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Blame and the Criminal Law[‡]

David Lefkowitz, University of Richmond

The retributivist dream, as I will construe it, is to create a world in which impositions of criminal liability and punishment correspond to our considered judgments of blame and desert. To characterize this aspiration somewhat differently, a given jurisdiction is regarded as just—more precisely, as conforming to the principle of retributive justice—when its penal law imposes liability only on those persons who are blameworthy, and inflicts punishments only on those persons who deserve them—in proportion to their blame and desert.¹

As the above quotation indicates, legal philosophers who adopt a retributivist approach to analysing and evaluating the criminal law commonly understand criminal proceedings as an effort to identify and respond to blameworthy violations of the criminal law.² In doing so, they appear to presume that the same concept of blame that figures in our interpersonal moral relationships also figures in the criminal law, with the practice of blaming in these two realms distinguished only by the agents who do the blaming and the norms the violation of which justifies their doing so. In short, criminal

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¹ Douglas Husak, ““Broad” Culpability and the Retributivist Dream,” (2011-2012) 9 *Ohio State Journal of Criminal Law* 449.

² Those who share Husak’s retributivist dream, broadly speaking, include Michael Moore, *Placing Blame* (Oxford and New York: Oxford University Press, 1997); R. A. Duff, *Punishment, Communication, and Community* (Oxford and New York: Oxford University Press, 2001); Larry Alexander, Kimberley Ferzan, and Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009); Mitchell N. Berman, “Rehabilitating Retributivism,” (2012) 32(1) *Law and Philosophy* 83.

blame is of a piece with moral blame, and to judge someone criminally blameworthy is to judge her morally blameworthy.

David Shoemaker thinks this presumption mistaken.³ He argues that on what he takes to be the most plausible account of moral blame currently available, namely the one developed by T. M. Scanlon, criminal blame cannot be understood as an instance of moral blame. Whereas for Scanlon moral blame is a response to the meaning of an agent's wrongdoing, criminal blame, which Shoemaker equates with legal punishment, is a response only to the impermissibility of the agent's conduct.⁴ The different conceptions of blame operative in the interpersonal and criminal realms reflect the different fundamental functions they serve, functions that entail in turn different relationships between blamer and blamed. If successful, Shoemaker's argument provides many legal philosophers with a compelling reason to revise their understanding of what it is to hold a person criminally responsible.⁵ What is at stake may not be merely whether we employ a single or two (or more) concepts of blameworthiness and blame, though that seems a question worthy of investigation in its own right. Rather, Shoemaker's argument may also pose a challenge to retributivism

³ David Shoemaker, "Blame and Punishment," in D. Justin Coates and Neal A. Tognazzini (eds.), *Blame: Its Nature and Norms* (Oxford and New York: Oxford University Press, 2013) 100-18.

⁴ Note that punishment is not the only blaming response the state may make to a criminal offender. For example, subsequent to her conviction the judge presiding over a criminal trial may deliver an angry lecture to the offender that explicitly calls her attention to the meaning of her criminal act. Moreover, the very act of convicting a defendant may convey censure; i.e. it may constitute a blaming response and not simply a judgment of blameworthiness. For purposes of this paper, however, I focus exclusively on the law's use of punishment to respond to criminal conduct.

⁵ Alternatively these legal theorists might reject Scanlon's account of blame, though Shoemaker suggests that his arguments likely pose a strong challenge to any attempt to construct a unified account of blame (see Shoemaker (n 3) 118).

insofar its defenders rely implicitly or explicitly on judgments of blame and blameworthiness in interpersonal contexts to motivate, elaborate, or substantiate their theories of punishment. If successful, Shoemaker's argument entails that such inferences are unwarranted; we ought not to rely on either the theory or practice of moral blame in an interpersonal context to make sense of or to justify the criminal law's practices of trial and punishment.⁶

In what follows I seek both to rebut Shoemaker's arguments and to offer a preliminary defence of the claim that when justified legal punishment is necessarily a response to a criminal's moral blameworthiness, understood in Scanlonian terms.⁷ I begin in section I with criticisms of Shoemaker's argument that the criminal trial's focus on what the accused did – that is, whether she committed a criminal offense (in the absence of a defence) – demonstrates that the grounds for criminal blame, or legal punishment, is solely the impermissibility of her conduct and not its meaning. Specifically, I argue that the trial phase of a criminal proceeding might just as well be understood as an attempt to determine indirectly whether the defendant is morally blameworthy for criminal conduct by eliminating reasons to think she is not, before

⁶ Shoemaker targets inferences in the opposite direction; ie reliance on the theory and practice of holding people criminally responsible to make sense of blame in interpersonal contexts. See Shoemaker (n 3) 100.

⁷ While moral blameworthiness is a necessary condition for just punishment, I argue elsewhere that a just criminal legal system may factor in to a limited degree considerations of deterrence when calculating the appropriate magnitude or type of punishment. To the extent that it does so, punishment will not serve solely to communicate blame nor engage its target as a moral agent, a point I briefly expand on in the third section of this paper. There is a sense, then, in which blame may provide only part of the justification for particular acts of punishment. This does not undermine the thesis defended here, however, namely that punishment is justifiable only if it a response to an agent's moral blameworthiness. See Author, ----; Andrew Von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993).

proceeding (if necessary) at the sentencing phase to determine how much blame she merits for her criminal wrongdoing. I also illustrate how Shoemaker's narrow focus on the trial phase of a criminal proceeding blinds him to the possibility that the criminal proceeding as a whole constitutes a response to moral blameworthiness. In section II I rebut four criticisms Shoemaker levels against the view that a just, or at least a legitimate, criminal law should punish offenders for their failure to act with sufficient or proper regard for others' legally protected interests. As I explain below, blame is a response to a failure of proper regard; thus a defence of the claim that just legal punishment is a response to a failure of proper regard amounts to a defence of the claim that criminal blame is of a piece with (or an instance of) moral blame. My responses to Shoemaker focus largely on his failure to give due consideration to law's legitimate authority – both its claim to it and its actual enjoyment of it – and his conflation of two separate claims, one regarding what the law may justly demand of its subjects and one regarding what it may justly do, all things considered, to those who fail to meet its demands. In the third and final section I critique Shoemaker's argument for the existence of two conceptions of blame, one operative in the interpersonal realm and the other in the criminal realm, distinguished by the different functions they serve. Instead, I attribute the differences we see in the practice of blaming in these two realms to the extent or degree to which we employ responses other than blame, especially conditional threats, in our efforts to bring others to conform to the norms that define or specify our relationship to them.

In order to assess the truth of Shoemaker's claim that criminal blame is not merely an instance of moral blame, we first need to understand the nature of (Scanlonian) moral blame and of legal punishment.

Scanlon takes blame to be a response to a judgment of blameworthiness. To say that an action is blameworthy, he writes, 'is to make a claim about its meaning: to claim that the action indicates something about the agent's attitudes that impairs his or her relations with others.'⁸ Scanlon understands the agent's attitude to others to be constituted by her reasons for acting as she did and the fact that certain other considerations did not count for her as reasons against so acting.⁹ As I understand the view, then, to judge a person morally blameworthy is to judge that she failed to respond appropriately to one or more of the norms that specify or define a relationship she bears to one or more others (or, possibly, herself). What these norms specify or define is what counts as proper or appropriate regard for the others to whom a person stands in a particular relationship. Adherence to a norm that defines one's relationship to another involves treating it as a reason to act or feel, or not act or feel, in certain ways at certain times in certain contexts, etc. Thus to judge a person morally blameworthy is to conclude that she failed to respond properly to reasons for acting and/or feeling that apply to her in virtue of her standing in a particular relationship to others.

To blame someone, Scanlon writes, is to 'judge him or her to be blameworthy and to take your relationship with him or her to be modified in a way that this judgment

⁸ T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, MA: Harvard University Press, 2008) 6.

⁹ *Ibid*, 152-3.

of impaired relations holds to be appropriate.¹⁰ What sort of modification is called for, or what counts as an appropriate response to a judgment of blameworthiness, will vary depending on the particular relationship in question (and perhaps other considerations as well). What matters for our purposes here is that blame is a response to a judgment of blameworthiness, and on Scanlon's account judgments of blameworthiness track a person's reasons for acting as she did. Those reasons give the person's act its meaning. As for legal punishment, Shoemaker cites Antony Duff's characterization of it as 'the imposition of something that is intended to be burdensome or painful, on a supposed offender for a supposed crime, by a person or body who claims the authority to do so.'¹¹

Though Shoemaker acknowledges certain similarities between moral blameworthiness and moral blame on the one hand, and criminal blameworthiness and criminal blame (which, again, he equates with legal punishment) on the other, he contends that the former differs fundamentally from the latter. Specifically, Shoemaker argues that moral blameworthiness tracks only the meaning of a person's action – his reasons for acting as he did – while criminal blameworthiness tracks only the impermissibility of an agent's action. While a person may be morally blameworthy for performing a permissible act if she does so for the wrong reason(s), Shoemaker writes: 'one could never be punishment-worthy for performing a criminally permissible action;

¹⁰ *Ibid*, 128-9.

¹¹ See Shoemaker (n 3) 5. In a recent update to the article Shoemaker cites, Duff replaces the phrase 'the imposition of something that is intended to be burdensome or painful' with the phrase 'the imposition of something that is intended to be both burdensome and reprobative' (Duff, "Legal Punishment," *The Stanford Encyclopedia of Philosophy* (revised May 2013), Edward N. Zalta, ed., URL = <http://plato.stanford.edu/entries/legal-punishment/>).

one's conduct has to be illegal for one to deserve punishment,' but 'one is punishment-worthy for performing a criminally impermissible action alone, regardless of the meaning of that action.'¹² If Shoemaker correctly identifies the respective targets of moral and criminal blame, and if these different targets are indeed essential features of these responses to (perceived) violations of norms that define specific relationships, then it follows that criminal blame is not an instance of moral blame.

Consider, first, Shoemaker's defence of the claim that agents warrant legal punishment solely for their criminally impermissible conduct, not their reasons for violating the criminal law.¹³ In determining whether a person accused of a particular crime ought to be punished, Shoemaker argues that the state investigates only whether she committed a criminal offense without a defence, not her reasons for doing so. He grants that the court may consider a defendant's reasons for acting as she did when it considers whether she has a legal defence for her violation of criminal law; for example, if those reasons show that her action was done under duress. As Shoemaker emphasizes, however, defences function to preclude conviction, 'whereas defendants are ultimately held criminally responsible only for offenses, and these are responses solely to impermissible conduct... not meaning.'¹⁴ Thus Shoemaker concludes that

¹² See Shoemaker (n 3) 103-4.

¹³ I offer a rebuttal to Shoemaker's other claim, namely that one could never be punishment-worthy for performing a legally permissible action, in the next section. To anticipate, one can indeed be punishment-worthy, i.e. deserve punishment, for performing a criminally permissible action if one does so for the wrong reasons, but practical concerns may well provide compelling grounds for largely limiting legal punishment (as well as criminal investigation and prosecution) to those instances in which agents perform criminal acts.

¹⁴ See Shoemaker (n 3) 104.

‘criminal impermissibility [offense without defence] delivers grounds for punishment,’ which entails that ‘the grounds for punishment are delivered precisely without the sort of meaning Scanlon takes to be essential to blame.’¹⁵

I contend that Shoemaker fails to recognize a plausible alternative construal of the purpose served by the trial phase in a criminal proceeding. On this account, the trial phase does not deliver the grounds for punishment; rather, the purpose of a criminal trial is to investigate the various reasons why the defendant may not be morally blameworthy for the criminal offense with which the prosecution charges him. These include the prosecutor’s failure to prove beyond a reasonable doubt that the defendant committed the offense in question, and the defendant’s successfully demonstrating that though he committed the offense his act was justified or excused. Absent these reasons, however, the state justifiably concludes that the accused merits moral blame; i.e. that its initial judgment of blameworthiness as expressed in its accusation or charge of wrongdoing stands. Whatever the offender’s particular reasons for committing the offense may turn out to be, a question that may be and sometimes is taken up at the sentencing phase of a criminal proceeding, those reasons constitute an attitude that impairs her relationship to others, i.e. to her victim(s) and, in a legitimate state, to all members of the political community whose law she violates as such. In terms I defend later in this paper against Shoemaker’s criticisms, the state concludes that the defendant failed to act with sufficient regard for one or more of another’s legally protected interests, and that it therefore has a sufficient reason to investigate further

¹⁵ *Ibid*, 104-5.

(often at the sentencing phase) to determine the extent to which she failed to do so. In short, a criminal trial does not establish that the accused is morally blameworthy *directly* by investigating his or her reasons for acting as she is accused of acting, i.e. the meaning of her act. Instead, it establishes that a person is morally blameworthy *indirectly* by eliminating all those considerations that entail that a person is not at all blameworthy for performing the act in question. Absent any of these considerations the state takes itself to have good reason to stand by its initial judgment that the defendant is morally blameworthy for criminal conduct, and to devote the resources necessary to determine the degree of blame and the specific type of blaming response the offender warrants for her unjustified and unexcused violation of the law.

The suggestion that the point of a criminal trial is to establish the absence of any reason to revise the preliminary judgment of blameworthiness expressed in the criminal charge may seem at odds with the presumption of innocence; ie the principle that the law bears the burden of proof when it comes to establishing a defendant's criminal guilt. The conflict is merely apparent, however. The presumption of innocence does not speak to the aim of trial, eg whether it is to establish merely that the defendant acted impermissibly or that he is morally blameworthy. Rather, it constitutes the evidentiary standard the law must meet in making its case regardless of whether that case is rightly understood as demonstrating that the defendant acted impermissibly or is blameworthy. The concern to protect innocent subjects from legal officials who might mistakenly misuse or deliberately abuse their powers (not only of prosecution but also investigation), or the judgment that the punishment of the innocent is generally morally

worse than the failure to punish the guilty, or both, likely provide the most plausible justification for the burden of proof. If so, then the justifiability of employing the presumption of innocence does not depend on the aim of the criminal trial, and is compatible with both Shoemaker's and my own depiction of it.

In defending his claim that criminal blame is a response to the impermissibility of an agent's act and not its meaning Shoemaker considers separate suggestions by Victor Tadros and Scanlon that the *mens rea* component of many criminal offense definitions reveals that the state does care about the accused's reasons for violating the law even at the trial phase of a criminal proceeding. Scanlon, for instance, maintains: 'distinctions between various crimes, such as manslaughter, first degree murder, and second degree murder are a matter of the agent's attitudes. This strongly suggests to me that criminal penalties are, among other things, expressions of blame [in] the sense I describe.'¹⁶ Shoemaker responds that *mens rea* serves only to distinguish different types of criminal offenses (e.g. different grades of criminal killing) that have the same *actus reus* for the purpose of establishing which offense in particular to attribute to the accused. *Mens rea* speaks to *what* the defendant did (or is accused of doing), not *why* he did it.¹⁷ It is the latter, however, that provides the action's meaning, and which is the proper target of moral blame. Given the account I set out above of the function served by the trial

¹⁶ T.M. Scanlon, at 9:51 a.m., 5/19/11, on <http://peasoup.typepad.com/peasoup/2011/05/scanlon-on-blame-part-3-criminal-blame-and-meaning.html#tp>.

¹⁷ In other words, Shoemaker maintains that the criminal law employs only what Joshua Dressler labels the narrow or elemental meaning of *mens rea*, not the broad, culpability, meaning that is the heart of the retributivist's dream. See Joshua Dressler, *Understanding Criminal Law*, 6th Edition (New Providence, NJ: LexisNexis, 2012), 118-9.

phase of a criminal proceeding, I need not contest Shoemaker's argument that investigations into the defendant's *mens rea* do not concern her reasons for action. Nevertheless, I raise his discussion of it here because I believe his exclusive focus on the trial phase results in an incomplete analysis of criminal blame, whereas a fuller picture lends support to the view that it is but an instance of moral blame.

Legal systems often attach different punishments or punishment ranges to the different degrees or grades of criminal killing. For example, conviction for murder typically carries with it the possibility of a greater punishment than does conviction for manslaughter. One plausible explanation for why legal systems do this is that they presume that murder is more blameworthy than is manslaughter; all else equal a person who kills with 'malice aforethought' or 'wilful disregard' reveals a more reprehensible attitude toward his or her victim than does a person who kills in the absence of either condition.¹⁸ If we ask only about *what* the state aims to investigate at the trial phase of a criminal proceeding, we will find that the state does not care what motivated the criminal act (i.e. the criminal act's meaning). Asking only this question, however, leaves it unclear *why* the state cares whether the accused killed with or without malice aforethought or wilful disregard. A plausible answer to this question is that whatever their particular reasons for committing a criminal killing, the state (and people generally) judges people who do so with malice aforethought or wilful disregard to be more blameworthy than those who does so without. Suppose A's reason for attacking B is the same as C's reason for attacking D; say the victims each poured a beer over their

¹⁸ See Alexander et al (n 2) 284.

assailants' heads. If A deliberately intends to kill B while C does not, then in the event that both A and C kill their victims the state (and people generally) may judge A to have acted with even less regard for B's legally protected interest than it judges C to have acted with regard for D's legally protected interest. If so, then the fact that A receives a stiffer punishment than does C in light of the fact that A is convicted for murder while C is found guilty of manslaughter entails that the state's concern with *mens rea* can be grounded in its aim of punishing in line with an offender's moral blameworthiness. This connection becomes clear, however, only when we expand our examination to include both the trial and sentencing phases of a criminal proceeding.

II.

Thus far I have sought to challenge Shoemaker's argument that criminal blame, ie punishment, is solely a response to the criminal impermissibility of a defendant's conduct. I have suggested to the contrary that in many jurisdictions the criminal law (rightly) aims to punish offenders in response to their moral blameworthiness. Moral blameworthiness, however, tracks the meaning of an agent's conduct: to hold a person morally blameworthy is to judge that she failed to act with appropriate regard for others, where what counts as appropriate regard is determined (albeit with more or less specificity) by the norms that define her relationship to another. Thus if the criminal law punishes offenders at least in part in response to judgments of their moral blameworthiness, it punishes them for their failure to act with appropriate regard for others as determined by the norms that define their relationship to one another qua subjects of a common criminal law. Or, to use a phrase I employed earlier in this paper,

the criminal law punishes offenders at least in part for their failure to act with appropriate or sufficient regard for others' legally protected interest(s).¹⁹

Shoemaker levels several criticisms against the claim that 'the reasons against breaching the criminal law... boil down to paying insufficient regard to the interests of others.'²⁰ First, he maintains that sufficient regard 'is too vague to be a realistic target of criminal investigation in criminal trials,' with no non-arbitrary solution to the question of what counts as sufficient regard.²¹ This complaint is rather ironic, since one of the main functions the criminal law serves is to render more determinate various moral prohibitions, a task it performs by authoritatively determining the sort of regard people ought to have for one another qua moral agents in various types of relationships (eg "bare" subjects of a common legal system, parties to a legal contract, co-executors of an estate, parent and child, etc.). References to agents' legally protected interests, then, are references to the law's judgment regarding agents' interests and the kind of setbacks to or promotions of those interests its subjects may, must, or must not perform. Of course the criminal law's specifications of sufficient regard, i.e. the content of its criminal prohibitions, will still be somewhat vague, but that is one reason why the application of the criminal law in a particular case is sometimes a matter of judgment

¹⁹ To be clear, as I employ it here the phrase 'appropriate or sufficient regard' refers to the reasons agents take themselves to have to interact with or relate to others in certain ways and not others. It is not, then, simply shorthand for conduct in accordance with the law. For discussion of this potential ambiguity, see Kenneth W. Simons, "Retributivism Refined – or Run Amok?" (2010) 77 *University of Chicago Law Review* 551 at 566-8.

²⁰ See Shoemaker (n 2) 110.

²¹ *Ibid.*

(by the police and the prosecutor's office, as well as the judge and/or jury).²² And while it is true that the law's specification of sufficient regard will likely include certain arbitrary cut-offs and thresholds, this may simply reflect the fact that morality itself contains indeterminacies, and/or the fact that while morality itself is characterized by neither indeterminacy nor vagueness we cannot know where precisely its various boundaries lie.

Another way in which the criminal law often serves to improve its subjects' responsiveness to the reasons that apply to them is by settling their (sometimes reasonable) disputes over what sufficient regard for one another requires.²³ Consider in light of this role the criminal law often plays Shoemaker's second objection to the claim that criminal breaches boil down to paying insufficient regard to others' legally protected interests. He maintains that criminal conduct is compatible with sufficient regard, and offers as an illustration that he could "take extremely seriously your interests in doing what you want with your property but still steal from you because I weigh my own interests as slightly more important than yours."²⁴ When it is legitimate,

²² Note that for many relationships the law of a modern liberal state provides only an incomplete specification of the regard those in the relationship ought to have for one another (or, perhaps, it specifies only one of the two or more relationships people have to one another). This is so because the modern liberal state generally seeks to ensure only that its subjects enjoy the conditions for living a good life, whatever its particulars, not that they succeed in living good lives (i.e. that they flourish). The requirements modern liberal states typically place on parents of minors illustrate this point. Even if a just state should aim to perfect its subjects, to actively pursue their success in living good lives, some further argument will be needed to demonstrate that the state ought to use the criminal law as part of its attempts to achieve this goal.

²³ Author -----; John Finnis, "Law as Co-ordination," (1989) 2 *Ratio Juris* 97; Jeremy Waldron, *Law and Disagreement* (Oxford and New York: Oxford University Press, 1999). For an application of this argument to the criminal law, see John Gardner, "Gist of Excuses," reprinted in *Offences and Defences* (Oxford and New York: Oxford University Press, 2007).

²⁴ See Shoemaker (n 2) 110.

only the law enjoys the authority to determine for its subjects what constitutes sufficient regard for one another qua legal subjects. That is, only the law has the standing to determine that sufficient regard for another's legal property rights in X does or does not preclude me from using X in certain ways. A number of theorists, myself among them, argue that in circumstances where people reasonably disagree over what constitutes proper regard for one another, but where morality requires adherence to common norms, submission by all to the law of a liberal-democratic state itself constitutes proper regard for one's fellow legal subjects.²⁵ Even those who argue that the justification for the law's authority is wholly instrumental maintain that its subjects have a duty to obey it in some range of cases in which, substantively, the law deviates from what sufficient regard for others actually requires.²⁶ The point, then, is that insofar as the law enjoys the right to determine for its subjects what counts as sufficient regard for one another, to which correlates a duty on the part of its subjects to obey the law, criminal conduct is not compatible with sufficient regard for others' legally protected interests.

In fact, it may be that we need not posit a given criminal law's legitimacy (ie justified authority) in order to rebut Shoemaker's second objection to the claim that criminal blemishes cannot be a matter of insufficient regard for others' legally protected interests. Suppose, as some legal theorists maintain, that law necessarily claims the

²⁵ See, e.g., Author, ----; Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press: New York, 2010); David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press: Princeton, 2009); Anna Stilz, *Liberal Loyalty* (Princeton, NJ: Princeton University Press, 2009).

²⁶ See, e.g., Joseph Raz, *Morality of Freedom* (Clarendon Press: Oxford, 1986).

authority to determine for its subjects what counts as appropriate regard for one another qua legal subjects. Moreover, it understands itself to be justified in doing so; that is, the law necessarily takes itself to enjoy legitimate authority. Given these presuppositions, the criminal law (i.e. agents qua criminal law officials) cannot conceive of criminal activity in the absence of a justification defence that is compatible with sufficient regard for others' legally protected interests. If we take the question at issue to be whether criminal blame can be *intelligibly* understood to be of a piece with moral blame - that is, as necessarily undertaken as a response to the meaning of offenders' criminal conduct - then the claim that the criminal law cannot conceive of criminal activity that is compatible with sufficient regard suffices to rebut Shoemaker's objection. Of course, we may think the state acts *unjustifiably* when it punishes someone because it judges her to be morally blameworthy for failing to conform to the law's judgment of what sufficient regard for another requires. But to conclude that the state acts unjustifiably is not to conclude that it acts unintelligibly; that is, to find that it is not actually doing what it claims to be doing, namely holding a person responsible for her failure to properly regard others.

Shoemaker also maintains that certain criminal violations involve no disregard for others' legally protected interests, and offers tax fraud as an example. Yet subjects of a given legal order, or at least the citizens of a legitimate state, surely have an interest in others contributing their fair share to the state's operation.²⁷ Where the

²⁷ For a defense of this claim, see author, ----. Note that the claim that the burden involved in creating and maintaining a (legitimate) state should be distributed fairly is distinct from any

state is a legitimate one, and so its law possesses legitimate authority, tax law serves to specify in part what counts as a fair share of the collective burden involved in maintaining the state.²⁸ At a minimum, tax fraud typically constitutes a form of free riding – the taking advantage of others’ good faith sacrifices (ie their compliance with the law) – and so comprises a failure of proper regard for the legally protected interests of others (or at least other citizens).²⁹

The three criticisms canvassed thus far are but a prelude to Shoemaker’s “main worry” with the idea that criminal offenses boil down to paying insufficient regard to others’ legally protected interests. That objection goes as follows:

To punish for insufficient regard for the interests of others is, at the end of the day, just to require *sufficient* regard, that is, to make it part of the criminal code that citizens must pay attention to a certain class of reasons, at least when they are considering criminal breaches. This would be an outrageous demand, however. It can be no legitimate business of the state what actual attitude we have toward one another in interacting; rather, its demands for our interactions cannot go beyond

particular argument establishing who has a duty to bear a fair share of this burden, and why they have a duty to do so.

²⁸ The same conclusion may hold for some incomplete range of a state’s laws even when it is illegitimate and seriously unjust. For an argument to that effect, see Kent Greenawalt, *Conflicts of Law and Morality* (Oxford University Press: Oxford, 1987).

²⁹ Shoemaker maintains elsewhere that the duties of the criminal law are non-directed, a view clearly at odds with the position I set out in the text. See: <http://peasoup.typepad.com/peasoup/2011/05/scanlon-on-blame-part-2-criminal-blame.html>. Since his discussion of that claim is informal and not part of the paper to which I am responding, I will not address those remarks here (though I note that several other contributors to the on-line discussion respond to Shoemaker’s claim along similar lines to the argument I make in the main text).

requiring that we behave toward one another *as if* we had sufficient regard. It is only our failing to *act* in this way that provides legitimate targets for state punishment.³⁰

Shoemaker offers here a *reductio ad absurdum* argument against the claim that criminal blame is a response to the meaning of an offender's criminal breach. Surely it would be outrageous for the (just, liberal) state to punish a person who conformed to the law simply because she did so, say, only because she thought that acting as the law required would impress others. Yet the view that treats criminal blame as a species of moral blame does appear to entail that a legitimate state ought to punish those responsible for mere bad-attitude crimes, as I will call conformity to the law in the absence of proper regard for others' legally protected interests.³¹ Therefore we ought to reject the view that criminal blame is a response to moral blameworthiness, which is a function of the offender's reasons for acting as she did. Instead, we ought to follow Shoemaker and construe criminal blame as a response to criminal impermissibility, regardless of its meaning.

³⁰ See Shoemaker (n 2) 17.

³¹ As I noted in the first section of this paper, I follow Scanlon in understanding an agent's attitude to others to be constituted by her responsiveness to the norms that specify the relationship she stands in to those others. An agent has a bad attitude in the relevant sense if she culpably fails to advert to those standards; i.e. if she culpably fails to treat them as reasons for action (or, as I explain below, is culpable for not being disposed to do so in the absence of other reasons to act as those standards require). In the case of crime, the relevant standards are the criminal laws that govern the relationship of agents qua subjects of a common criminal law. Hence mere bad-attitude crimes.

Someone might contend that punishment for mere bad-attitude crimes is ruled out by the fact (supposing it is one) that crime requires an *actus reus*. But the issue raised in the text might simply be rephrased as the question of whether a legitimate state should have a category of crimes whose definitions do not include an act component.

While it may well be outrageous to design a criminal law and implement a criminal-justice system that aims to punish people for mere bad-attitude crimes, the conclusion that we ought to do so does not follow necessarily from the view that those who conform to legitimate law while culpably disregarding their duty to do so are punishment-worthy. Rather, we must distinguish two claims Shoemaker runs together. The first concerns what the criminal law may justly demand of its subjects, while the second concerns what the criminal law may justly do to those who fail to meet its demands. An account of what the criminal law may justly demand of its subjects will tell us when its subjects warrant blame; that is, when they are an appropriate target of a judgment of blameworthiness. An account of what the criminal law may justly do to those who fail to meet its demands will tell us what sort of blaming-responses the state ought to adopt when addressing these individuals. Consider, then, the question of what the state may justly demand from its subjects. Is it really outrageous for the state to demand that its subjects treat the fact that the law prohibits them from performing tokens of act-type A – e.g. assault or dumping toxic waste in a river – as a sufficient reason not to A? I expand on this gloss on what sufficient regard for others' legally protected interests involves below. Here I simply wish to point out what follows if we take the criminal law to demand that its subjects have sufficient or proper regard for others. A person who fails to acknowledge that legitimate criminal prohibitions as such provide her with a sufficient reason to refrain from treating others in the manner specified by those prohibitions is a proper target for a judgment of moral blameworthiness. Suppose we know with absolute certainty that a person refrained

from doing what the law considers to be assault, or dumping what the law determines to be an unacceptable amount of toxic waste in a river, only because she feared being punished for doing so. This person, I contend, reveals an attitude that impairs her relationship to others qua subjects of a common legal regime, which on Scanlon's account just is the content of a judgment of blameworthiness. Both those individuals whose interests as spelled out in the law she failed to take as reasons for action and perhaps also the members of the political community that organizes itself according to the law in question may justifiably feel aggrieved by this agent's disregard for the law's demand that she act with proper regard for other's legally protected interests.³²

Some clarification of what it means to say that the criminal law (of a liberal, modern state) requires that its subjects have proper regard for others' legally protected interests may lend further credence to the claim that the state does not act outrageously in demanding this from those it rules. As I noted previously, the law necessarily claims authority over those within its jurisdiction. Suppose the criminal law prohibits them from performing tokens of act-type A; say, again, assault or dumping toxic waste. In doing so, the law maintains that its subjects ought to take this criminal prohibition as a sufficient reason to forbear from performing tokens of A.³³ The law does not demand that its prohibitions serve as its subjects' only operative reason, by

³² Moreover, at least some blaming-responses to this individual seem unproblematic (at least generally), including feelings of anger, resentment, or indignation toward her, and revisions to one's willingness to trust her to abide by the law, or perhaps even to take others' interests in bodily integrity, property, etc., as providing any sort of reason for action.

³³ More precisely, I argue elsewhere that the duty correlative to law's legitimate authority is disjunctive; either obey or perform an act of suitably constrained civil disobedience. See Author, -----.

which I mean a consideration reflection upon which actually moves the agent to act. Rather, all the law requires is that its subjects be disposed to do so; that they be such that the thought 'the law prohibits A' would motivate them to forbear from performing tokens of A even in the absence of any other reasons they may have to forbear from performing tokens of A. Of course, in a society subject to a legitimate, moderately just, and effective criminal law, individuals will often have multiple sufficient reasons to forbear from performing tokens of A, including the law's authority over them, one or more independent moral reasons (eg the immorality of assault), and prudential considerations (eg the expected disutility of legal punishment for performing tokens of A). Each of these reasons may suffice on its own to move an individual to do that which the law would have her do, which is one explanation for why it may sometimes be difficult for us to know from a person's behaviour whether she genuinely has regard for our legally protected interests. However, as long as a person takes, or in the absence of other reasons would take, the illegality of doing so to provide her with a sufficient reason for acting accordingly, she acts with proper regard for others' legally protected interests.³⁴

Consider a person who conforms to the criminal prohibition on performing tokens of A only because he fears he will be punished if he does so. This person fails to act with proper regard for others' legally protected interests because he does not take the law's prohibition on, say, assault to provide him with a reason to refrain from

³⁴ Clearly this claim has implications for the complexity that may be built into a criminal code if it is to be legitimate, as well as for the justifiability of a mistake of law defense, but space does not permit me to explore them here.

assaulting others. Indeed, not only does he disregard others' legal interests (e.g. the law's specification of their interest in bodily integrity), he disregards their interests *per se* (e.g. their moral interest in bodily integrity). In the bloodless language of analytic philosophy, this person takes the fact that his assaulting another would set back the latter's interest in bodily integrity to provide him with no reason for action at all; he has no regard for the other. Consider now a person who conforms to the criminal prohibition on performing tokens of A only to the extent it overlaps with her own moral judgment of what constitutes assault, or perhaps her own judgment of when assault is justifiable on grounds of self-defence or necessity. If the law enjoys authority over this person on either instrumental or non-instrumental grounds, or both, then she too acts with improper regard for others' legally protected interests.³⁵ She ought to defer to the law's judgment regarding what counts as assault, or justifiable self-defence, and when she fails to do so by not taking the law to provide her with a sufficient reason for action, she displays an attitude that impairs her relationship to all of the other subjects of the law as such. Though less reprehensible than a person motivated to conform to the criminal law only by fear of punishment, the moralist still warrants blame (though how much, and what sort of blaming response, depends on further details I will not attempt to fill in here). Contra Shoemaker, then, it is not enough that one act as if one has proper regard for others' legally protected interests; rather, one must genuinely have

³⁵ The grounds for the law's authority are instrumental if acknowledging the law's authority is merely a means to treating others morally, and non-instrumental instrumental if acknowledging the law's authority constitutes treating others morally.

proper regard for others, though doing so does not require that one only be motivated in every, or any, case by the thought that the law requires one to act thus and so.

In one respect the conclusions drawn in the preceding paragraph are too broad; moral blameworthiness attaches only to agents who culpably fail to advert, or to be disposed to advert, to legitimate criminal prohibitions. Moreover, the conditional nature of the claim bears emphasizing: an agent's failure to recognize the law's authority is morally blameworthy only if the law actually enjoys the authority it claims over her. If an agent has no duty to defer to the law's judgment regarding what she ought to do, then in paying no mind to the legality of her actions per se she does not fail to respond appropriately to the norms that specify or define her relationship to others.³⁶ On the instrumental account law's legitimacy may be, and almost certainly will be, piecemeal. Some laws will be legitimate only vis-à-vis certain legal subjects, and some of the legal system's laws may lack authority over any agent within its jurisdiction. And while non-instrumental justifications of law's legitimacy typically entail a general and universal duty to obey the law, they also treat respect for various rights as a condition for law's legitimate authority. Therefore in assessing the claim that an agent is blameworthy (punishment-worthy) merely for her failure to advert to a criminal prohibition we must be sure to focus on cases in which we think the law – the legal system or a particular norm – legitimate. But if, as I suggested above, a legitimate

³⁶ But does the law not specify people's relationship to one another qua legal subjects regardless of its legitimacy? Factually, yes, but not normatively, and the judgment that a person is blameworthy for her failure to advert to the criminal law is a normative judgment; i.e. a judgment regarding the reasons a person actually has to act thus and so.

criminal code rightfully renders more determinate norms that structure various relationships people bear to one another, and resolves reasonable disagreements regarding the content of those norms even where they are not (believed to be) indeterminate, then why think it is outrageous for the criminal law to demand that people pay attention to the reasons it provides them? Perhaps it is outrageous for the state (a particular state, or any state) to demand that its subjects defer to its judgment on these matters, but that claim targets the law's legitimacy, not the claim that given law's legitimacy agents are punishment-worthy even for mere bad-attitude crimes.

The case of an agent who culpably fails to treat a legitimate criminal prohibition as a reason for him not to perform the prohibited act seems analogous to one in which Alf promises Betty that he will perform some task as she directs but then culpably fails to treat her directives as reasons for action. Even if Alf happens to act as Betty would have him act, in deliberating as he does he manifests a kind of contempt or disrespect for her and the relationship between them constituted by his promise. Betty has a claim not simply to his conduct but to his deliberating in a particular way, and Alf is blameworthy for his failure to do so. The same is true in the case of legitimate law. Either the political community or the particular agents who are more likely to enjoy moral treatment as a result of an agent's deference to the law, or both, have a claim to her deliberating or being disposed to deliberate in a particular manner, namely one that treats the law as providing her with a reason for action.³⁷ Even if the agent in question

³⁷ Note that analogy relies on the deference one agent owes another when deliberating, not the claim, mistaken in my view, that law's legitimacy depends on an agent having promised to obey it.

performs the act the law would have her perform, those with a claim to her obedience to the law would be justified in feeling aggrieved by her (perhaps implicit) contempt for their claim.

I conclude, then, that there is nothing outrageous or absurd about the law demanding that its subjects act with sufficient regard for others' legally protected interests, at least not if the law enjoys legitimate authority and we understand proper regard as I spelled it out above. Those who fail to properly regard others' legally protected interests are punishment-*worthy*; they deserve, in Scanlon's terms, the community's modification of its relationship to them, and the modification that is called for in virtue of the impairment to that relationship is properly characterized as punishment. However, it does not follow necessarily from a person being punishment-worthy that the state ought to be empowered to punish him.³⁸ To the contrary, I submit that there are several considerations that together provide support for a norm severely limiting or even outright prohibiting the state from punishing mere bad-attitude crimes, ie behaviour in conformity to the criminal law performed without proper regard for others' legally protected interests. The first consideration in favour of such a norm is the epistemic challenge of proving beyond a reasonable doubt that a particular individual who has not behaved in a way that violates the criminal law nevertheless lacks an attitude of proper regard for others' legally protected interests. Note that doing so will require more than simply proving that what motivated this person's conformity to law was something other than the fact that the law required the conduct

³⁸ See Moore (n 2) 172-4, 186-7.

in question. What would be needed is proof of a counterfactual – that in the absence of considerations other than her legal obligation (eg fear of punishment) she would not have acted as the law requires.³⁹ A second justification for the norm in question can be found in the practical challenge of designing and operating a criminal justice system that punishes people who have only committed mere bad-attitude crimes without a resulting level of corruption and abuse that produces even more disregard for others' legally protected interests than occurs under a criminal justice system that punishes only those who perform criminal acts. Furthermore, given the many uses to which the state might put its resources, and the many uses to which its subjects might put their resources other than supporting the state, there may well be a compelling case against the state even investigating mere bad-attitude crimes, let alone prosecuting them. In my view, the considerations enumerated here constitute a weighty presumption against empowering the state to punish mere bad-attitude crimes. Of course, unlike a principled argument against punishing such crimes a presumption against doing so may be defeated, but that is a conclusion I happily embrace. The contempt a person who culpably ignores legitimate law displays toward those with a claim to her deference

³⁹ Suppose a person were to confess to a bad-attitude crime. Should he or she be punished? I am open to the possibility that we should design our criminal justice institutions to punish such a person; that is, I do not take this possible implication of my view to constitute a *reductio ad absurdum* argument against it. However, the other considerations adumbrated in the text against empowering a state to punish mere bad-attitude criminals may warrant the conclusion that, all things considered, we should not do so.

to it warrants blame, and in particular the kind of blaming response constituted by just punishment.⁴⁰

For the reasons set out in the preceding paragraphs, I conclude that Shoemaker's *reductio* argument against the insufficient or improper regard account of criminal wrongdoing fails. It follows, therefore, that the *reductio* argument does not provide a reason to think that moral and criminal blame differ fundamentally in part because the former can attach to permissible acts while the latter cannot. Rather, qua legal subjects agents are morally blameworthy for indefensible failures to conform to the law for the right reasons. The justification, where there is one, for not employing criminal law mechanisms to blame them for their conduct involve practical limitations on our ability to do so well, not an in principle prohibition on the political community requiring that its members treat one another with due regard, as specified by its criminal law.

I have sought in this section to defend the claim that violations of the criminal law constitute failures of proper regard for others' legally protected interests. Together with the arguments in the previous section rebutting Shoemaker's claim that criminal blame is entirely a response to impermissibility, this defence provides a plausible case for the view that legal punishment should be and sometimes is a response to an agent's moral blameworthiness. In the final section of this paper I criticize Shoemaker's view that what distinguishes the interpersonal and criminal realms are two different conceptions of blame grounded in two different functions. Instead, I trace the

⁴⁰ I touch briefly on the nature of just punishment and its connection with blame in the next section.

difference in how we respond to blameworthy wrongdoing to the degree to which we employ responses other than blame, and particularly conditional threats, in an effort to move others to conform to the norms that define or specify relationships in these two realms.

III

Having argued that criminal blame differs fundamentally from moral blame, Shoemaker traces the difference between them to the distinct function each serves. Whereas the fundamental aim of criminal blame, or punishment, is the imposition of a sanction, the expression of moral blame serves essentially to communicate the basic moral demand for proper regard.⁴¹ This difference in the fundamental aims of criminal and moral blame has repercussions for the relationship that blamer and blamed stand in to one another. Punishment, Shoemaker contends, occurs only within an asymmetrical relationship, one in which the blamer enjoys authority over the blamed. Though he argues for this claim by appeal to paradigm cases of punishment, the point is actually a conceptual one. A necessary condition for A's imposition of a burden on B counting as an instance of punishment is that A claim the authority to impose those sanctions (or, perhaps more accurately, some combination of Hohfeldian power-rights and liberty-rights that together entitle A to impose some burden on B). Moral blame, in contrast, occurs only within interpersonal moral relationships characterized by equal moral standing, where neither party enjoys the requisite authority to punish the other. Indeed, Shoemaker maintains: 'punishment is no legitimate part of blame between

⁴¹ *Ibid* 113-4.

moral equals.⁴² In short, criminal and moral blame serve different functions, in virtue of which those who engage in these respective forms of blaming stand in different relationships to those they blame.

Not surprisingly, I think this diagnosis mistaken. Shoemaker confuses a claim regarding the nature of punishment (what makes a particular act an instance of punishment) with a claim regarding its proper function (the purpose or purposes that justify punishment) and/or a claim regarding its actual function (the purposes for which people actually punish, not all of which overlap with punishment's proper function). This confusion can be brought out by considering Shoemaker's remarks on active blame, understood as expressions of anger at another in response to a judgment that he or she is blameworthy.⁴³ In order to qualify as blame, such expressions must communicate the blamer's demand for proper regard from the blamed. Absent this aim, no expression of anger counts as an instance of active blame. The proper function of active blame, I suggest, is to call for or initiate a dialogue aimed at repairing the damage done to the relationship between blamer and blamed. One person's active blame of another is proper or justifiable when she seeks to call the latter's attention to his lack of proper regard for her, ie his failure to respond appropriately to reasons for treating her in certain ways that he has in virtue of standing in a certain relationship to her. As Shoemaker notes, however, active blame can be used for other purposes as well, such as causing the blamed agent to suffer or undermining his confidence. Moreover, the

⁴² *Ibid* 115.

⁴³ *Ibid* 116.

target of active blame may suffer these consequences even when the blamer does not intend them.

Punishment is subject to a similar analysis. While punishment necessarily involves one agent's imposition of a burden or sanction on another, this tells us nothing about the function of punishment; that is, why people ought to and/or do punish. One proper function of legal punishment, I contend, is the communication of blame. Punishment plays an important part in the moral dialogue between the offender, her victim, and the political community; it communicates the political community's condemnation of the convicted person's criminal conduct and provides the criminal with a publicly recognized form of penance.⁴⁴ Though necessary for proper (or just) punishment, the communication of blame may not be the only function legal punishment properly serves; in particular, I argue elsewhere that considerations of deterrence may also figure in a calculation of the appropriate amount or type of punishment.⁴⁵ Moreover, legal punishment is but a part of a larger practice of responding to blameworthy wrongdoing, one that is best understood and justified in part by appeal to the account of justifiable active blame sketched above. And of course

⁴⁴ See Duff (n 2).

⁴⁵ See fn. 7. Given the claim that agents are morally blameworthy (or punishment-worthy) if they would not conform to the law but for fear of being punished, the claim that considerations of deterrence may sometimes figure in the justification for punishment entails that the state may sometimes incite blameworthy conduct. This may be problematic if the threat of punishment leads to an agent's prudential reason for conforming to the law blinding him to his duty to obey the law, where he would have acted on the latter reason had the punishment attached to committing the crime in question been less. It does not strike me as problematic, however, if it induces conformity to the law on the part of an agent who would otherwise have violated it. While this agent will still be morally blameworthy (or punishment-worthy), he will be less blameworthy than he would have been had he violated the law.

legal punishment can, and all too frequently does, serve ends that are not part of its proper function, such as preserving one group's rule over another or garnering officeholders a reputation as tough on crime that they can use to gain election to higher office. What this analysis reveals is that, contra Shoemaker, the function or rationale for punishment is not the imposition of sanctions; rather, the imposition of sanctions is part of what makes one agent's treatment of another punishment, while the function or rationale is whatever end or ends at which the (practice of) punishment in question aims, or ought to aim.

Shoemaker argues that punishment need not communicate blame, and that active blame need not involve the imposition of a sanction or suffering on the blamed. I agree: punishment is not essentially a blaming response, nor is a blaming response essentially punitive. This observation does not warrant postulating the existence of two different conceptions of blame, however. Rather, it highlights the fact that punishment, like the expression of anger, can serve multiple ends. The interesting questions here do not concern the concept of blame, of which there is only one, but the justifiability of punishment as a means for expressing blame, particularly given what I maintain is blame's proper function. I have planted my flag on this question, but of course that position stands in need of defence from the criticisms of both pure deterrence theorists on the one hand and advocates of restorative justice on the other. Space does not permit me to take up that task here. Instead, I close by offering an alternative to Shoemaker's explanation for the apparent differences we observe in the practice of blaming in the interpersonal and criminal realms.

One agent's justifiable active blame of another involves a good faith attempt to engage the latter in a moral dialogue regarding a (possibly only apparent) failure of proper regard. Active blame, then, engages its target as a moral agent, one able to respond appropriately to moral reasons, including reasons to repair past (blameworthy) wrongs as well as reasons to forbear from present and future (blameworthy) wrongdoing. In contrast, deterrence, or a conditional threat, engages its target as a prudential agent, one able to respond appropriately to prudential reasons. In punishing someone simply to deter her (and others) from doing A, the punisher makes no effort, and does not care, whether those he threatens are thereby brought to recognize the reason(s) they have to forbear from acts of type A independent of the fact that performing them will result in punishment. Though both active blame and conditional threats involve engaging with the target's practical reason, active blame (at least when justified) is a component of a dialogue between moral equals, whereas conditional threats are a component of bargaining between rational agents on the basis of their relative power over one another.

I submit that one important difference we often observe between the criminal and interpersonal moral realms concerns the degree to which parties in the relationships in question can and do rely upon conditional threats to garner conformity to the norms that define the relationships in question. Shoemaker's remark regarding the place of punishment in relationships between moral equals suggests that he might reject this claim on the grounds that conditional threats have no place in interpersonal relationships. That may be true of the ideal form of various interpersonal relationships,

but it does not seem true to reality. Rather, even in interpersonal relationships we sometimes use threats to motivate our friends, family, colleagues, etc., to conform to (what we take to be) our legitimate expectations of them. Typically we do so when we fear our attempts to reason with them, including actively blaming them, will not suffice to serve this end. Moreover, we often (though perhaps not often enough) follow up on those threats with renewed efforts to engage the others in the relationship in a dialogue regarding what each can legitimately demand as a matter of proper regard from the other. I suggest that the same conclusions hold in the criminal realm. However, in any relationship the use of conditional threats to motivate others to conform to the norms that define it will strain that relationship because it constitutes one agent's attempt to impose his or her will on the others, and this agent's stance toward the others is incompatible with respect for them as moral equals.⁴⁶ Moreover, the employment of threats is ultimately antithetical to the trust that is essential to any valuable relationship; the more those in a given relationship rely on it the more they damage the relationship (and its prospects for repair or improvement). These conclusions, too, hold just as much for the relationship between subjects of a common legal order as they do for the relationship between friends, colleagues, and family members. If correct, these observations substantiate Shoemaker's sense that the practice of blaming in the interpersonal realm frequently differs from the practice of blaming in the criminal realm (ie punishment) without postulating any essential difference between them.

⁴⁶ Thus there may be a kernel of truth in Shoemaker's observation that punishment is no legitimate part of blame between moral equals, namely if deterrence provides the sole rationale for a particular instance of punishment.

* * *

When we blame someone, we respond to what her reasons for acting as she did say about how she values something; eg another person, or the natural environment. Specifically, we modify our relationship to her in a manner we deem to be appropriate in light of her failure to respond appropriately to reasons we believe she has in virtue of a normative relationship she stands in to that thing. Contra Shoemaker, I have argued that so understood moral blame plays a necessary (if not necessarily exclusive) part in both the justification of legal punishment and a plausible rational reconstruction of many existing criminal law practices. While practical considerations may often justify limiting the scope of criminal blame to conduct in violation of the criminal law, and conditional threats may justifiably play a larger role in regulating the interactions of people qua legal subjects than it does in more intimate relationships, neither of these facts undermine the claim that criminal blame is of a piece with moral blame. The retributivist dream lives on.