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Exploring justice in extreme cases: Criminal law theory and international criminal law

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Cover Page



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Summary

This thesis is about the encounter between criminal law theory and international criminal law (ICL). This encounter can be illuminating both for ICL and for criminal law theory. To manage the scope of the inquiry, I focus on one subset of criminal law theory, which is concerned with fundamental moral constraining principles (culpability, legality). I refer to these as “deontic” constraints, because they respect the agency and dignity of the persons affected by the system. The main contribution of this thesis is to advance a method for identifying and clarifying the appropriate principles. It is surprisingly difficult to specify the principles appropriate to ICL and their parameters; this thesis suggests some solutions.

A first challenge, raised by many scholars, is that familiar principles from national law may not even be appropriate in ICL, because ICL deals with extraordinary circumstances and collective conduct. I argue that principled constraints of justice must be respected, but also that unusual circumstances may generate deontically-justified refinements of our understandings. I draw lessons from common criticisms of liberal accounts, to argue for a humanistic, cosmopolitan approach, which is prepared to re-examine its assumptions.

A second challenge is finding a *method* for this inquiry. How can we even attempt to evaluate what ‘justice’ requires in novel contexts? I will show that the most familiar sources of guidance are unreliable. Accordingly, I propose a ‘coherentist’ method as the best solution. ‘Coherentism’ stipulates that we do not need to identify a bedrock comprehensive ethical theory in order to discuss the justice of particular doctrines. Instead, we can work productively at a middle level, using all of the available clues – including patterns of practice, normative arguments, and considered judgments. We can test these clues against each other to form the best hypotheses we can. The coherentist account accepts that the currently prevailing understandings of the principles are contingent human constructs. Nonetheless, a human and fallible conversation can let us do valuable analytical, normative, and critical work.

Thus, the major contribution of this thesis is to lay the groundwork for even the *possibility* of doing criminal law theory in ICL. This topic is relatively philosophical and fine-grained in comparison to some of the larger controversies currently raging about

ICL. Nonetheless, the inquiry is important and potentially illuminating, for at least three reasons.

First, it is important to ensure that persons are not treated unjustly. Recent ICL jurisprudence and scholarship shows intensified interest in deontic constraints; this thesis will assist jurists and scholars engaging in such analyses. Second, clarifying the constraints can also help produce more effective criminal law, because it helps avoid excessively rigid conceptions of the constraints. The coherentist method provides reference points for a more grounded debate. Third, the inquiry can be illuminating for general criminal law theory. ICL presents novel doctrines and novel problems. The study of special cases can help us discern unnoticed variables, connections, and caveats, that we would not have noticed when we work in a 'normal' context. As an analogy, the study of physics near a black hole, or at velocities near the speed of light, may lead us to notice that concepts we used in everyday experience are actually more subtle than we thought.

In this thesis, I proceed in three steps. First, I set out the *problem*: the need for more careful deontic reasoning. Second, I outline a *solution*, a proposed framework which includes the coherentist approach to deontic reasoning. Third, I *demonstrate* the framework by applying it to a specific controversy: the doctrine of command responsibility.

I select command responsibility as a case study because it raises novel and important questions. Command responsibility originated in international law, and thus has not had the same scrutiny as other modes of liability, which were developed in national practice over centuries. Command responsibility is currently hotly contested and the discussion is now very tangled. I argue that this seemingly anomalous doctrine is valuable and deontically-justified. The 'should have known' fault standard seems, at first glance, to contradict familiar principles. I argue that command responsibility reveals a sound insight of justice; it delineates a set of circumstances in which a criminally negligent omission is just as blameworthy as a knowing omission. The analysis illustrates my theme that the novel doctrines and contexts of ICL can lead us to rethink assumptions rooted in the 'normal' contexts, and thereby furnish new insights.