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SHOULD CRIMINAL LAW MIRROR MORAL BLAMEWORTHINESS OR CRIMINAL CULPABILITY? A REPLY TO HUSAK

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ABSTRACT. In *Ignorance of Law*, Doug Husak defends a version of legal moralism on which ‘we should recognize a presumption that the criminal law should...be based, on conform to, or mirror critical morality’. Here I explore whether substantive criminal law rules should directly mirror not moral blameworthiness, but a distinct legal notion of criminal culpability – akin to moral blameworthiness but refined for deployment in legal systems. Contra Husak, I argue that the criminal law departing from the moral ideal embodied in the standard of moral blameworthiness is not always to be regretted. After showing how criminal culpability might come apart from moral blameworthiness, I argue that my alternative to Husak’s view has practically interesting upshots. In particular, it allows us to resist Husak’s central conclusions about the exculpatory force of normative ignorance. There are good reasons for the criminal law to make certain charitable presumptions about citizens as competent agents, which the standard of moral blameworthiness needn’t similarly embody, and this calls into question Husak’s argument for the claim that normative ignorance exculpates.

In *Ignorance of Law*, Doug Husak defends a version of legal moralism on which ‘we should recognize a presumption that the criminal law should...be based on, conform to, or mirror critical morality’.¹ This is the ‘[t]he default position [applicable] if insufficient reasons are marshaled in favor of the opposing point of view’.²

I’m sympathetic to Husak’s position and agree morality is a crucial anchor-point for any sound approach to criminalization. However, here I explore whether substantive criminal law rules should directly mirror not moral blameworthiness, but a distinct

¹ DOUG HUSAK, *IGNORANCE OF LAW* 34 (2016).

² *Id.* at 41.

legal notion of criminal culpability – akin to moral blameworthiness but cleaned up for deployment in legal systems.³

This is an intra-familial issue. Husak may be amenable to much of what I argue here. Indeed, Husak's position and my alternative are similar in assuming criminalization decisions should begin with morality. I merely offer the institutionally constrained notion of culpability as a more apt concept for the content of the criminal law to *directly* track than moral blameworthiness. Husak accepts that practical limits and institutional design considerations provide reason to depart from the moral facts he sees as the primary guide to the substance of the criminal law. However, Husak goes a step further to claim that departures from morality in the criminal law are inevitably to be regretted. As he notes, '[t]o insist that law should mirror morality presumptively helps to remind us that conformity between the two domains is an aspiration or goal. (...) The deviations we permit should be regarded as occasions for regret, as invitations to try to do better'.⁴ He thinks 'we should regret these retreats from our ideal and do our best to find ways to avoid them', even while agreeing 'retreat is almost certainly needed'.⁵

Is this claim about regretting the inevitable retreats from the ideal true in general? It's admittedly plausible for punishing the morally innocent. But punishing wholly innocent actors is not the only way law might depart from morality, and not all departures from morality are occasions for significant regret that should prompt us to try to do better. Since law's authority is to be wielded by limited humans, aren't there legitimate ways in which we would affirmatively want the criminal law *not* to track morality? Suppose we are dealing with conduct governed by an exceedingly complex moral rule (or set of moral considerations). Here it might be legitimate for criminal law to adopt a simplified version of the moral rule – one whose application will be more uniform and predictable to regular citizens. Moreover, suppose the rule's simplicity never makes criminal liability *overinclusive* relative to morality (*i.e.* never calls for punishing those who are entirely innocent, morally speaking), but

³ In saying culpability is a legal concept, I don't mean it tracks the law's actual culpability attributions. Instead, it's meant to reflect the attributions legal systems like ours *should* make. This 'should' is moral, but it's a moral question about how to design a legal system, not about the moral ideal independent of implementation.

⁴ Husak, *supra* note 1 at 44.

⁵ *Id.* at 253.

does minimize harm compared to other possible rules. This would be a legal departure from the full moral ideal, but I doubt it would be cause for substantial regret. Instead, it seems a desirable departure from morality to be expected in well-functioning criminal law systems.⁶

Thus, rather than relegating institutional design considerations to a secondary position reached only after mapping the moral ideal, I propose a modified version of Husak's position in which practical considerations – at least insofar as they are fairly stable across time and place (not just one-off exceptions) – are built into the criminal law theorist's inquiry from the outset by focusing on mapping out an institutionally refined notion of criminal culpability.

I first clarify Husak's legal moralism (I), and then sketch my alternative (II). From there (III) I reply to Husak's main argument for his own view that criminal law should mirror morality. Lastly, I suggest my alternative has practically interesting upshots (IV). Distinguishing criminal culpability from moral blameworthiness opens up alternatives to Husak's central conclusions about the exculpatory force of normative ignorance. There are good reasons for the criminal law to make certain charitable presumptions about citizens as competent agents, which the standard of moral blameworthiness needn't similarly embody, and this calls into question Husak's argument for the claim that normative ignorance exculpates.

I. HUSAK'S MORALITY MIRRORING THESIS

I begin by clarifying Husak's *Morality Mirroring Thesis*, which states that the rules of the criminal law should presumptively conform to morality. He clarifies: '[t]he morality in question is critical; its content is ascertained through philosophical argument rather than a

⁶ An anonymous reviewer notes that more could be said about when regret is aptly felt over departing from the ideal. Indeed, analogous questions might arise about the gap between what is criminalized and what is punished: should we regret it when the latter fails to track the ideal embodied in the former? These are rich questions, though I don't have space to fully investigate them here. Here my working hypothesis – contra Husak's view that criminal law departures from the moral ideal are cause for regret – is this: such departures needn't always merit substantial regret, particularly when institutionally implementing ideal moral rules would create predictable difficulties and unfairness in application and the institution instead implements modified rules that will be fairer, more uniform, and more workable.

⁷ *Id.* at 33.

sociological poll'.⁷ However, morality contains many evaluative concepts – wrongness, rights, goodness, virtues, vices, etc. Which matter? Two are particularly important for criminal law purposes: wrongness of actions and blameworthiness of actors for such actions. Though he doesn't say so, I take Husak's claim to mean that the substantive criminal law rules that determine liability should presumptively mirror *both* the moral wrongness facts *and* the moral blameworthiness facts:

Moral Mirroring Thesis:

- a) *Wrongness Mirroring*: Presumptively, only actions which are morally wrong (either independently of law or in virtue of the law's triggering pre-existing moral reasons against those actions, say, via fair play) may legitimately be prohibited by the criminal law (perhaps only within a particular domain of moral wrongs, like the public ones).
- b) *Blameworthiness Mirroring*: Presumptively, the amount of criminal liability (*i.e.* how much hard treatment and censure by the state) a person may legitimately be exposed to in virtue of doing a properly prohibited action should correspond (not be disproportionate) to the actor's degree of moral blameworthiness for that action.

The relation between wrongness and blameworthiness is contested. Utilitarians think the two come apart, as moral wrongness tracks the failure to maximize utility while blameworthiness tracks something else (like manifesting bad attitudes in action).⁸ Other philosophers hold that an action is morally wrong iff it is blameworthy (unless it admits of sufficient countervailing considerations).⁹ I assume the latter view, as it simplifies matters greatly.

Most importantly, if I'm allowed the assumption that the blameworthiness of an action (absent sufficient supporting or mitigating considerations) entails that it is wrong (which I won't argue for), then this permits the discussion to focus primarily on prong b) of the Mirroring Thesis. If blameworthiness absent sufficient countervailing considerations – or 'all-in blameworthiness' – entails wrongness, then any time the criminal law satisfies prong b) of the

⁷ *Id.* at 33.

⁸ Fred Feldman, *Actual Utility, the Objection from Impracticality, and the Move to Expected Utility*, 129 *PHILOSOPHICAL STUDIES* 49 (2006).

⁹ STEPHEN DARWALL, *SECOND PERSON STANDPOINT* 27 (2006); J.S. MILL, *UTILITARIANISM*, ch. V, para. 14 (1861).

mirroring thesis, prong a) will also be satisfied. Why? If the amount of criminal liability imposed is proportionate to all-in blameworthiness, as prong b) requires, then one will not be punishable for an action without at least some all-in blameworthiness, and if all-in blameworthiness entails wrongness (per my assumption), then one will not be punishable for an action unless it's also wrong, as prong a) requires. Hence, I mainly focus on the moral mirroring in prong b). The ways I put pressure on b) should be neutral regarding a).

II. AN ALTERNATIVE TO MORAL MIRRORING

I'm sympathetic to Husak's idea that critical morality is the appropriate starting point for determining the substance of criminal law. However, I want to put pressure on b) in the Moral Mirroring Thesis. I'll sketch an alternative view before examining Husak's argument for moral mirroring in III.

Rather than tracking blameworthiness, I propose the criminal law should be more directly anchored in the legally oriented notion of criminal culpability. This suggests a different form of mirroring. On this view, prong b) above would be replaced with the claim that the criminal law rules presumptively should mirror not the facts about how morally blameworthy actions are but the degree to which they are criminally culpable.

Criminal culpability, I suggest, is distinct from but grounded in moral blameworthiness. The former seeks to refine and institutionalize our intuitive blameworthiness judgments. Criminal culpability, as I've suggested elsewhere, can be understood as a stripped-down, coarse-grained analog of moral blameworthiness.¹⁰ If we adopt an insufficient regard theory,¹¹ the two notions would be structurally similar in the following way. An act is *morally blameworthy* to the extent it manifests (in the way morality requires) insufficient regard for the interests, rights, and values morality deems relevant. That is, the act is blameworthy to the extent it's based on a valuation of reasons that *diverges* from the morally correct weights to be ascribed to the reasons bearing on whether to do that action. By contrast, an act is *criminally culpable* to the extent it manifests (in the way criminal law requires) insufficient regard for the interests, rights, and values

¹⁰ ALEXANDER SARCH, CRIMINALLY IGNORANT 64–67 (2019).

¹¹ *Id.* at 28–29, 50–54; cf. Husak, *supra* note 1 at 168.

that are properly protected by the criminal law. That is, an action is culpable to the degree it's based on a valuation of reasons that diverges from the correct weights *the law* ideally would say should be ascribed to the reasons bearing on whether to do the action.

Despite this structural similarity, substantive differences can arise. Criminal culpability can be understood as a cleaned-up analog of moral blameworthiness which is systematically constrained by institutional design considerations in predictable and desirable ways. On the insufficient regard picture just sketched (which broadly maps onto the reason-responsiveness picture Husak favors¹²), the most important way differences between criminal culpability and moral blameworthiness will arise stems from differences in the substantive reasons bearing on how to act that are properly recognized by morality and the criminal law, respectively.¹³ It's *conceptually possible* that the reasons that matter to moral blameworthiness are the same as those to be recognized by criminal law, though I doubt it. Instead, the reasons the criminal law should demand that we not demonstrate disregard for in action – *i.e.* the interests, rights, and values meriting legal protection – plausibly come apart from the applicable moral reasons. Why?

Here are some leading possibilities (though I won't argue for them).¹⁴ First, differences in the reasons to be respected on pain of moral blameworthiness or criminal culpability might arise due to institutional design considerations. These include the need i) for bright line rules, ii) for a generally applicable resolution of contested

¹² Husak, *supra* note 1 at 163–68. Husak notes a possible overlap between quality of will theories and reasons-responsiveness views: 'Perhaps...deficiency in reason-responsiveness *just is* (or at least *involves*) a defect in the will that manifests a failure to assign a proper weight to [relevant] considerations...'. *Id.* at 168.

¹³ A second difference between blameworthiness and culpability I've noted elsewhere concerns manifestation. For culpability, you don't necessarily manifest the full amount of insufficient regard you *possess* that causes your action. Instead, I argue you manifest only the least amount needed to get someone in your position (under the facts you're aware of) to perform the criminal act. Any additional bad attitudes possessed remain unmanifested. With moral blameworthiness, it's plausible that any insufficient regard you possess and helps cause your action is manifested. Sarch, *supra* note 10 (ch. 2).

¹⁴ An anonymous reviewer notes that institutional design considerations might also bear on our moral practice of interpersonal blaming. I'm open to this possibility. However, interpersonal morality seems not to be deliberately designed in the same way a formal legal institution is. Moreover, institutional design considerations applicable to moral blaming (if any) would be substantially different than those applicable to criminal law. Thus, I assume moral blaming norms are much less affected (if at all) by considerations like workability, uniformity, and institutional integrity, which more plausibly bear on criminal culpability.

normative questions, and **iii**) for criminal prohibitions to be simple enough to be capable of guiding action for most citizens.¹⁵ Furthermore, it's plausible that **iv**) we cannot routinely be given *carte blanche* to determine for ourselves what interests are sufficiently weighty to exempt us from otherwise generally applicable criminal prohibitions, as this would open the door to more offending given the natural human tendency to rationalize conduct we want to perform. Given **i**)-**iii**), the reasons to which criminal culpability demands conformity plausibly should not permit a proliferation of borderline cases that are on the cusp of being punishable. Given **iv**), to avoid creating temptation to rationalize misconduct via weak justifications, criminal law should not recognize all the very fine-grained, case-specific partial justifications, excuses, and mitigators that morality would on its own. Finally, **v**) criminal law plausibly has greater need of uniformity and predictability in the eyes of the public than analogous moral principles do. It's important that the public perceive the criminal law to be treating like cases alike, as this bolsters the institution's perceived legitimacy and engenders trust and obedience to its standards. But the public cannot absorb limitless information about different cases. So criminal law may need to adopt a uniform approach to broad categories of roughly similar cases, rather than more nuanced approaches that produce surprisingly different results based on differences too fine for the public to appreciate.

Thus, the reasons the law should recognize as affecting criminal culpability are likely to be more coarse-grained than the reasons that matter for moral blameworthiness.¹⁶ By contrast, I see no principled limit on how fine-grained or case-specific the moral reasons bearing on how to act can be. While I don't have a theory of moral blameworthiness, it's an open question whether anything in your personal history, any attitudes (whether you act on them or not), or any pressures you face could affect how you're morally evaluated.

There could also be deeper differences between the two notions if they have different functions or aims. Here are four compatible ways

¹⁵ Note these design considerations aren't meant to include highly changeable considerations like epistemic limitations in specific cases.

¹⁶ A consequence plausibly might be that detailed considerations about motives generally shouldn't matter to criminal culpability. But there may well be no similar restrictions on the impact of motives on moral blameworthiness.

the aims of the two notions might come apart. Again, I don't argue for them but suggest that they are plausible enough to merit inquiry.

First, moral blameworthiness may be aimed at justifying certain kinds of hard treatment by private individuals for purposes of maintaining and repairing individual relationships, while criminal culpability may focus on justifying other kinds of hard treatment by the community *qua* group entity. Thus, the latter might center on the conditions for maintaining one's relationship to the political community and standing as group member, not just one's relationship to individuals.¹⁷

Another possibility, for which Husak shows sympathy, is that criminal culpability concerns only wrongs that are of public concern, while moral blameworthiness would cover also wrongs that fall within some (difficult to delineate) private sphere. Private immorality 'provides a kind of case in which the law should *not* conform to morality'.¹⁸ Here it may be that criminal law's presumptive mirroring of morality is defeated (or otherwise non-operative). But another possibility is that the criminal law really should mirror a distinct legal concept of culpability that differs in its aims and scope from moral blameworthiness, where private matters are excluded by the former but not the latter.

Third, criminal culpability – a notion designed for legal implementation – might aim to promote *individual freedom* in ways moral blameworthiness doesn't.¹⁹ Plausibly, for reasons underlying the ideal of a liberal criminal law, criminal culpability should attach only to voluntary actions there was a fair opportunity to avoid. But this may not be a requirement for moral blameworthiness. On some views, one needn't have acted on one's bad attitudes for one to incur blameworthiness as a result.²⁰ There seems less to worry about from a freedom-preservation standpoint if moral blameworthiness were incurred based on mere thoughts or character traits. However, it's broadly agreed that criminal liability shouldn't be imposed on such grounds.

¹⁷ Ekow Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHILOSOPHY 457-475 (2015).

¹⁸ Husak, *supra* note 1 at 46.

¹⁹ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 23 (2008) (discussing fair notice and the need to 'maximize[] individual freedom within the coercive framework of law').

²⁰ Pete Graham, *A Sketch of a Theory of Blameworthiness*, 88 PHIL. & PHENOMENOLOGICAL AFF. 388, 396-99 (2014).

Fourth, the criminal law may owe us particular kinds of respect as citizens, which needn't be similarly reflected in judgments of moral blameworthiness. These modes of respect might take the form of presumptions – perhaps conclusive ones – the criminal law should make about us when assessing our culpability for what we did, which morality needn't make. One of these I've endorsed (echoing Yaffe²¹) is a principle of lenity under which the criminal law should treat us as the least bad versions of ourselves – the smallest possible departure from the practical reasoning of the perfectly law abiding citizen – that would be consistent with what we did.²² Perhaps the criminal law should make other presumptions too – say, a presumption of rationality.²³ As discussed in Section IV, the criminal law plausibly has reason to make certain presumptions about the minimum competences of citizens brought before it who don't contest their competence. While it's not hard to see what might ground such presumptions in law, it's less clear why morality need accept them.

I raise these merely as possibilities worth exploring. One methodological reason to distinguish the two concepts in *some* way is this. Disagreement about evaluative matters is pervasive. One overt benefit of cleaving off criminal culpability from its moral cousin is that this allows us to leave morality as the contested battlefield where the most difficult, mushy, or divisive evaluative questions can be fought over. Criminal culpability, then, could be left to focus on what remains: the broader principles and clearer contours around which an overlapping consensus is more likely to emerge. Of course, this is just a hope, but one with enough promise to explore. Section IV suggests additional payoffs from this move.

III. HUSAK'S ARGUMENT FOR MORAL MIRRORING

Despite the above considerations in support of distinguishing criminal culpability from moral blameworthiness, Husak offers an argument that might block my suggestion for criminal law to be grounded in culpability not blameworthiness. He argues that crim-

²¹ Gideon Yaffe, *The Point of Mens Rea: The Case of Willful Ignorance*, 12 CRIM. L. & PHILOSOPHY 19, 27 (2018).

²² Sarch, *supra* note 10 at 51.

²³ Yaffe, *supra* note 21 at 27.

inal law *must* be grounded in morality or else be unsupportable. If only moral blameworthiness mirroring can defuse this normative challenge, and culpability mirroring cannot, then it wouldn't be defensible to tether criminal law rules directly to culpability as I'm suggesting. Let's therefore pause to consider whether Husak's argument decisively favors moral mirroring over the culpability mirroring alternative.

The first premise in Husak's argument is that punishment necessarily involves harsh treatment by the state: 'By definition, the criminal law is that domain of law that subjects offenders to state punishment'.²⁴ Second, '[s]tate punishment must be justified'.²⁵ This is because 'deliberate impositions of hard treatment and stigma – in other words, punishments – treat persons in ways that would amount to a gross violation of their rights in the absence of a special justification'.²⁶ The last main premise is that only a moral justification can provide what's needed here. 'What kind of defense would be needed to assuage our reservations [about punishment]? The sense of justification we seek can only be moral. (...) We are simply not interested in a legal defense of state punishment'.²⁷

To get from these stated premises to the Moral Mirroring Thesis we need a connecting principle. Even if the required justification must be moral, why would this require the criminal law to track moral blameworthiness *specifically* (as the Moral Mirroring Thesis states) – rather than other moral concepts? Presumably, a picture like the following lies in the background. While harsh and stigmatizing state treatment is something we normally have a right against, this can be *forfeited* (or waived, defeated, or whatever the relevant operation is) by morally blameworthy actions. To act in morally blameworthy ways would forfeit the normal protection against stigmatizing state treatment. Call this the *forfeiture premise*. If all four of these premises are true, the Moral Mirroring Thesis would seem to follow.

However, there are problems with the argument. One worry is invalidity. Second, one might reject the forfeiture premise if one thinks something *besides* moral blameworthiness does the forfeiting.

²⁴ Husak, *supra* note 1 at 35.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Start with invalidity. The Moral Mirroring Thesis requires a match between i) the amount of harsh treatment a convicted party faces and ii) her degree of moral blameworthiness. However, even if moral blameworthiness is what forfeits the protection against harsh and stigmatizing state treatment (*i.e.* renders one liable to some amount of such treatment), the *amount* of harsh treatment that is proportionate still might reflect something other than moral blameworthiness – namely, criminal culpability.

How could this occur? Even supposing moral blameworthiness is what forfeits one's right against harsh and stigmatizing state treatment, and even supposing one cannot properly be criminally culpable without also being somewhat morally blameworthy, it might still be true that the *degree* of criminal culpability may differ from one's degree of moral blameworthiness for one's act. For example, stealing money to buy medicine for your moderately sick child plausibly is both morally blameworthy and criminally culpable, but perhaps the mitigating factors in such cases carry more weight in morality than is proper in law. If so, the actor's moral blameworthiness may be quite small, while the degree of criminal culpability properly remains high (even if not quite what it would be if there were no redeeming facts about the theft). If so, this might forfeit the protection against harsh and stigmatizing treatment by the state (in virtue of one's blameworthy action). But it still might be true that the *degree* of censure and harsh treatment the criminal law should impose ought to track one's greater degree of criminal culpability, not one's lower degree of moral blameworthiness.

If this is right, the argument would be invalid. In the above example, we granted the premise that morally blameworthy acts are what forfeit one's protection against harsh and stigmatizing state treatment. The suggestion was that criminal culpability might always entail some moral blameworthiness, even if their amounts differ: acts might carry less blameworthiness (or more²⁸) than culpability. If so, the Moral Mirroring Thesis could turn out to be false – the amount of harsh treatment imposed ought to track criminal culpability not blameworthiness – even if the premises are all true. Nonetheless, we

²⁸ How could this be? Perhaps moral blameworthiness can attach in virtue of merely possessing bad thoughts, but this should not increase one's criminal culpability at all. Alternatively, perhaps borderline private actions can be quite morally blameworthy, but little or no criminal culpability should attach to them.

would still have the kind of moral justification for the imposition of harsh treatment that Husak calls for.

A second way the argument could fail is that the forfeiture premise is false. Perhaps morally blameworthy conduct is not what forfeits the right against harsh and stigmatizing state treatment – what renders one liable to it²⁹ – but *something else*. Different things can render one liable to be harmed in different contexts. In tort, mere causal responsibility for a situation where *someone* must bear a loss (plus, perhaps, some objective fault in one's conduct) can be enough to make one liable to bearing that loss by compensating the victim. Of course, causal responsibility wouldn't by itself justify harsh treatment that communicates a state-backed condemnatory message. But what's required for this may not be moral blameworthiness either. Even if criminal culpability does not guarantee the relevant forfeiture by entailing moral blameworthiness, perhaps culpability entails something else, X, that *does* bring about the relevant forfeiture. What could this X-factor be if not moral blameworthiness?

Most plausibly, one might render oneself liable to stigmatizing state treatment by doing things one knew or suspected (or perhaps effortlessly should have known) may give unfair advantages or otherwise go against the conventionally accepted rules defining 'fair play' in our community – even if one does not believe or suspect in any way that this is morally wrong or blameworthy.³⁰ Plausibly doing something that crosses an official line, with some mens rea that it does, within a domain as serious as the criminal law amounts to defying or challenging the values and practices constituting the civil order. Because the community may correct such defiant acts with condemnation in order to reconstitute and fortify the civil order, acts that amount to not 'playing fair' or otherwise defying the social order, would be enough to render one liable to *some* amount

²⁹ Cf. Jeff McMahan, *Necessity and Proportionality in Law and Morality*, in *NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW* 3-40 (Claus Kress and Robert Lawless eds., 2020). Here we're concerned with what justifies specifically *harsh and condemnatory state treatment*, which is more specific than the imposition of just any defensive harm (which isn't condemnatory or stigmatizing) on which McMahan focuses.

³⁰ Thanks to Ambrose Lee for helpful discussions here. See also Ken Levy, *Dangerous Psychopaths: Criminally Responsible But Not Morally Responsible, Subject to Criminal Punishment and to Preventive Detention*, 49 *SAN DIEGO L. REV.* 1299, 1305-06 (2011) ('even if...people are unable to be sufficiently motivated by morality and respect for...law, they are still criminally responsible...as long as they knew that they were breaking the law and [this] would likely mean getting punished if...caught').

of official condemnation and harsh treatment – *even if* one reasonably believes one is morally on safe ground in acting as one did. If acting in criminally culpable ways entails crossing a weighty official line with some mens rea of this fact, and if this is the X-factor that forfeits the right against harsh and stigmatizing state treatment, then criminal culpability can make one liable to such treatment – even if the amount that is proportionate tracks your criminal culpability not your moral blameworthiness.

To illustrate, suppose you do something properly prohibited by the legislature: you sell explosive chemicals without providing reassurances to the community by first acquiring a license. There is a plausible case for criminal culpability here because of the public nature of the activity and the legitimate demand society has for assurances of the safety of such conduct. But suppose you are not morally blameworthy because you're in excusing conditions that have moral force, but which the criminal law should not recognize. Perhaps you were facing psychological abuse and vague threats of severe but non-imminent harm from family members you cannot easily avoid, which would not meet any plausible legal definition of duress. Over an extended time, your resistance is worn down and you ultimately are cajoled into going ahead with the unlicensed chemical sales. Plausibly this renders you far more morally sympathetic, such that many might give you a pass morally speaking. But it's equally plausible that because of sensible institutional design considerations, including the need to effectively communicate that broadly similar cases will be treated alike, the law shouldn't allow this to reduce the seriousness of the offense committed – *i.e.* your criminal culpability. Thus, this would be a case where you have some criminal culpability despite not being morally blameworthy due to your moral excuse. Still, you will have forfeited your right against stigmatizing state treatment by doing something you recognize as plausibly violating the terms of fair play around here – something that stands as a challenge to the civil order.³¹ You shirked the burdens normally required to provide public assurances of safety through obtaining a license. Plausibly it's this breach of the conventions of fair play and the resulting challenge to the civil order –

³¹ R.A. Duff, *Criminal Law and the Constitution of Civil Order*, 70 (Supp. 1) U. TORONTO L. J. 4-26 (2020).

which stands despite your moral excuse – that forfeits the protection against harsh state treatment, not moral blameworthiness.

If something like this is right, there would still be a moral justification of the kind Husak demands for harsh and stigmatizing state treatment. Still, once you've thus rendered yourself liable to some amount of harsh state treatment, it may remain true that your criminal culpability should be reflected in the *amount* of such treatment the law may impose on you if convicted, not your moral blameworthiness (here assumed to be zero or close to it).³² This is another way Moral Mirroring may be false while we still get a moral justification of the sort Husak wants.³³

This isn't an isolated example. Perhaps morality regards it as an excusing condition that one had a rotten social background or that one's community is benighted about certain moral matters. Nonetheless, it would presumably remain proper for the law to decline to recognize these considerations as having exculpatory force. Such considerations might lessen one's moral blameworthiness, but not one's criminal culpability. Thus, harsh state treatment would be permitted in virtue of breaching the terms of fair play with *mens rea* in ways that challenge the civil order even if one has no (or less) moral blameworthiness due to excusing conditions. Nonetheless, the *extent* of the harsh treatment imposed might still plausibly track not moral blameworthiness, as Moral Mirroring requires, but criminal culpability.

IV. HUSAK'S ARGUMENT THAT MORAL IGNORANCE EXCULPATES

Distinguishing criminal culpability from moral blameworthiness can illuminate concrete problems too. I'll explore one way a distinct notion of criminal culpability might raise doubts about Husak's main argument that normative ignorance exculpates. Even if one accepts Husak's argument as to moral blameworthiness, it may fail for criminal culpability. If the substance of the criminal law really should track culpability not blameworthiness, then Husak's more revisionist

³² As an anonymous reviewer points out, the conventional norms of fair play may themselves have moral force or upshots. Nonetheless, here we are assuming that whatever moral criticism is generated by the actor's not 'playing fair' as understood within the community, this still does not generate much or any moral blameworthiness due to the morally excusing conditions the actor is assumed to be in. Furthermore, because we are assuming this moral excuse isn't apt for being carried over to the criminal law, we still get a case of criminal culpability without as much moral blameworthiness.

³³ In Section IV, I'll suggest Husak's core case of moral ignorance may fit within this category.

conclusions can be resisted. We could agree that normative ignorance reduces blameworthiness but deny that the criminal law should automatically follow suit.

The strategy explored here, like certain examples discussed in the previous section, admittedly would make criminal culpability harsher than moral blameworthiness. Some might think divergences between the two concepts are less problematic when culpability is more lenient than blameworthiness. I certainly do. But the harsher implications of criminal culpability at issue in this section are especially worthy of consideration because they stem from a desire to show deeper forms of charity and respect to the agents in question. At least this line of reasoning shows why legal systems might not be unreasonable in resisting Husak's conclusion that ignorance of relevant normative standards exculpates. Thus, it helps explain how sensible well-meaning lawmakers could plausibly have reached different conclusions than Husak on this issue.

Start with Husak's argument, which I amend for greater realism.³⁴ Suppose a company disclosure to be filed with the Environmental Protection Agency (EPA) may contain material falsehoods about the amount of greenhouse gases company plants are releasing into the atmosphere. Lying in formal communications to the government is both immoral and a crime.³⁵ On Husak's analysis,³⁶ setting aside purely self-interested reasons not to submit the report, two bits of knowledge are needed to get one to abstain from submitting it:

- (P1) This report to be submitted to the EPA contains material falsehoods
- (P2) Communicating material falsehoods to the government is wrong

Compare two people. Juan believes P2 but has no awareness of P1. Suppose he is not aware even of a risk of P1 (as even awareness of a risk should make one hold back the report) and is not to blame for this ignorance. Thus, Juan submits the report but is not blameworthy for its misrepresentations.

³⁴ Husak, *supra* note 1 at 150-56. Husak's argument involves someone who does not know it's wrong to kill the innocent. Although a strange scenario, this is the hardest case for Husak. If he can convince readers of this most difficult case, his conclusions would be on the strongest ground. I use a more realistic version of the case – which is easier for him to capture anyway – just to bring more readers onboard.

³⁵ 18 U.S.C. § 1001.

³⁶ Husak, *supra* note 1, at 151-53.

Now compare Carlos who knows P1 but doesn't believe P2. To preserve parity with Juan, assume Carlos is unaware of any risk that P2 is true. This case may be peculiar, since we'd expect Carlos to be aware of a *risk* that P2 is true simply from knowing that many people believe it. Nonetheless, for argument's sake, assume Carlos does not think there is any chance whatsoever P2 might be true.³⁷ Perhaps he's never formed any belief about the matter. More plausibly, perhaps he takes it entirely for granted (*i.e.* is certain) that P2 is false. He's been raised in a community of free speech extremists and government-skeptics, who ardently believe no speech by private actors can be wrong, and regardless there would be nothing wrong with lying specifically to the government. (Husak focuses on how moral blame depends on beliefs about what is morally wrong, but thinks analogous legal conclusions follow. To correspondingly flesh out the story of Carlos, suppose he also has no idea that lying to the government is prohibited by statute.)

Since Carlos has no inkling that submitting the report might be wrong (morally or legally), he does it. Is he to blame for this? Husak contends Carlos should get some exculpation compared to the analogous actor who knows *both* P1 and P2 but submits the report anyway.³⁸ As Husak explains, 'p2 could not enter into Carlos's rational deliberations about what to do. If Carlos does not believe p2, he has no more moral reason (from his internal point of view) not to [submit the report] than Juan, who does not believe p1'.³⁹ Thus he concludes: 'neither Juan nor Carlos merits any blame for conduct they perform in complete ignorance of propositions that play no role in their rational calculations'.⁴⁰ Juan, Husak explains, 'is not blameworthy for [submitting the report] because the reason not to do so could not have entered into his rational calculation'.⁴¹ Husak wants to treat normative ignorance analogously to factual ignorance, so he thinks the same holds for Carlos: 'He is not morally blameworthy because the moral reason not to [lie to the government] (p2) could

³⁷ Husak's discussion doesn't specify whether Carlos lacks a belief in P2 or believes P2 is false. *Id.* at 152-55. Presumably Husak thinks his argument that normative mistakes exculpate goes through either way.

³⁸ Husak, *supra* note 1 at 153.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 155.

play no more of a role in his rational deliberation than the factual reason (p1) could play for Juan'.⁴² Schematically, the argument is:

- 1) Blameworthiness consists, roughly, in defects in your 'rational calculations' (practical reasoning) – *i.e.* how you recognize, attach weight to, and are motivated by the reasons you 'have', where these, in turn, are facts to which you have sufficient cognitive access to be able to reason from or be guided by them.
- 2) You cannot be motivated by, reason from, or be guided by a fact that you don't believe or whose truth you don't have any credence in whatsoever. Such a fact cannot figure into your 'rational calculations' (practical reasoning).
- 3) Carlos does not believe or have any credence in the truth of P2.
- 4) Therefore (from 2 and 3), Carlos cannot be motivated by, reason from or be guided by P2 in deciding whether to submit the report he knows to contain falsehoods.
- 5) Therefore (from 1 and 4), Carlos is not blameworthy for submitting the report he knows to contain falsehoods.

Premise 1 encapsulates the outline of the reasons responsiveness and insufficient regard theories of blameworthiness that Husak and I agree on. An analogous claim is plausibly true for criminal culpability. One could contest the details, but it captures the broad strokes well enough for now.

The important thing is what's meant in 1) and 2) by 'having' a reason. In outline, I assume one 'has' a reason when one has sufficient cognitive access to the fact(s) constituting that reason for one to be reasonably able to use that information in one's practical reasoning, call it up to consciousness if prompted, and be motivated or guided by it in one's actions, *without undue effort or difficulty*. The key to resisting Husak's argument is that morality and criminal law may place the bar of what you're deemed to have 'sufficient access to' – what degree of effort is 'due' – in different places. This generates differences in what reasons each takes it we 'have'.

For both morality and criminal culpability, there are clear instances of 'having' a reason. If fact F is a reason against action A, the easiest case of 'having' this reason is if one consciously entertains F when deliberating about whether to do A. There are more border-

⁴² *Id.*

line cases too, but which also count. First, one has sufficient access to reasons that one is preconsciously aware of – *i.e.* a fact ‘easily called to mind if attention is focused on it’ such that it ‘remains part of a person’s mental states’.⁴³ Similarly, one ‘has’ a reason if one counts as *latently believing* it. Latent beliefs include inferences one would immediately draw with minimal time, difficulty, or effort. Husak discusses elsewhere a ‘marksman who fires his weapon at a distant target’, and even though he ‘does not think to himself “I might miss”, he nonetheless knows he might’.⁴⁴ This is a latent belief. Husak thinks ‘a latent belief in the wrongfulness of conduct is probably all that is needed to render the wrongdoer responsible’.⁴⁵ After all, such beliefs are able to figure into one’s practical reasoning.

What is at issue in this argument, then, are cases of people like Carlos who don’t clearly qualify as consciously, preconsciously, or latently believing a normative fact like P2, but could still be expected to put two and two together to draw the inference that P2 is true or has a substantial chance of being true. The key question Husak’s argument depends on is this: Does someone like Carlos, who does not actually believe P2 or believe there is any risk it’s true, nonetheless have *sufficient* access to P2 for it to be *capable* of figuring into his practical reasoning or otherwise motivating or guiding his conduct without undue effort? (For simplicity, focus on P2 as claim about the moral wrongness of lying to the government.)

My basic suggestion is that morality and law might answer differently. Assume Carlos is aware of other facts (the harm caused by lies, the usefulness of a truth-telling norm, the fact that most people think lying is wrong also toward the government, etc.) from which it is not so hard to infer at least a substantial *risk* of something like P2 being true.⁴⁶ Even if morality would judge one only on the basis of the inferences one *actually* drew – regardless of how nearby or easily

⁴³ Kim Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 629-30 (2001) (preconscious awareness of *e.g.* road conditions when driving).

⁴⁴ Doug Husak, *Distraction and Negligence* in L. Zedner and J. Roberts, eds., *PRINCIPLES AND VALUES IN CRIMINAL LAW AND CRIMINAL JUSTICE: ESSAYS IN HONOUR OF ANDREW ASHWORTH*, 85 (2012).

⁴⁵ Husak, *supra* note 1 at 191.

⁴⁶ One might object that even if Carlos doesn’t believe P2 and isn’t aware of any risk it’s true, he still presumably is aware of many of the facts that make P2 true and from which a risk of P2’s truth is obvious. Presumably *these* facts he’s aware of can still motivate him, guide his action, and figure into his deliberations. This is a further problem for lines 2) and 3) in Husak’s argument. Nonetheless, let’s tell the story of Carlos to block this worry. Suppose he doesn’t attach *any* normative significance to facts he’s aware of that make P2 true. This strengthens Husak’s argument against this further objection. The main text presents my chief objection to Husak.

accessible it might be to draw further inferences – the law has good reasons to judge one on the basis of the inferences that a minimally competent person in the defendant's shoes would normally be expected to draw without undue difficulty. To put it another way: what information does one have sufficient access to for it to count as at least latently believed, such that it can motivate one, guide one's conduct, and figure into one's practical reasoning without undue effort or difficulty? Morality may well hold that very little effort is due, and one therefore qualifies as latently believing only propositions that one has extremely easy access to (that one can call to consciousness effortlessly). Thus, morality plausibly might assign blameworthiness by looking only at the inferences one in some sense actually did draw. Merely being aware of facts that normal people would easily recognize as red flags of the truth of something like P2 would not be enough for *morality* to regard Carlos as having sufficient cognitive access to P2 for it (or something close) to figure into his practical reasoning, provide motivation, or guide his conduct.

By contrast, the criminal law has reason to be different. Criminal law plausibly should take it – for reasons outlined below – that more cognitive effort is due, such that one qualifies as latently believing more propositions than would be allowed under the moral standard. Thus, one plausibly should count as latently believing, for criminal culpability purposes, propositions that one has access to through exerting a bit more attention and effort than morality demands. Perhaps criminal law should assign culpability by looking not only at the inferences one actually drew, but the inferences one is easily able to draw with just a bit of effort. Thus, the criminal law might take it one latently believes a wider range of propositions than morality does, and so has sufficiently easy access to reasonably be *able* (in the criminal sense) to be motivated by these propositions and deploy them in practical reasoning. Thus, for criminal culpability, being aware of facts normal people would recognize as red flags of something like P2 plausibly should be enough for the criminal law to regard Carlos as having *sufficient* cognitive access to P2 for it to be *able* to figure into his practical reasoning and motivate him. Accordingly, he could have criminal culpability for failing to be motivated by (something like) P2 not to submit the report.

Why should criminal law be this way, then? Two reasons come together to support this approach: one concerns the aims of criminal law, the other institutional design.

As suggested in Section III, lawmakers might reasonably take there to be reasons of political morality for the criminal law to make certain presumptions about citizens appearing before it. Criminal law plausibly should aim to recognize and promote citizens' independence and autonomy. Toward this end, there is reason for it to treat defendants as practically competent, rational, and efficacious agents – at least insofar as they don't contest their competence. This may stem from the desire to show respect to defendants while encouraging them to be independent, autonomous, and competent by presumptively *treating* them as such in the hopes that they will live up to these expectations. If so, the criminal law should presume defendants are *competent rational agents*,⁴⁷ and if this is not contested through a doctrinally available route (of which there should be some) like an affirmative defense that goes to competence or perhaps fitness to stand trial, the law may treat this presumption as conclusive. One component of this presumption of competent agency concerns *cognitive* competence. That is, in order to recognize people as, and encourage them to be, practically competent agents, the criminal law has reason to treat defendants as having *sufficient access* to the information a normal reasonable person in the defendant's shoes with the defendant's beliefs about the world *would* be able to infer or call to consciousness and deploy in their practical reasoning without undue effort or difficulty.

For Carlos, this presumption of competent agency suggests that because he is aware of facts (like the harm, confusion, and distrust caused by lying about important matters) from which something like P2 could be easily inferred, the criminal law should presume that Carlos actually has *sufficient* access to something like P2 for it to be able to figure into his practical reasoning. It may seem in some ways infantilizing or demeaning for the state not to presume defendants are able to put two and two together to figure out that lying to government is bad and wrong. So to avoid sending this message, and to encourage citizens generally to strive to be more competent and independent, it's plausible the criminal law – when making culpa-

⁴⁷ Cf. Yaffe's presumption of rationality. *Supra* note 21 at 27.

bility judgments – should presume Carlos actually has sufficient access to something like P2, as long as he doesn't contest his competence in doctrinally available ways. This amounts to treating Carlos as a competent rational actor who thinks through the implications of his beliefs at least to the minimum expected degree. If this presumption is false, Carlos should have ways to contest his competence – e.g. the insanity defense, denying his capacity to form mens rea, appealing to diminished capacity, or perhaps contesting his fitness to stand trial. But assuming the threshold of capacity is not contested through a recognized channel (of which there should be some), the law could conclusively presume Carlos is a sufficiently competent rational agent to be able to be motivated by and reason from something like P2. Even if he has not in fact put two and two together to form a (perhaps merely latent) belief in P2, the criminal law can treat him as having sufficiently easy access to it that it *can* (in the relevant sense of 'can') figure into his practical reasoning. Therefore, his submitting the report could be treated as culpable.

However, there is no similar basis for morality, which is not designed for institutional settings, to adopt a similar presumption. Morality, to the extent it aims chiefly at governing our interpersonal relationships, plausibly does not share the aim of promoting competent rational agency among the citizenry in general. So judgments of moral blameworthiness needn't be similarly guided by a presumption of competent rational agency.

Principles of institutional design provide a second source of support for this approach. The standards of morality plausibly can require as in-depth a look into the contents of one's mind as you might like. Thus, judgments of moral blameworthiness might really call for taking an in-depth look at the actor's mind to determine whether she *really with zero effort* could call up, reason from, and be guided by a piece of information she had reasonable access to. But criminal culpability is meant to be deployed in institutional settings by actual humans, and so criminal law has reason to seek to set broadly uniform standards that appear stable and predictable to the general population. What is more, it would often be too demanding to routinely take an in-depth look inside the psychology of each defendant claiming normative ignorance of mala in se behaviors to determine if they effortlessly could, but simply did not, call up or

reason from the relevant normative facts about the wrongness of their behavior. This plausibly is too difficult an inquiry to expect the law to regularly engage in. Furthermore, it would risk undermining the goal of broadly uniform criminal law standards that will be seen as predictable and consistent to the general public, as required for the perceived legitimacy and trustworthiness of the criminal law. Therefore, there are good institutional design reasons for the criminal law to resolve such a thorny issue by employing a presumption like the above. Institutional design reasons suggest assuming defendants are able to be motivated and guided by facts like P2 in conditions where a normal minimally cognitively competent person would easily be able to call up something like P2 and reason from it – at least assuming the defendant does not contest her basic competence. Indeed, this seems a *desirable* way for the criminal law to resolve the matter, as it's in many ways a generous presumption (affording the defendant respect) to presume her competence.⁴⁸ Thus, practical considerations dovetail with matters of principle.⁴⁹

If this line of thinking about the legal notion of culpability is roughly right, then we could reject Husak's argument as applied to criminal culpability even if we accept the analogous line of argument as applied to moral blameworthiness. Perhaps blameworthiness judges one according to the inferences one actually drew – what one believed at least latently. But criminal law has good reasons of principle and practicality for presuming one *can* be motivated by and reason from information one had sufficiently easy access to – things

⁴⁸ Beyond presumptions, institutional design might provide further explanations of why morality may end up expecting less cognitive effort than criminal law. Institutional design counsels seeking sufficient simplicity and uniformity in the norms governing criminal culpability attributions, but there is in principle no limit on how fine-grained and personal the excusing or justifying conditions may be that the moral blaming norms can recognize. Thus, there may be certain very nuanced and fine-grained mitigating factors that moral blaming plausibly recognizes but that should not automatically carry over into criminal culpability. (Consider, for example, the moral but not legal duress example at the end of Section III.) Thus, moral blame might recognize very nuanced, individual-specific mitigating factors that reduce the blameworthiness of failing to put two and two together about important matters, but which should not, for institutional design reasons, likewise be taken to reduce criminal culpability.

⁴⁹ This also can help explain culpability for negligence (a connection Husak also mentions): For political morality and institutional design reasons, criminal law should presume defendants who don't contest their baseline competence are *sufficiently competent* to notice the obvious risks of their conduct. Treating defendants as so incompetent they could not draw blindingly obvious inferences would be somewhat infantilizing. Moreover, it requires a deep dive into the defendant's psychology to determine what they consciously inferred or didn't. Therefore, to avoid practical difficulties and afford citizens respect as competent agents, criminal law could legitimately presume defendants are competent enough to recognize obvious risks, so these can figure into their reasoning and disregarding them can be culpable.

one reasonably could infer without overmuch effort or difficulty. If so, the law should deem Carlos to be in the relevant sense *able* to reason from something like P2, so it can regard him as culpable for submitting the report. At least this is an option for resisting Husak's argument if we accept that criminal culpability can diverge from moral blameworthiness. Accordingly, we could still maintain that normative ignorance of mala in se behaviors should not exculpate within criminal law. This would admittedly make the institutionally deployed notion of culpability harsher than moral blameworthiness. But perhaps this shouldn't be ruled out entirely (from an all-things-considered moral perspective) because the harsher culpability outcomes stem from adopting a more generous view of human agential capacities than moral blameworthiness adopts. Even if there might initially seem to be something regrettable about treating actors more harshly than their moral blameworthiness suggests, on closer inspection it's unlikely that much regret will be called for in the end if this is the all-things-considered best way to design the criminal law as an institution – where 'best' here is understood in a broad moral sense that extends beyond just considerations of moral blameworthiness.

V. CONCLUSION

I've suggested criminal culpability diverges from moral blameworthiness. Could Husak respond by saying his methodology of fixing the ideal moral content of the criminal law should come as the first step in the inquiry and political morality or institutional design considerations can be accommodated later? This would resemble my view. Still, the difference between us is that I claim there is a distinct legally oriented notion of criminal culpability which the content of the criminal law should track more tightly and directly than the further removed notion of moral blameworthiness. I suggest it pays dividends for the theorist to take criminal culpability as the primary anchor-point rather than starting with the idealized notion of moral blameworthiness and making isolated practical compromises from there. Focusing on criminal culpability as a separate concept of mid-level idealization can help capture systematic departures from the moral ideal which we'd *want* to see built into the criminal law, rather than seeing them as always being cause for significant regret.

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