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# CRIMINAL LAW AND/AS POLITICAL THEORY

Stephen Galoob\*

VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* (OXFORD UNIVERSITY PRESS 2018). PP. 288. HARDCOVER \$99.00.

ERIN KELLY, *THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY* (HARVARD UNIVERSITY PRESS 2018). PP. 240. HARDCOVER \$35.00.

## INTRODUCTION: CRIMINAL LAW AND POLITICAL THEORY

How, if at all, do core questions of political philosophy (such as the legitimacy of the state's authority and the contours of a just society) matter to thinking about criminal law? Roughly, most criminal law theorists over the past sixty years have answered this question in one of two ways.

Approach 1 sees criminal law as distinct from political theory. Fundamental questions about the former do not depend on insights from the latter. The logic of this position is encapsulated in the following passage from an eminent scholar:

[P]olitical philosophy—the theory of the state—is for the most part unimportant for purposes of doing work in criminal law theory. . . . Good work in criminal law theory must suggest paths to resolving concrete problems that can be taken from one or several of the plausible political starting points. But there is rarely mileage to be gained, in terms of criminal law theory, from sorting out which is the appropriate theory of the state.<sup>1</sup>

Approach 1 is the predominant position among theorists in what Michael Davis has called the “golden half century” of criminal law theory.<sup>2</sup> Often, those who adopt Approach

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1. Stephen J. Schulhofer, *The Mathematician, the Monk, and the Militant: Reflections on the Role of Criminal Law Theory*, 88 CALIF. L. REV. 705, 707 (2000). The notion that punishment theory bears no necessary relationship to political theory is shared by many other commentators. See, e.g., Michael Davis, *Punishment Theory's Golden Half Century: A Survey of Developments from (About) 1957 to 2007*, 13 J. ETHICS 73, 97 (2009) (“The problems of understanding punishment do not seem to change much because of who (or what) administers the institution. That seems a good reason not to require a theory of punishment to explain the role of government in punishment.”).

2. Davis, *supra* note 1, at 73–74. Among those who adopt Approach 1 are LARRY ALEXANDER & KIMBERLY

1 construe their project as vindicating the internal or immanent logic of criminal law,<sup>3</sup> orienting their analysis around questions such as “what is the moral justification for criminal punishment?” and “how much should an offender be punished?”<sup>4</sup> Even theorists who take opposing positions in these debates are nevertheless united in their embrace of Approach 1.<sup>5</sup>

Approach 2 sees criminal law fundamentally as a topic in political philosophy. On this approach, as George Fletcher contends, “the first question that must be asked is . . . [w]hat makes it legitimate for the state to make people suffer?”<sup>6</sup> In other words, criminal justice institutions not only invite the same questions about coercion and legitimacy that apply to other political institutions, but also call for evaluation via generally-applicable (rather than domain-specific) principles of political justification.<sup>7</sup>

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KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 6 (2009) (“When we say that [one who chooses to violate legal norms deserve punishment], we are invoking the reactive attitude that punishment of a certain amount is a fitting response to the choice. Thus, the criminal law both creates and reflects value by announcing which conduct is sufficiently wrong to deserve blame and punishment.”); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 33 (1997) (“My own theory [of criminal law] is that criminal law is a functional kind whose function is to attain retributive justice.”); VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 23 (2011) (“[T]his book defends the view that punishment can be justified only in virtue of its instrumental value. But it does so in the light of a non-consequentialist view of morality.”).

3. Compare Stephen Morse, *Compatibilist Criminal Law*, in *THE FUTURE OF PUNISHMENT* 107, 131 (Thomas A. Nadelhoffer ed., 2013) (distinguishing between internal and external challenges to practices of criminal responsibility and contending that, because “[t]he criminal law is the product of centuries of development,” the “burden of persuasion” in critiquing these practices “is surely on the external challengers”), with ALAN BRUDNER, *PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE* 14 (2009) (“Were we to understand penal law solely with reference to conceptions of freedom internal to it, we would perhaps have achieved a faithful understanding; but we would not have justified the law as having normative force for anyone but those already committed to those conceptions.”).

4. See, e.g., MOORE, *supra* note 2, at 30 (“The first question of a theory of the criminal law is the question of why we punish.”); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From “Why Punish?” to “How Much?”*, 25 *ISR. L. REV.* 549 (1991).

5. In debates about punishment theory, for example, retributivists and their critics often adopt Approach 1. Compare Mitchell N. Berman, *Punishment and Justification*, 118 *ETHICS* 258, 260 (2008) (stating theories of punishment “are moral claims in response to the proposition that punishment stands in need of justification. If theories of punishment are thus situated ab initio within an argumentative dialectic, one might expect their persuasiveness to depend, in part, on how fully and satisfactorily they understand the proposition to which they aim to respond.”), with Russell L. Christopher, *Deterring Retributivism: The Injustice of Just Punishment*, 96 *NW. U. L. REV.* 843, 975 (2002) (“Unless retributivism departs from the formula of desert as the sole justification for punishment, it is circular or empty. But once retributivism departs from desert as the sole justification for punishment by resorting to consequences, and since the consequences may be obtained by punishing an offender without desert, retributivism is subject to the very same problems of consequentialist theories—justifying intentional punishment of particular, identifiable innocents and the use of offenders as mere means.”).

6. George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 *CALIF. L. REV.* 687, 697–98 (2000).

7. Perhaps the most prominent exemplar of Approach 2 is JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* (1990). Other works adopting Approach 2 include Corey Brettschneider, *The Rights of the Guilty: Punishment and Political Legitimacy*, 35 *POL. THEORY* 175 (2007); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *BUFF. CRIM. L. REV.* 307 (2004); Chad Flanders, *Punishment, Liberalism, and Public Reason*, 36 *CRIM. J. ETHICS* 61 (2017); Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 *J. CRIM. L. & CRIMINOLOGY* 305 (2018); TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* (2016); Malcolm Thorburn, *Criminal Law as Public Law*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 21 (Antony R. Duff & Stuart P. Green eds., 2011); Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 *CRIM. L. & PHIL.* 457 (2015).

As with nearly all dichotomies, the one described in the text is false. Some theorists take an intermediate approach on which political theory entails criminal law theory, or vice versa. For some, theorizing about criminal law serves to illustrate or vindicate an antecedently preferred political theory. See CHRISTOPHER HEATH WELLMAN,

The lines delineating these two approaches are permeable. Many criminal law theorists have taken more than one approach over the course of their careers<sup>8</sup> and, indeed, within the same work.<sup>9</sup> What, if anything, hangs on theorizing from one of these approaches rather than the other?

Vincent Chiao's *Criminal Law in the Age of the Administrative State* and Erin Kelly's *The Limits of Blame: Rethinking Punishment and Responsibility* are both specimens of Approach 2, albeit to varying degrees. Both works demonstrate how theorizing criminal law as a subset of political theory is likely to differ from the predominant position.

## I. CHIAO ON CRIMINAL LAW AS PUBLIC LAW

Chiao's book provides the most sustained and forceful defense to date of construing criminal law as a topic in political theory. Chiao contends that "criminal law and its associated institutions are . . . subject to the same principles of institutional and political evaluation that apply to public law and public institutions generally."<sup>10</sup> Therefore, Chiao argues, theories of criminal law should aim to "live up to a fully political standard of justification,"<sup>11</sup> rather than endeavoring to capture or reflect "the norms of interpersonal morality."<sup>12</sup>

Chiao's core argument rests on several insights. Chiao's first important point is to defend what (after Malcolm Thorburn) he calls the "public law" understanding of criminal law, the notion that the "same evaluative standard should apply" to criminal law institutions as applies to other political or social institutions that engage in coercive rule enforcement.<sup>13</sup> For Chiao, the case for the public law understanding follows from appreciating the role of criminal law in "stabiliz[ing] a public sense of justice by providing assurance that cooperation with legal rules will not leave one open to victimization or exploitation."<sup>14</sup> The public law understanding also addresses a series of problems that are raised by the US case of *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*: namely, whether criminal law institutions should be assessed in isolation and construed as condemning wrongful or harmful actions *ex post*, or whether they should be assessed based on their contribution to the protection of moral entitlements (which requires appraising

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RIGHTS FORFEITURE AND PUNISHMENT (2017); A. John Simmons, *Locke and the Right to Punish*, 20 PHIL. & PUB. AFF. 311 (1991). As Michael Davis noted regarding fairness-based theories of punishment, those who take this approach adopt a theory of punishment "because it fits a moral (or political) theory that is their main focus." Davis, *supra* note 1, at 94.

8. For example, Gideon Yaffe's work on attempts analyzes the criminalization of attempts along the lines of Approach 1. See GIDEON YAFFE, *ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* (2010). However, Yaffe's work on the justification for punishing juvenile offenders less than adult offenders ultimately offers a political resolution consonant with Approach 2: that legal institutions have lesser legitimacy over juvenile offenders "because of the political meaning of age." GIDEON YAFFE, *THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY* 125 (2018).

9. As discussed below, the first four chapters of Erin Kelly's *The Limits of Blame* might be construed as adopting Approach 1, while the remainder of the book clearly takes Approach 2.

10. VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* vii (2018).

11. *Id.* at viii.

12. *Id.* at 51.

13. *Id.* at 56.

14. *Id.* at 37.

them in continuity with other social and political institutions).<sup>15</sup> The public law understanding strongly favors the latter.

This public law understanding contrasts with the notions, predominant among criminal law theorists, that the goal of criminal law is to vindicate private rights and that the legitimacy of criminal law is a question of whether criminal punishments track offenders' desert.<sup>16</sup> However plausible such deontological and/or retributivist approaches are as a description of interpersonal morality, Chiao argues, they are implausible as political morality because they are "antidemocratic, illiberal, resentful, and more concerned with the righteousness of those who punish than with the interests of those who are made to bear its costs."<sup>17</sup> They also cannot appreciate the *Deshaney* problems because they assess criminal justice institutions largely in isolation from other political and social institutions.<sup>18</sup>

To see criminal law as a species of public law is to embrace Approach 2. Yet, Chiao concedes, identifying the appropriate connection between criminal law and political theory does not establish the *content* of criminal law—that is, the specific goals that criminal law institutions should pursue and the means by which they should pursue them. To begin resolving these questions, Chiao articulates a substantive theory of criminal law based on the ideal of democratic egalitarianism or "anti-deference,"<sup>19</sup> according to which "public institutions should strive to promote effective access to central capability for all" that is consistent with assigning an equal status to all.<sup>20</sup> This theory, in turn, grounds several principles for evaluating criminal justice institutions, including the principles of equal opportunity for influence (the notion that those subject to political institutions should have "an equal opportunity to weigh in on . . . basic policies and values"),<sup>21</sup> anti-subordination (i.e., that criminal justice institutions should not be used to "entrench objectionable patterns of status hierarchy"),<sup>22</sup> optimality (the idea that, because criminal punishment necessarily impairs an offender's "status as an equal," criminal punishment should be reserved only for the most serious offenses against victims),<sup>23</sup> and inclusive aggregation (that "criminal justice interventions" should be evaluated "in terms of [their] overall impact on effective access to central capabilit[ies], with priority for the interests of those whose access to those capabilities is least secure").<sup>24</sup>

After working out the anti-deference theory and its subsidiary principles in chapters one through three, Chiao analyzes an array of questions related to criminal justice, from the justifiability of mass incarceration,<sup>25</sup> the legitimacy of criminalizing "harmless"

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15. CHIAO, *supra* note 10, at 247–48.

16. *Id.* at 28.

17. *Id.* at 256.

18. *Id.* at 32–33.

19. *Id.* at 72. In describing the anti-deference conception, Chiao invokes the work of Elizabeth Anderson, Niko Kolodny, and (most importantly) Phillip Pettit.

20. CHIAO, *supra* note 10, at 73.

21. *Id.* at 77.

22. *Id.* at 86.

23. *Id.* at 90.

24. *Id.* at 96.

25. In chapter four, Chiao contends that any adequate theory of punishment "must be open to considering the aggregate costs and benefits of a system of punishment" and have the resources to criticize excessively punitive

wrongdoing and *mala prohibita*,<sup>26</sup> the due process distinctions between criminal and civil law,<sup>27</sup> and the connection between criminal justice institutions and other social and political institutions.<sup>28</sup> In these chapters, Chiao offers new theoretical insights on vital questions in ongoing debates. Chiao also spells out the incapacity of deontological and retributive theories to appreciate the importance of many of these questions. Because of the vitality of such questions, this incapacity suggests the need to reconsider these modes of theorizing.

Chiao's most far-reaching contribution is to vindicate the public law understanding of criminal law, a view that calls for a wholesale reevaluation of the predominant way of thinking about criminal law. The public law understanding shows why theorists should embrace Approach 2 and reject Approach 1. The magnitude of Chiao's achievement can be appreciated regardless of whether one agrees with all (or, really, any) of the book's main arguments about the cooperation-facilitating case for the public law understanding, the anti-deference theory of criminal law, and the specific principles that derive from that theory. *Criminal Law in the Age of the Administrative State* reorients what criminal law theory is about and illuminates where it should go.

## II. KELLY ON CRIMINAL LAW WITHOUT BLAME

Erin Kelly's *The Limits of Blame* takes a different route to the conclusion that criminal law theory is a topic in political theory. Unlike Chiao, Kelly more fully inhabits Approach 1 before using its inadequacies to build the case for Approach 2. For Kelly, predominant retributivist theories of punishment hold that "[t]he state should ensure that

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systems of mass incarceration (such as, *ex hypothesi*, the one realized in the contemporary United States). CHIAO, *supra* note 10, at 112–13. "Strictly deontological" theories of punishment justify punishment solely in terms of deontological considerations such as an offender's deservingness or forfeiture of right not to be punished. *Id.* at 114. These theories are inadequate to the task because they focus only on individual offenders. *Id.* at 130. By contrast, the anti-deference theory can provide a basis for criticizing such a system based on its aggregate social costs, which undermine the possibility of political equality. *Id.* at 138.

26. In chapter five, Chiao argues that, on the public law conception, there is no "core" to criminal law—that "we should reject the idea that the criminal law is essentially prohibitory rather than regulatory in function." *Id.* at 158. From this point, it follows that the decision whether to criminalize a pattern of conduct "is subject to justification under a fully political standard," and that "any subject-matter-based constraints [on criminalization] must themselves be justified under that standard, rather than as a matter of the freestanding morality of the criminal law." *Id.* at 160. Chiao's thesis here differs from the conclusion, advanced by Stephen Garvey (and, as discussed below, Kelly), that the state's authority to criminalize *malum in se* is not contingent on its political legitimacy. See Stephen P. Garvey, *Injustice, Authority, and the Criminal Law*, in *THE PUNITIVE IMAGINATION: LAW, JUSTICE, AND RESPONSIBILITY* 42 (Austin Sarat ed., 2014).

27. In chapter six, Chiao argues for a "pragmatist" approach to delineating criminal and civil law, which he contrasts with the "formalist" approach that characterizes the United States Supreme Court's jurisprudence. CHIAO, *supra* note 10, at 182–83. The main difference between these approaches is that pragmatism would apply the more-rigorous standards of criminal due process to all matters that affect central capabilities (such as the collateral consequences, deportation, pretrial detention, and civil commitment), while many of these topics are deemed essentially civil under the formalist approach. *Id.* at 210–19.

28. In chapter seven, Chiao provides a sustained argument why, under the public law conception, administrative states should "often favor crime prevention," which implicate institutions outside of the criminal justice system, "over punitive response." *Id.* at 222. On Chiao's argument, the egalitarian state should aim for a purely remedial criminal law. *Id.* at 230–31. Nor should it be agnostic between the choice between funding institutions that aim to "strengthen[] capacities for moral deliberation and choice" and those that "respond[] to poor exercises of that agency with official forms of censure, blame, and punishment" (or, in Chiao's memorable phrasing, the choice between "schools, now and prisons, later"). *Id.* at 228.

criminals get the punishment they deserve.”<sup>29</sup> Kelly initially shows that such retributivist theories are inadequate on their own terms, then argues why the criminal justice system should not be animated by blame. Rather, criminal justice institutions should aim to reduce the harm that crime does by deterring criminal behavior, incapacitating people who pose ongoing danger to others, addressing the causes of crime, and redressing the harm that criminal actions create.

In chapters one through four, Kelly offers an internal critique of retributivism. Retributivists see punishment as a kind of public blaming that offenders deserve.<sup>30</sup> For the retributivist, criminal responsibility is a subset of moral responsibility, since both categories of appraisal are based on essentially the same considerations. If anything, Kelly contends, the blaming function of punishment requires the criteria for attributing criminal responsibility to be more stringent than those for attributing moral responsibility, given the “serious consequences of the stigma of criminality.”<sup>31</sup>

However, Kelly argues, this picture of the fit between criminal and moral responsibility rings false. There is a mismatch between criminal punishment and moral blameworthiness: “the criteria of legal guilt and punishment in our system are not well calibrated to judgments of blameworthiness and desert.”<sup>32</sup> Considerations that diminish or defeat moral responsibility are often irrelevant to assessing criminal responsibility. For example, some views attribute moral responsibility on the basis of competence. On these views, a person with diminished moral competence might not be fully morally blameworthy for their action. Yet existing criteria for attributing criminal responsibility are insensitive to such considerations of diminished moral competence.<sup>33</sup>

Therefore, Kelly argues, the retributivist must take one of two problematic routes: either embrace an implausible notion of moral responsibility (on which, for example, an agent’s general capacities for action and/or specific history and motivations for action are irrelevant) as the basis for criminal responsibility; or else deny that moral and criminal responsibility are species of the same genus. For Kelly, neither of these routes leads to a plausible account of retributive justice. Moreover, neither strategy would survive the scrutiny applied to public policy in a legitimate democratic state: retributivism either “fit[s] poorly” with the existing criteria of criminal liability, or else it fails to fulfill our collective obligation “through law, to redress violations of individual rights” involved in criminal wrongdoing.<sup>34</sup>

Kelly articulates an alternative approach to justifying criminal justice institutions based on harm reduction. In a just society, “[t]he practice of punishment would be used only to prevent and to redress the harms caused by criminal wrongdoing, especially the criminal violation of individual rights.”<sup>35</sup> Kelly sees harm reduction as a principle to

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29. ERIN KELLY, *THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY* 17 (2018).

30. *Id.* at 6–7.

31. *Id.* at 48. The idea that standards for criminal responsibility are a more-demanding subset of moral responsibility is widely shared among criminal law theorists. *See, e.g.*, Antony Duff, *Legal and Moral Responsibility*, 4 *PHIL. COMPASS* 978 (2009).

32. KELLY, *supra* note 29, at 18.

33. *Id.* at 46–53.

34. *Id.* at 119–20.

35. *Id.* at 122.

animate both criminalization and punishment.<sup>36</sup> For Kelly, generally-applicable criteria for public justification would license the creation of a criminal justice system to “establish and sustain an effective, credible, and fair system of threats, with the aim of protecting people’s basic rights and liberties by incapacitating criminal wrongdoers, deterring crime, reforming lawbreakers, and redressing harms.”<sup>37</sup> The focus of criminal justice would be wrongful conduct, and morally blaming offenders would play no important role.

Still, Kelly argues, this harm reduction rationale must also be constrained by assessments of the defendant’s psychological and social circumstances, including whether the defendant enjoyed a reasonable opportunity to comply with the law.<sup>38</sup> It should also be constrained by background social injustices applicable in a specific case. Here, Kelly takes a moderate approach. Severe injustices undermine the state’s authority to punish altogether.<sup>39</sup> By contrast, less severe injustices limit (without undermining) the legitimacy of criminal justice institutions: under such conditions, individuals are “liable to punishment only for acts that are morally wrong,” but not for “acts that are merely legally prohibited.”<sup>40</sup>

One might take issue with Kelly’s specific conclusions. For example, it is unlikely that Kelly’s critique of retributivism will convince a thoroughgoing retributivist of the error of their ways.<sup>41</sup> Second, a Rawlsian might quibble with Kelly’s harm reduction rationale for the criminal justice system on the grounds that it does not provide sufficient justification for the deployment of coercion in light of the possibility of non-coercive interventions.<sup>42</sup> Finally, one might contest Kelly’s moderate conclusion regarding the delegitimizing effects of background and historical injustices.<sup>43</sup> Given the significant and entrenched patterns of racial injustice that characterize contemporary Western nations, the case for abolitionism might be stronger than Kelly (or, for that matter, Chiao) allows. Nonetheless, Kelly’s book is an achievement: it makes the case for Approach 2 in terms that are too powerful for retributivists to ignore.

#### CONCLUSION: CRIMINAL LAW AS POLITICAL THEORY

Suppose you are persuaded by Chiao and Kelly that criminal law theory is fundamentally a topic in political theory. How would criminal law theory oriented around Approach 2 differ from one oriented around Approach 1? Here are a few conjectures inspired by Chiao’s and Kelly’s books.

One implication is the centrality of what, after Chiao, might be called “*Deshaney*

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36. *Id.* at 122–32.

37. KELLY, *supra* note 29, at 144.

38. *Id.* at 134.

39. *Id.* at 163.

40. *Id.* at 174.

41. For the retributivist, some of the force of Kelly’s critique of retributivism might be blunted by conceding that criminal responsibility is not a subset of moral responsibility, so that any asymmetries in attributional criteria do not necessarily confound the retributive project. Indeed, some contend that this relationship characterizes contemporary criminal law. See Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992).

42. See Nathan Hanna, *Liberalism and the General Justifiability of Punishment*, 145 PHIL. STUD. 325 (2009).

43. See Stephen Galoob & Stephen Winter, *Injustice, Reparation, and Legitimacy*, in 5 OXFORD STUDIES IN POLITICAL PHILOSOPHY 65, 68–71 (David Sobel, Peter Vallentyne & Steven Wall eds., 2019).

problems.” Assessing the justification and legitimacy of criminal justice institutions requires analyzing a host of other social institutions oriented toward the provision of basic rights and opportunities. As Kelly puts it, “[i]n order to ‘solve’ the problem of crime, a society would have to make a commitment that goes beyond criminal justice. It would need to address the causes of crime, which is something a criminal justice system does not do.”<sup>44</sup> The holistic assessment needed to resolve *Deshaney* problems calls into question the wisdom explicating the “internal logic” or “immanent morality” of criminal law in isolation from other principles of political morality. On Approach 2, the principles of criminal law must, at a minimum, be compatible with the principles animating other, related social institutions.

Second, criminal law theory involves questions of political legitimacy far more (and in different ways) than is currently supposed. Approach 2 suggests that political legitimacy cannot be derived simply from an assessment of the formal properties of a state’s political institutions, and its criminal justice institutions in particular.<sup>45</sup> Rather, actual patterns of exercising its authority (not to mention the actual distribution of political, social, and economic resources that characterize a society) can significantly affect a state’s authority to enforce criminal law. If so, then viable theories of criminal law cannot be satisfied by abstract inquiries concerning the point of criminalization and punishment. They should also aim to be sensitive toward (and productive in light of) the histories of injustice and oppression and facts about disagreement that describe our world.

Third, criminal procedure (that is, institutions of policing, adjudicating, and punishing crime) is central to theorizing criminal law. Most straightforwardly, criminal procedure institutions can affect the overall legitimacy of a criminal justice system, thereby potentially affecting a state’s authority to criminalize and punish specific types or tokens of conduct. Moreover, criminal procedure values (captured in the colloquial notion of “due process”) can have normative significance independent of their accuracy. This implication suggests the non-instrumental importance of the procedures by which crime is policed, prosecuted, and punished.<sup>46</sup> A viable theory of criminal law, then, would need to explain and defend how criminal procedure should go.

Both *Criminal Law in the Age of the Administrative State* and *The Limits of Blame* are essential reading. Both books are among the most important works in criminal law theory of the past ten years. Each offers compelling insights regarding the justification and legitimacy of criminal punishment. Apart from these insights, both books are perhaps even more important for what they suggest about the future of criminal law theory and (not to mention as) political theory.

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44. KELLY, *supra* note 29, at 123.

45. See A. JOHN SIMMONS, BOUNDARIES OF AUTHORITY 59–90 (2016) (discussing structural and non-structural approaches to theorizing political legitimacy).

46. See Stephen R. Galoob, *Retributivism and Criminal Procedure*, 20 NEW CRIM. L. REV. 465 (2017). This implication is somewhat in tension with the “pragmatic” approach to analyzing criminal procedure that Chiao suggests in chapter six of *Criminal Law in the Age of the Administrative State*. However, any tension might be resolved by construing instrumental and non-instrumental approaches to criminal procedure as complements, rather than as rivals.