophical

texts and in the work of Antony Duff. He then moves on to the moral psychology of guilt, assuming that feelings of remorse or guilt as psychological phenomena deserve more attention. The texts discussed here come from the field of psychoanalysis. Norrie cites work that traces strong feelings of guilt back to the emotional world of small children and their relationship with their parents, arguing that guilt is a "fundamental element in the human psyche" (p. 129). This raises questions of how the psychoanalytical description relates to the sociological diagnosis of "social exclusion" at the beginning of the chapter. Norrie, at the end of his chapter, writes that it is possible that while a criminal offender should feel no guilt in one domain (the social), he or she nevertheless experiences the feeling of guilt. He ends with the plea to address social injustice and promote mutual recognition.

The starting point of Craig Reeves' chapter on "responsibility beyond blame" is Hanna Pickard's and Nicolay Lacey's widely discussed distinction between affective blame and detached blame, followed by reparatory efforts and forgiving. Reeves expresses scepticism towards any version of blame. He argues that it is essential to reflect on offenders' past and to understand how they have become the person they are. He also criticises the thought that choice, control, and knowledge could be a sufficient basis for practices of blame. Based on reflections about human psychology, including motivations and unconscious distortions, Reeves emphasises that autonomy is difficult to accomplish, rather than representing a standard feature of human agency. His conclusion is that "our practice of holding responsible is fundamentally inadequate to the real psychology of criminal law's persons" (p. 158). Reeves then calls on us to consider different ethical practices, and he argues against the assumption that respect for persons necessarily demands practices of blame in contrast to objectifying attitudes. He assumes that a "truthful and ethically serious" practice could mean to ask the other person to take responsibility rather than holding him or her responsible. While this seems quite convincing as a guideline for psychoanalysis (Reeves chooses this as an example) and also (some) moral interactions, it is not entirely clear to me whether this idea could be transferred into criminal justice practices.

Jules Holroyd and Federico Picinali focus on the reasonable person, a notion that plays a decisive role in US and English criminal law when errors need to be assessed (not in other legal systems, for instance in German law, where any genuine error means that *mens rea* is lacking). If the decisive question is how a reasonable person would have evaluated the situation, then close attention must be paid to what "reasonable" means. More specifically, the authors are interested in the impact of implicit racial biases on the question of how a reasonable person would have responded to a situation that the offender wrongly identified as an imminent attack. Holroyd and Picinali cite studies that show the prevalence of stereotypical assumptions when individuals are identified as Black (for instance a weapons bias). They convincingly argue that the reasonable person is not "the ordinary person", and they discuss two alternatives: having a reasonable basis for one's belief, or not having made a culpable mistake when coming to a belief that is not supported by a reasonable basis. According to them, the first approach would deem any belief irrelevant that is based on biases. At this point, the discussion could be extended. Holroyd and Picinali do not pay sufficient attention to the features of decisions about self-defence: the need

for a very fast decision, based on the assessment of probabilities, with patchy knowledge of the circumstances. Of course, in other situations, crude heuristics should be avoided; e.g., crude heuristics that use belonging to a group as one factor for predicting individuals' behaviour. However, if – due to a lack of time and information and faced with a serious risk – a person is roughly aware of statistical information (crime statistics often provide some) and concludes, for instance, that (everything else being equal) the elderly woman is not dangerous, but the young man is – would this be obviously unreasonable? Holroyd and Picinali write about implicit racial bias, which leads to much more contentious debates. While they seem to classify any reference to group membership and crude heuristics as unreasonable (even in cases of putative self-defence), they also argue that individuals might not have had a fair chance to realise and correct their own racist biases. This leads to an obvious tension: If the fair-avoidability argument is taken seriously as a decision rule (the backward-looking perspective) and thus the claim of self-defence accepted, strong public protest could be expected. It would be perceived as outrageous if the legal reasoning were "racist attitude, but unavoidable". The authors consider whether granting an excuse rather than a justification would help, but they see that this would not make much of a difference. An alternative, which the authors do not discuss, might be not only to focus on defendants and social norms, but to spend more efforts on developing meaningful rituals of apology after an error.

The perspectives and premises of the authors in this volume vary considerably. Despite these differences, they share one basic assumption: For the purposes of criminal law theory, it is insufficient to simply stipulate a fictional picture of human beings as autonomous, independent, free persons. I would add that the starting point is somewhat different in constitutional theory: One can argue that constitutions should aspire to more than reality can offer. Criminal law is, however, obviously different as it underpins convictions and hard treatment for real individuals. The authors disagree on the extent to which normative theory should play a role at all for criminal law doctrine; but, as several chapters show, anchoring criminal law theory in political theory has advantages. Criminal law as one of the most coercive instruments at the disposal of the state should be used to protect the rights of citizens. Thus, criminal law theory needs to focus on the relations between citizens, rather than zooming in on the moral failings of individual agents.

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