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AUTHORITY, IGNORANCE, AND THE GUILTY MIND

Stephen P. Garvey*

ABSTRACT

The criminal law holds an actor liable only if he acts with a guilty mind (mens rea). But in what does a guilty mind consist? We tend nowadays to regard the guilty mind as consisting in nothing more than the various mental states necessary to prove that an actor committed this or that criminal offense. Knowing in what the guilty mind consists thus requires nothing more than reading and interpreting the statute defining the crime. The guilty mind, in other words, consists in whatever the state in the exercise of its authority to define crimes says it consists.

I suggest we regard the guilty mind not simply as a result of the state's exercise of its authority, but as a limit on the exercise of the state's authority as well. My thesis is this: An actor possesses a guilty mind if and only if he freely chooses to ϕ , where ϕ -ing is contrary to the demands of the criminal law, and where the actor's choice to ϕ manifests—either in the choice itself, or in the actor's failure to realize that ϕ -ing is contrary to the demands of the criminal law—a quality of will inconsistent with that of a law-abiding citizen.

I. INTRODUCTION

YOU'RE not guilty of a crime unless you committed it with a "guilty mind," or mens rea. *Actus non facit reum nisi mens rea.*¹ The act is not culpable unless the mind is guilty. Everyone knows

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1. The phrase is usually traced to St. Augustine's Sermon 180 on perjury. See Saint Augustine, Sermon 180, in 5 THE WORKS OF SAINT AUGUSTINE: A TRANSLATION FOR THE 21ST CENTURY, PT. III—SERMONS, 314, 315 (John E. Rotelle, O.S.A. ed., Edmund Hill, O.P. trans., 1992):

Take another person; he thinks it's false, and swears to it as if it were true—and it so happens that it is true. For example, to help you understand: "Did it rain in that place?" you ask someone, and he thinks it didn't, but it suits his purpose to say "Yes, it did." But he thinks it didn't. You say to him, "Did it really rain?" "Yes, really," and he swears it did; and in fact it did rain there, but he doesn't know it, and thinks it didn't; he's a perjurer. What makes the difference is how the word comes forth from the mind. The only thing that makes a guilty tongue is a guilty mind.

that. The problem is that no one really knows, or if they know, haven't clearly said, in what the guilty mind consists.

Or maybe I'm wrong. According to one line of thought, the criminal law, or at least our criminal law, doesn't really rely on or need an account of mens rea. Talk of mens rea is the talk of a bygone time. Like any bad habit, it may persist, as indeed it does, but we'd all be better off, so the thinking goes, if we dispensed with such talk. Today's criminal law relies on, and has no need for anything more than, *mentes reae*, which are nothing more, and nothing more mysterious, than the various mental states that the state happens to have decided it must prove in order to convict an actor of this or that crime.² Talk of mens rea is thus not only elusive and confusing, it's unnecessary. The criminal law gets on just fine without it. So let's stop talking about it.

But this move won't do for my purposes. We should continue to think about the guilty mind as *mentes reae*, but not only as *mentes reae*. The modern move from guilty mind as mens rea to guilty mind as *mentes reae* treats the guilty mind as something *subject* to state authority. The state gets to decide what makes for a guilty mind when it defines the mental-state elements of a crime, and indeed it should get to decide, as long as it has the authority to do so. But any authority is subject to limits, and the guilty mind as mens rea is one such limit. No state can legitimately punish an actor unless he committed a crime with mens rea. *Actus non facit reum nisi mens rea*.

So what does it mean to say that an actor committed a crime with a guilty mind (mens rea) understood as a limit on a state's authority to subject those under its authority to punishment? The guilty mind in this older-fashioned sense is commonly said to consist in an "evil-meaning mind," a "general immorality of motive," a "general notion of moral

2. See, e.g., 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 95 (1883) ("The truth is that the maxim about 'mens rea' means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes."); Francis Bowes Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 404 (Roscoe Pound ed., 1934) ("An intelligent understanding of the various states of mind requisite for criminality can be gained only through an intensive study of the substantive law covering each separate group. The old conception of *mens rea* must be discarded, and in its place substituted the new conception of *mentes reae*.").

The distinction I draw between mens rea and *mentes reae* is sometimes described as the distinction between culpability and elemental accounts of mens rea, or normative and descriptive accounts, or broad and narrow accounts. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.02, at 118–19 (6th ed. 2012); GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 6.2, at 398–99 (1978); Douglas Husak, "Broad" Culpability and the Retributivist Dream, 9 OHIO ST. J. CRIM. L. 449, 454–59 (2012). The vexing distinction between general-intent offenses and specific-intent offenses can be seen historically as a step between the guilty mind as mens rea and the modern conception of the guilty mind as *mentes reae*. See PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW § 4.1.1, at 154–55 (2d ed. 2012). The specific intent-general intent distinction is unimportant for my purposes.

blameworthiness,” or as Blackstone put it, a “vicious will.”³ But to what do such abstract expressions really amount? They seem to do little more than let the blind lead the blind, substituting one black-box expression (“mens rea”) for another (“evil-meaning mind,” “vicious will,” and such). When the guilty mind functions to limit the state’s authority to condemn and punish, we should try hard to figure out more precisely in what the guilty mind consists, lest a supposed limit on the state’s power to punish turns out in the end to be little, if anything, more than an unlimited license to punish.

In what follows I try to say as clearly as I can in what the guilty mind as a normative limit on the state’s authority to punish consists. Stated as succinctly as I can, my thesis is this: *An actor possesses a guilty mind if and only if he freely chooses to ϕ ,⁴ where ϕ -ing is contrary to the demands of the criminal law,⁵ and where the actor’s choice to ϕ manifests a quality of will inconsistent with that of a law-abiding citizen.*⁶ Unless an actor freely decides to ϕ with a guilty mind the state cannot legitimately find

3. DRESSLER, *supra* note 2, § 10.02[B], at 118. Characterizing the guilty mind as, or as reflecting or expressing, a “vicious” will is apt to sound odd to modern ears, but I hope to explain the sense in which the guilty mind can loosely be said to reflect an ill will, or perhaps even a vicious will, where “vicious” refers to a quality of will that reflects, not a particular vice, but the lack of a particular virtue, i.e., law-abidance, and nothing necessarily more sinister.

4. For present purposes ϕ can include acts, omissions, or intentions. If ϕ is an omission, the statement of my thesis should be modified in relevant part to say that the actor freely chooses to not- ϕ . When I say that an actor chooses to ϕ , I mean that he exercises his will’s capacity to produce ϕ . See, e.g., ALFRED R. MELE, *MOTIVATION AND AGENCY* 197–214 (2003). I recognize that “intentions are often passively acquired; that is, they are often acquired independently of an *action* (like deciding) of intention formation. . . . The requirements for deciding are stronger than those for intending.” ALFRED R. MELE, *SPRINGS OF ACTION: UNDERSTANDING INTENTIONAL BEHAVIOR* 231 (1992).

5. When I say the “demands of the criminal law,” I mean any obligation, which if breached with a guilty mind, renders one criminally liable. That which is contrary to the demands of the criminal law, whether an action, omission, or intention, is a wrong.

6. I use the term “manifest” interchangeably with cognate expressions, such as “express” or “reflect,” though one might stipulate different meanings for each such term. See, e.g., Neil Levy, *Expressing Who We Are: Moral Responsibility and Awareness of Our Reasons for Action*, 52 *ANALYTIC PHIL.* 243, 248 (2011) (distinguishing between an act “expressing, reflecting, and matching an attitude”). The phrase “quality of will” is perhaps most famously associated with Strawson’s use of it in *Freedom and Resentment*. See P.F. Strawson, *Freedom and Resentment*, 48 *PROC. BRIT. ACAD.* 187 (1962). Frankfurt uses the term “will” in a similar manner. See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 *J. PHIL.* 5, 8 (1971). When I refer to an actor’s quality of will, I mean to distinguish it from his character, which is an actor’s relatively stable or enduring quality of will over time. Moreover, the term “will” in the phrase “quality of will” refers not to the actor’s executive capacity, i.e., the capacity to form intentions and volitions, but rather to what (apparently) medieval philosophers described as a “rational appetitive faculty,” understood as “a more or less rational appetitive or conative faculty whose functions include desiring . . . as well as the initiation of voluntary motion.” Robert Merrihew Adams, *Involuntary Sins*, 94 *PHIL. REV.* 3, 6 (1985). For a more elaborate description of Aquinas on the matter, see David Gallagher, *Thomas Aquinas on the Will as Rational Appetite*, 29 *J. HIST. PHIL.* 559 (1991). Holly Smith describes what I’m calling an actor’s “quality of will” as the “overall configuration of [an actor’s] motives (including their relative strengths).” Holly M. Smith, *Non-Tracing Cases of Culpable Ignorance*, 5 *CRIM. L. & PHIL.* 115, 129 (2011). For a helpful discussion on, and clarification of, the meaning of the phrase “quality of will,” see MICHAEL MCKENNA, *CONVERSATION AND RESPONSIBILITY* 57–64 (2012).

him guilty of criminal wrongdoing. Absent such a finding, the state has no permission to subject him to the criminal law's repertoire of responses, not the least of which is punishment.

An actor whose choice to ϕ manifests a quality of will inconsistent with that of a law-abiding citizen is one whose choice manifests ill will toward, or at least insufficient concern or regard for, the law and its ends. An actor can manifest such a quality of will in two different ways. First, an actor who forms an intent to ϕ expresses ill will for the law if he wants to ϕ and forms the intent to ϕ believing all the while that the law prohibits the formation of such an intent. The mind of such an actor is guilty because it manifests ill will in the actor's decision to *defy* a demand he knows the law has placed upon him.⁷ He defies the law's authority inasmuch as he chooses to pursue ends, realizing that in so doing, he exceeds limits the law has placed upon everyone subject to its authority, including him.

But what if the actor chooses to ϕ *without* realizing that the law prohibits his choice? What if he believes the law permits him to so choose, or at least doesn't believe it prohibits his choice? Does his ignorance render his mind guilt-free? We all know how the law itself would (more often than not) answer that question: No! Ignorance of the law is no excuse. Better luck next time.

I disagree. When an actor's ignorance of the law stops us from attributing to him a guilty mind, such ignorance *does* excuse, and ignorance often does stop us from attributing a guilty mind. Often, but not always. Sometimes an actor's ignorance itself can manifest a quality of will constitutive of a guilty mind: a quality of will no law-abiding citizen would ever dream of having. If so, then the exculpatory force his ignorance would otherwise have had disappears. His mind is guilty, not because he defies the law, but because he is *indifferent* to it.

My concern here is to describe in what the guilty mind consists when it assumes the form of indifference. I leave for another occasion the effort to describe in what the guilty mind consists when it assumes the form of defiance. My discussion proceeds in three steps.

Because my account of the guilty mind presupposes a state endowed with a special—some say magical—moral power (namely, the moral power or capacity to alter the moral status of those subject to its authority), the first step (Part I) is to explain how a state comes to be endowed with such power and to describe in what its power consists. No state's authority is without limit.⁸ One such limit disables a state from rendering

7. See JEAN HAMPTON, *Mens Rea*, in *THE INTRINSIC WORTH OF PERSONS: CONTRACTARIANISM IN MORAL AND POLITICAL PHILOSOPHY* 72, 102–06 (Daniel Farnham ed., 2007) (describing a “defiance conception” of culpability or mens rea).

8. Because, as I suggest below, only a democratic state can possess legitimate authority, my claim that such authority is subject to limits amounts to the claim that limits exist on the exercise of democratic authority. See THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS* ch. 7 (2008). For a well-known and hard-to-dismiss argument to the effect that any such limits will themselves be subject to

criminally liable those who choose to ϕ but who do so without a guilty mind.⁹ A legitimate state has permission to punish those who choose to ϕ with a guilty mind, but enjoys no such permission with respect to those who choose to ϕ without a guilty mind. Those without guilt retain their immunity to such treatment.

The second step (Part II) is to explain what I mean when I say that an actor is ignorant or unaware of the fact that his choice to ϕ is criminal, which I'll hereafter abbreviate as ignorance or unawareness of the fact that p , where p stand for that fact that ϕ -ing constitutes a crime. Ignorance is a matter of degree, and the aim of the second step is to identify, as clearly as I can, at what point we can fairly say that an actor was ignorant of the fact that his choice to ϕ crossed the line into crime.¹⁰ The last step (Part III) is to explain how and why an actor who is ignorant of the fact that p can nonetheless sometimes choose to ϕ *with* a guilty mind.

Before proceeding I should emphasize once again that the guilty mind, as I shall render it, is a limit on the exercise of state authority. I mean to describe the state of mind without which an actor who commits a criminal wrong cannot legitimately be subject to the responses associated with the criminal law. A state is of course free to require more before it will give itself permission to resort to such responses. Perhaps, for example, a state will give itself permission to punish an actor only if he was aware of each of the material elements constituting the crime with which he has been charged, thereby rejecting any use of strict liability in its definition of criminal offenses. Indeed, a just and wise state might do precisely that. But a legitimate state is not obliged to do more, and if it declines to do more, it doesn't thereby lose its claim to legitimacy.¹¹

II. AUTHORITY

Most contemporary criminal-law theorists assume, it seems safe to say, that no state can, or at least no state does, possess authority, which means

reasonable disagreement and thus properly resolved through a democratic process, see JEREMY WALDRON, *LAW AND DISAGREEMENT* 302–12 (1999).

9. In addition to the requirement of a guilty mind, democratic states labor under at least two other limits on their power to punish. First, a democratic state cannot render anyone liable to punishment for the exercise of rights commonly associated with, or perhaps constitutive of, liberal democracies. Second, a democratic state cannot, in the otherwise proper exercise of its permission to punish, impose grossly disproportionate punishments.

10. In his discussion of "broad culpability," Husak argues that any theory of such culpability "must be able to conceptualize blame in shades of grey rather than simply in black or white." Husak, *supra* note 2, at 450. I agree that "broad culpability" in the sense in which Husak uses the term is a matter of degree. My goal here is to describe the circumstances under which an actor's mind can be said to be culpable or guilty at all. Reasonable minds can and do disagree on what makes one actor who crosses that threshold more or less culpable than another. Authoritatively settling those disagreements is properly left to the democratic process.

11. I make no effort here to describe how, if at all, the account of the guilty mind and its role as a limit on the exercise of state authority to render an actor criminally liable is reflected or not in the law, and in particular the constitutional law, of this or that jurisdiction.

that no one has a moral obligation, not even a prima facie one, to obey the state.¹² Most contemporary criminal-law theorists therefore understand their job to entail telling the state what its criminal law should look like, and thus telling the state what conditions should exist before it can permissibly punish anyone. So understood, the job requires doing moral theory because morality is the only authority to which anyone or anything, including the state, can or should submit. The state has no authority of its own. Any authority it has piggybacks on the authority of morality.

I make the opposite assumption. I assume that a state can possess an authority all its own, and thus that those subject to the state's authority have a prima facie moral obligation to obey its law. Accordingly, I see the criminal-law theorist's job (first and perhaps foremost, but not only) to be about describing the *limits* on the state's authority to decide what its criminal law should look like, and thus about describing the conditions that must obtain before the state can permissibly punish anyone. The job requires (first and perhaps foremost, but not only) doing political theory, or perhaps second-order moral theory. I've elsewhere tried to explain in more detail what I mean when I say that a state has authority, and moreover, what it would take for a state to have such authority.¹³ Here's a short summary.

When we say that a state has authority, we usually have in mind one or two possibilities. First, we might mean (only) that a state is morally permitted to threaten and sometimes use coercion in order to secure compliance with its demands. A legitimate state is one that can justifiably use coercion to gain the obedience of its subjects. It can justifiably apply or threaten to apply coercion against those who do or would disobey. Those subject to such an authority are not obligated to obey. The state has no power to impose moral obligations on them. Only morality has that power. When the subject of such an authority disobeys, he therefore does no wrong, or at least no wrong to the state, but neither does the state do any wrong to him when it threatens him with some burden or hardship, or visits such a burden or hardship on him if he disobeys.¹⁴

12. The assumption with which criminal law theorists begin is the conclusion to which most contemporary political theorists argue. See, e.g., Matthew Noah Smith, *Political Obligation and the Self*, 86 PHIL. & PHENOMENOLOGICAL RES. 347, 347 (2013) ("There may be a consensus amongst moral and political philosophers that there is not today any existing obligation to obey the law."). Perhaps the most prominent political theorist in the debate has nonetheless recently detected a "backlash" against this consensus. See A. John Simmons, *Democratic Authority and the Boundary Problem*, 26 RATIO JURIS 326, 330 (2013) (describing a "kind of Kantian backlash against the skepticism about political authority that was for a time an increasingly common feature of the recent literature on the subject").

13. See Stephen P. Garvey, *Was Ellen Wronged?*, 7 CRIM. L. & PHIL. 185 (2013). For helpful summaries of the literature on political authority and political obligation, see, for example, Tom Christiano, *Authority*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://pla.to.stanford.edu/entries/authority> (last updated Jan. 11, 2012); William A. Edmundson, *State of the Art: The Duty to Obey the Law*, 10 LEGAL THEORY 215 (2005); David Lefkowitz, *The Duty to Obey the Law*, 1 PHIL. COMPASS 571 (2006).

14. For discussions defending or relying on an account of authority according to which possessing authority neither conceptually nor normatively entails a correlative obligation

Second, when we say that a state has authority, we might mean (more strongly) not only that it can permissibly use coercion to back up its demands, but also that it has the power or capacity to change the normative position of those subject to its authority, primarily, if not exclusively, through the imposition of new moral obligations or the recognition of existing ones. If a state has authority in this sense, then those subject to that authority have a *prima facie* moral obligation to obey its demands. An actor's culpable failure to obey constitutes culpable wrongdoing, thereby rendering him liable not only to state coercion, but also to punishment, which combines coercion with censure. My account of the guilty mind presupposes a state with authority in this second, stronger sense.¹⁵

A state exercises this authority, its power or capacity to impose new moral obligations (or recognize preexisting ones), in a variety of ways to give structure and content to its criminal law. It imposes obligations on those subject to its authority to do this or refrain from doing that. It grants permission to others (prosecutors) to call to account those who they believe have culpably breached those obligations, and to others (judges or juries) to decide if those called to account have indeed culpably breached those obligations. Last but not least, it imposes obligations on some (judges) to censure through a judgment of conviction those who have been found guilty of a culpable breach, and on others (prison officials) the obligation to inflict some hardship or impose some burden for any such breach, thus transforming (mere) censure into punishment.

Many believe that no state can possess the normative power on which my account of the guilty mind relies. How can any state create a moral obligation *ex nihilo*, an obligation non-existent prior to the state's say-so? Or even with respect to an obligation extant prior to the state's say-so, how can the state's say-so suffice to transform that obligation into one that runs to the state (in addition to the person to whom or entity to which it would otherwise run)? It sounds like moral magic. Perhaps, but think about the power of uncoerced consent or the power of promising.

on the part of those subject to the authority to obey its demands, see, for example, KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 53, 53 (1987); Arthur Isak Applbaum, *Legitimacy Without the Duty to Obey*, 38 *PHIL. & PUB. AFF.* 215, 222 (2010); Allen Buchanan, *Political Legitimacy and Democracy*, 112 *ETHICS* 689, 689–95 (2002); Patrick Durning, *Political Legitimacy and the Duty to Obey the Law*, 33 *CAN. J. PHIL.* 373, 387 (2003); William A. Edmundson, *Legitimate Authority Without Political Obligation*, 17 *LAW & PHIL.* 43, 44 (1998); Robert Ladenson, *In Defense of a Hobbesian Conception of Law*, 9 *PHIL. & PUB. AFF.* 134, 139–41 (1980); Rolf Sartorius, *Political Authority and Political Obligation*, 67 *VA. L. REV.* 3, 5 (1981); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950, 975 (1973); Christopher Heath Wellman, *Toward a Liberal Theory of Political Obligation*, 111 *ETHICS* 735, 741–42 (2001).

15. The nature of the obligation I have in mind is an obligation to *conform*, not to *comply*. In other words, obedience to the law entails only conformity to the law; it may (but need not) entail compliance. The state may *claim* that any obligation it imposes is an obligation to comply, but the obligations it has the power actually to create lack that force. Compliance means that the reason an actor ϕ 's is because the law says so. Conformity means that the reason an actor ϕ 's is because the law says so or for any other reason. See Scott Hershovitz, *The Authority of Law*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 65, 66–70 (Andrei Marmor ed., 2012).

When I consent to a wrong, I thereby turn it (magically) into a non-wrong. When I promise to do something, I thereby (magically) create a self-imposed obligation to do that which I have promised to do, where no such obligation existed before. Both of these familiar moral powers have limits, but so too does state authority. It should therefore be at least conceivable that some states are capable of performing the moral magic associated with the exercise of authority.

What kind of state might have such a capacity? What does it take for a state to have the magical power associated with authority? I limit my answer to the state's authority over its criminal law. It may or may not extend to other departments of the law. My answer also comes in two parts. I give one explanation for the state's authority to declare *malum in se* wrongs to be crimes, and another for its authority to transform *malum prohibitum* acts into wrongs and from there into crimes.¹⁶

Take *malum in se* crimes first. I regard *malum in se* crimes as wrongs that, could they be committed with impunity, would threaten a return to the state of nature, where the lives of all would be nasty, brutish, and short. Such crimes are serious moral wrongs independent of whatever the state says or does. What nonetheless happens when the state says that the culpable commission of such a wrong is a crime (and will render one liable to punishment) is that the state thereby makes the obligation to refrain from such wrongdoing run not only to the immediate victim of the crime (assuming one exists), but to the state itself. Authority's moral magic works, not to render *malum in se* offenses wrongful in the first place, but rather to render those who culpably commit them liable to punishment at the hands of the state.

Having a state with the power to make itself in this way the victim of *malum in se* offenses, i.e., having a state with authority, brings the power of the state to bear in the effort to forestall the commission of such crimes, through either the use or threatened use of punishment. In other words, the good we achieve when we leave the state of nature and enter a state with the authority to punish *malum in se* wrongs is precisely to leave the state of nature. Of course, any state, democratic or dictatorial, can achieve this end, and thus, the authority of a state to render those subject to its authority liable to punishment for the culpable commission of *malum in se* wrongs doesn't depend on the character of the state. It depends on its ability to deliver the goods, and I'm bound to obey out of respect for my fellow subjects because and insofar as they likewise obey, making us all better off than we would be if we were to disobey and so return to the state of nature.

16. The way in which I draw the distinction between the categories *malum in se* and *malum prohibitum* is unconventional. *Malum in se* crimes consist in those acts that, if they could be committed with impunity, would threaten a return to the state of nature. *Malum prohibitum* crimes consist in those acts that, subject to certain limits, the state says are crimes and nothing more. See Garvey, *supra* note 13, at 206.

Next take *malum prohibitum* crimes. Some crimes commonly regarded as *malum prohibitum* can of course be seen on closer inspection to be moral wrongs. But not all. Some *malum prohibitum* crimes are moral wrongs only because the state says so. Indeed, the state's say-so is precisely what makes them moral wrongs, and moreover, moral wrongs *against the state*. Why would anyone want a state with that power? What good could it do?

Let me suggest the following. Having a state with authority to declare *malum in se* wrongs crimes, and thus render those who commit such crimes vulnerable to state punishment, saves us from the perpetual insecurity of the state of nature. Likewise, having a state with authority to transform non-wrongs into *malum prohibitum* crimes saves us from the perpetual disagreement of what might be called a political state of nature. We need some way to settle our disagreements about the scope of the criminal law outside of its *malum in se* core.¹⁷ Indeed, we need a way to settle our disagreements, not only about what should and should not be a crime, i.e., not only about the specific part of the criminal law, but about all the rules and doctrines that constitute the general part as well, not to mention disagreements about when and how (within limits) the state should exercise its power to punish.

The character of the state makes no difference to its authority to declare *malum in se* wrongs crimes, thereby rendering those who culpably commit such wrongs liable to state punishment. Any state can rescue those subject to its authority from the state of nature as long as it has the institutional wherewithal to enforce its demands. In contrast, when it comes to the state's authority to declare *malum prohibitum* acts crimes (and thus transform them into wrongs) the character of the state makes all the difference. Not just any old state will do. Only a well-functioning democracy can have the authority to say that a non-wrong is a crime and thereby render its culpable commission not only wrongful, but punishable. Any state can settle disagreements, but only a democratic state can enjoy authority over its subjects because only in a democratic state is everyone entitled to have his say in settling disagreements over what the rules of collective coexistence should be.¹⁸

17. I should add that even within what I'm calling the "*malum in se* core," disagreement will invariably arise over precisely how the offenses constituting that core should be defined. The neat distinction I draw between the justification and legitimation of state authority with respect to *malum in se* and *malum prohibitum* is thus not as neat as the text implies. I thank Guyora Binder for this point.

18. For accounts of political authority based upon the democratic nature of the state, see, for example, CHRISTIANO, *supra* note 8; DAVID ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* (2008); ANNA STILZ, *LIBERAL LOYALTY: FREEDOM, OBLIGATION, AND THE STATE* (2009); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Thomas Christiano, *The Authority of Democracy*, 12 J. POL. PHIL. 266 (2004); Scott Hershovitz, *Legitimacy, Democracy, and Razian Authority*, 9 LEGAL THEORY 201 (2003); Scott Hershovitz, *The Role of Authority*, 11 PHILOSOPHERS' IMPRINT 1 (2011); David Lefkowitz, *A Contractualist Defense of Democratic Authority*, 18 RATIO JURIS 346 (2005); Scott J. Shapiro, *Authority*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW* (Jules Coleman & Scott Shapiro eds., 2002). For criticism, see A. JOHN SIMMONS,

Let me summarize. A state's authority with respect to *malum in se* crimes is justified inasmuch as the exercise of that authority saves us from the state of nature, and we are bound to obey inasmuch as obedience shows due regard for the obedience and restraint of one's fellow subjects. Any state capable of achieving this end thereby earns authority over *malum in se* crimes. A state's authority with respect to *malum prohibitum* crimes, as well as the general part of the criminal law, is justified inasmuch as the exercise of that authority saves us from a political state of nature in which disagreements over the content of the criminal law are left perpetually unsettled. We are duty-bound to obey inasmuch as the rules governing collective existence emerge from a process within which your beliefs are accorded the same regard as mine, which means that only a democratic state can earn authority over *malum prohibitum* crimes and the general part of the criminal law.

III. IGNORANCE

When we think about what it takes to render an actor criminally liable we tend to have in mind some idea of freedom or control. Even when an actor has committed a criminal wrong, he's not responsible or culpable for his wrongdoing unless, for example, he freely committed the wrong, his wrongdoing was in his control, he could have done otherwise, he acted voluntarily, and so on. An actor doesn't shed his immunity from liability unless what he did was done, we might say more generally, of his own free will. Such freedom of the will is indeed necessary before we can ascribe a guilty mind to an actor for any crime he commits. But freedom isn't sufficient. We need something more.

What's needed is some realization on the actor's part that what he's doing (or not) is something the law demand he do (or not) on pain of censure or punishment. Take A and B, both of whom choose to ϕ , which is a crime. A chooses to ϕ knowing full well that in so doing he renders himself vulnerable to the force of the criminal law. B chooses to ϕ in blissful ignorance. He has no inkling whatsoever that in choosing to ϕ he crosses the Rubicon into criminality. Now, a law-abiding citizen is, if anything, one who abides the law. A's choice to ϕ thus manifests a quality of will inconsistent with that of a law-abiding citizen. Such defiance is as plain a manifestation of ill will as one could want. But what about B? If A's knowledge manifests a guilty mind, does B's ignorance reveal its absence?

B would get no break from the criminal law as we know it. With some important exceptions,¹⁹ B's plea to retain his immunity to criminal liabil-

POLITICAL PHILOSOPHY (2008); A. John Simmons, *Democratic Authority and the Boundary Problem*, 26 *RATIO JURIS* 326 (2013). I say nothing here about what a state must look like or how it must work to be fairly characterized as a democratic state endowed thereby with authority. I don't in any event mean to be saccharin about real-world democracies and how they work.

19. One set of such exceptions (estoppel, lack of notice, and void for vagueness) involve cases in which the actor's ignorance can fairly be said to be due to some malfeasance

ity based on his ignorance of the law will fall on deaf ears. *Ignorantia legis neminem excusat*. Ignorance of the law does not excuse.

One sometimes hears that ignorance of the law is no excuse because everyone is conclusively presumed to know the law, whether they really do or not. But this supposed defense of the no-excuse maxim is no defense at all. On the contrary, it amounts to a confession that ignorance *does* excuse. No one is actually excused only because the law blinds itself to reality. Whenever an actor is ignorant of the law, he is, in the eyes of the law, nonetheless presumed to have had knowledge of it. But that won't do. It only shifts the question from why ignorance is no excuse to why knowledge is conclusively presumed whenever an actor lacks it.

One sometimes hears too that ignorance is no excuse because everyone has a duty to know the law. But this defense of the maxim carries no conviction either.²⁰ One could imagine the state imposing on its citizens a duty to know whether ϕ -ing is unlawful. Yet no one who failed to discharge *that* duty should be criminally liable unless he failed to discharge it with a guilty mind. So maybe the state imposes a duty on its citizens to know whether they are violating their duty to know whether ϕ -ing is unlawful. But no one who failed to discharge *that* duty should be criminally liable unless he failed to discharge it with a guilty mind, and so on. Defenses of the no-maxim rule that appeal to conclusive presumptions and imagined add-on duties are smoke and mirrors.

The standard defense of the no-excuse maxim relies on the supposed ill consequences we would face if ignorance did excuse. Holmes thought the no-excuse maxim was a good idea because it encouraged people to learn what the law demanded of them, and the good thereby achieved was worth the admitted injustice occasioned when the ignorant were convicted and punished.²¹ Some defenders of the maxim go further and imagine an end to the rule of law itself if the law were to allow ignorant criminals to escape their just deserts. The law would end up being whatever the defendant believed it to be, and that couldn't be good for

or nonfeasance on the state's part. The other exception involves crimes to which the state has decided to impose on itself the burden of proving that the actor realized he was committing a crime, commonly through the use of the mental-state term "willful." Existing law, therefore, recognizes the exculpatory force of an actor's ignorance only when the state is at fault or when the state, for whatever reason, chooses to recognize it. The only exception to this generalization so far as I can tell are cases involving *M'Naughten*-style insanity, which are perhaps so extreme that no state can with a straight face refuse to recognize the power of ignorance to undermine the ascription of a guilty mind.

20. Douglas N. Husak, *Ignorance of Law and Duties of Citizenship*, 14 *LEGAL STUD.* 105, 107 (1994) (concluding that several arguments offered in defense of the *ignoratio juris* maxim that invoke an "alleged" duty to know the law are "unsound"); Douglas Husak, *Mistake of Law and Culpability*, 4 *CRIM. L. & PHIL.* 135, 137–38 (2010).

21. O.W. HOLMES, *THE COMMON LAW* 48–49 (1881). For a challenge to Holmes' calculus, concluding that "if the goal were truly to maximize private knowledge of the law, a negligence standard would be unambiguously superior to a strict liability standard," see Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 *MICH. L. REV.* 127, 133 (1997).

anyone.²²

It might turn out that the benefits of the maxim in the end outweigh its costs, and conversely, that discarding it might well produce more costs than benefits. Who really knows? Much depends on what counts as a cost and what counts as a benefit, and on whether the rule actually produces those costs and benefits. Maybe the calculus favors the maxim in some cases (e.g., when the crime is *malum in se* and the actor did or should have realized he was doing something morally, and therefore likely legally, wrong) but not in others (e.g., when the crime is *malum prohibitum* and the actor didn't and had no reason to realize he was doing anything morally, and therefore likely legally, wrong).²³ Maybe.

The standard defense suffers in any event from a deeper problem. A democratic state is free to rely on whatever cost-benefit analysis it wishes to rely on when deciding what its criminal law should look like, as long as it doesn't surpass the limits of its authority. The requirement of a guilty mind is one such limit, and as such, no state is free to ignore an actor's ignorance when it undermines the ascription of a guilty mind. If ignorance is incompatible with a guilty mind, then ignorance excuses whatever the consequences, and indeed, it seems to me that, all else being equal, ignorance does excuse.²⁴

Our reactive emotions tend, all else being equal, to subside if we come to believe that a wrongdoer (including a criminal wrongdoer) didn't realize he was doing wrong,²⁵ which is at least some evidence that ignorance

22. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 382–87 (1960). The standing reply to Hall's worry is that he confused ignorance as a justification with ignorance as an excuse. If ignorance excuses, offenders don't get to say what the law is. All they get is the chance to be excused for being unaware of what the law is.

23. One benefit of an ignorance defense would be to offset the costs arising from over-criminalization. For more on this point, see, for example, Paul J. Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, *CRIM. JUST.*, Spring 2013, at 10.

24. The parallel question in morality is whether an actor can be morally culpable for a wrong he does if he is unaware of its deontic status as wrongful. For arguments to the effect that non-culpable ignorance of the moral status of one's action renders one excused or non-culpable for one's wrongdoing, see, for example, RONALD MILO, *IMMORALITY* 82 (1984) (An actor who "mistakenly believes (assumes) that what he does is right—either that it is morally permissible or perhaps even that it is morally required . . . is sometimes excus[ed] and sometimes not[.]" depending on whether his ignorance is itself culpable.); MICHAEL J. ZIMMERMAN, *LIVING WITH UNCERTAINTY: THE MORAL SIGNIFICANCE OF IGNORANCE* 177 (2008) ("[L]ack of ignorance is a root requirement for responsibility."); Gideon Rosen, *Skepticism About Moral Responsibility*, 18 *PHIL. PERSP.* 295, 307 (2004) ("[E]very culpable bad action must be, if not itself a knowing sin . . . , then at least an act whose etiology involves a knowing sin."). For a reply to Rosen, see William J. FitzPatrick, *Moral Responsibility and Normative Ignorance: Answering a New Skeptical Challenge*, 118 *ETHICS* 589 (2008), and Matthew Talbert, *Unwitting Wrongdoers and the Role of Moral Disagreement in Blame*, in 1 *OXFORD STUDIES IN AGENCY AND RESPONSIBILITY* 225 (David Shoemaker ed., 2013).

25. Commentators are naturally most reluctant to contemplate the possibility that ignorance of the law will excuse an actor when the crime the actor commits is *malum in se*, i.e., a moral wrong everyone would characterize as grave or serious. See, e.g., Gideon Yaffe, *Excusing Mistakes of Law*, 9 *PHILOSOPHERS' IMPRINT* 1, 8 (2009) ("To say that [someone who intentionally kills with full awareness of all the facts] also needs to believe himself to be acting illegally if he's to be doing something deserving of punishment is to elevate a reverence for the law beyond morally tolerable bounds."). First, such cases are

has the power to excuse. Or maybe it would be more accurate to say that the retreat of the reactive emotions in the face of ignorance is some evidence that ignorance *does* excuse in morality and *should* excuse in criminal law. Moreover, although the *ignorantia* maxim is the orthodoxy (at least in Anglo-American criminal law),²⁶ it's always had its detractors. Andrew Ashworth minces no words: The doctrine that ignorance of the law is no defense is, he says, "preposterous."²⁷ Indeed, one might go so far as to say that ignorance should *always* excuse, in both morality and the criminal law (at least if it can't be traced back to a prior wrong or crime committed with a guilty mind).

Perhaps, but I won't go that far. It seems to me on reflection that our reactive emotions don't *always* retreat when we come to believe that a criminal wrongdoer didn't realize he was committing a crime, even if we assume the actor's ignorance can't be traced back to some prior culpable wrongdoing. Our reactive emotions sometimes tend to persist despite the realization that the actor never thought he was doing anything wrong. Before explaining when ignorance does and does not undermine the ascription of a guilty mind (in the next Part), I need first to be more precise about what I mean when I say an actor is "ignorant" of the "law." In what does his "ignorance" consist? Of what "law" must he be ignorant before he can be said to lack a guilty mind?

Although I'll continue to speak in terms of an actor believing (or not), or realizing (or not), or being aware (or not) that what he's doing is criminal, such terms are insufficiently precise to convey adequately what I have in mind when I describe the cognitive state an actor must have toward the fact that his conduct amounts to a crime before he can be said to have acted with a guilty mind. So let me be more precise.²⁸

Cognitive attitudes can vary along (at least) two dimensions.²⁹ First, they can vary in the extent to which an actor has confidence in the truth

bound to be rare insofar as they invite us to imagine an actor who realizes that what he's doing is seriously morally wrong but at the same time legally permissible. Second, for two ways I currently see to deal with such cases see *infra* pp. 130–31.

26. New Jersey recognizes reasonable ignorance as a defense. See N.J. STAT. ANN. § 2C:2–4(c)(3). So too (in one form or another) do Germany, Sweden, and South Africa. See ANDREW ASHWORTH, *POSITIVE OBLIGATIONS IN CRIMINAL LAW* 85–87 & n.32 (2013). In none of these places does the rule of law seem to be in any jeopardy.

27. ASHWORTH, *supra* note 26, at 81.

28. A similar problem with precision infects the distinction between the mental-state categories of recklessness and negligence. For efforts to render the distinction between these two categories more precise, see, for example, Douglas Husak, *Distraction and Negligence*, in *PRINCIPLES AND VALUES IN CRIMINAL LAW AND CRIMINAL JUSTICE: ESSAYS IN HONOUR OF ANDREW ASHWORTH* 81 (Lucia Zedner & Julian V. Roberts eds., 2012); Douglas Husak, *Negligence, Belief, and Criminal Liability: The Special Case of Forgetting*, 5 *CRIM. L. & PHIL.* 199 (2011); Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 *CRIM. L. & PHIL.* 147 (2011).

29. These two dimensions exist along a continuum, but the law (for better or worse, or perhaps necessarily) tends to deal in categories, not continua. See LEO KATZ, *WHY THE LAW IS SO PERVERSE* 181 (2011) ("The law splits hairs because it cannot do otherwise."). For a discussion of other ways in which one cognitive attitude varies from another, see Eric Schwitzgebel, *Belief*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, <http://plato.stanford.edu/>

of the proposition (*p*) constituting the content of the attitude. For example, when we say that an actor *knew* that *p*, we might mean to ascribe to him a cognitive attitude toward the truth of *p* that he holds with considerable confidence. He *knows* that *p*, whether *p* is in fact true or false.³⁰ In contrast, if we say that he *believed* that *p*, we might mean thereby to ascribe to him a cognitive attitude toward the truth of *p* that he holds with comparatively less confidence, but nonetheless enough confidence to warrant use of the term belief. Finally, if we say that he *suspected* that *p*, we might mean thereby to ascribe to him a cognitive attitude toward the truth of *p* that he holds with not much confidence at all, or at least less confidence than it would take to say that he believes that *p*, let alone that he knows that *p*.³¹

Second, cognitive attitudes can vary in terms of the extent to which the actor is aware or conscious of the fact that he has the attitude he has. If the attitude is present in the actor's mind at the relevant point in time, we can say that the attitude is *occurrent*. The actor's mind is currently—then and there—considering the proposition forming the content of the attitude. If the attitude is not present in the actor's mind at or during the time of action, but could be summoned to mind with little or no effort, we can say that the attitude is *dispositional*.³² Finally, if the attitude cannot be summoned to the forefront of the actor's mind without some appreciable effort, we can say that the attitude resides in the actor's unconscious. Unconscious beliefs can still influence what the actor (consciously) believes and does, but they exercise their influence off stage, so to speak.

Because my account of the guilty mind is meant to describe the threshold an actor must pass before losing his immunity to criminal liability, the cognitive attitude I have in mind must be just enough to cross that threshold and no more. It seems to me that an actor who *dispositionally suspects* that he is committing a crime (which proposition I will hereafter call *p*) possesses a cognitive attitude sufficient to ascribe to him a guilty mind, and thus render him criminally liable. Such an actor has some sense that he is committing a crime when he chooses to ϕ , even if that thought is not passing through his mind at the moment. Conversely, an actor is ignorant

entries/belief (last updated Nov. 21, 2010) at § 2 (“Types, Degrees, and Relatives of Belief”).

30. I realize that insofar as “knowledge” is understood to mean justified true belief, no one can be said to “know” a proposition if that proposition is in fact false.

31. Some actors who have no confidence in the truth of *p* might nonetheless hope that *p*. I'll leave aside for now whether we can ascribe a guilty mind to an actor who hopes that *p* (while neither knowing, believing, nor even suspecting that *p*). I also leave aside the problem of specifying the requisite measure of suspicion in terms of beliefs about the probability of the truth that *p*, i.e., how much suspicion is enough to warrant ascribing a guilty mind? Perhaps the most one can say here is that a suspicion is enough to warrant the ascription of a guilty mind if that suspicion would give pause to a law-abiding citizen.

32. One might also say that such an attitude is “personally available” to the actor. See Neil Levy, *The Importance of Awareness*, 91 AUSTRALASIAN J. PHIL. 211, 214 (2013) (arguing that moral responsibility requires that the moral status of an actor's act be “personally available” to the actor); Levy, *supra* note 6, at 246–47 (“Information is personally available when it is so readily available that it requires little effort to retrieve it and it is poised to guide behavior.”).

of the law if he has no cognitive attitude with respect to *p*, or some cognitive attitude not rising to the level of dispositional suspicion. For ease of exposition, I will continue to speak in terms of what an actor believes or not. Yet what I mean in so speaking is that an actor who chooses to ϕ does so with a guilty mind if in so choosing, he at least dispositionally suspects that *p*; otherwise, his mind (all else being equal) is guilt-free.

Let me now turn from the cognitive attitude needed for a guilty mind to the content of that attitude. When we say that an actor is ignorant of the law, what more precisely must he be ignorant of? What's the "law" about which I'm talking? I'm *not* talking about the specific criminal statute the actor has been charged with violating. On the contrary, all it takes for an actor to choose with a guilty mind is that he believe (i.e., dispositionally suspect) that he is committing *a* crime, even if the crime he believes he is committing is not one, or not the only one, he actually commits. He chooses with a guilty mind when, having freely chosen to ϕ , he believes he has done *something* to render himself criminally liable. An actor who chooses to ϕ , believing that in so choosing he's crossing the line into criminality, does so with a guilty mind, and in so doing, assumes the risk that the crime he actually commits will be worse than the one he believed he was committing.³³ *Versari in re illicita*.³⁴

Sound harsh? Yes, I confess. Indeed, it sounds like I'm endorsing doctrines criminal-law theorists have roundly condemned, like the felony-murder rule and the so-called legal wrong doctrine.³⁵ Both doctrines infect the criminal law with strict liability. The felony-murder doctrine imposes murder liability if you kill someone while committing a felony, even if you reasonably had no idea your conduct posed any risk to life. The legal wrong doctrine imposes liability for an unwittingly-committed greater crime if you wittingly commit a lesser crime included within it, even if you reasonably had no idea of the fact or facts that transform your lesser crime into the greater one, such as the victim's age or status.

The critics have my sympathy. If I were vested with the authority to define crimes, I'd probably require (as does the Model Penal Code) proof that an actor was at least reckless with respect to each of its material

33. For work discussing this principle, see, for example, JOHN GARDNER, *Rationality and the Rule of Law*, in OFFENCES AND DEFENCES 40–41 (2007); JOHN GARDNER, *Reply to Critics*, in OFFENCES & DEFENCES 239–80 (2007); Andrew Ashworth, *A Change of Normative Position: Determining the Contours of Culpability in Criminal Law*, 11 NEW CRIM. L. REV. 232 (2008); John Gardner, *On the General Part of the Criminal Law*, in PHILOSOPHY AND THE CRIMINAL LAW 204, 244 (Antony Duff ed., 1998); Jeremy Horder, *A Critique of the Correspondence Principle in Criminal Law*, 1995 CRIM. L. REV. 759, 764; Kenneth W. Simons, *Is Strict Criminal Liability in the Grading of Offences Consistent with Retributive Desert?*, 32 OXFORD J. LEGAL STUD. 445 (2012).

34. This doctrine apparently comes from canon law. See Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 705. Gardner states the maxim as *versanti in re illicitae imputantur omnia quae sequuntur ex delicto*, which he translates as "one acting unlawfully is held responsible for all the consequences of his conduct." *Id.*

35. The natural-and-probable consequences doctrine associated with accomplice liability is another example. See DRESSLER, *supra* note 2, § 30.05[5], at 475–76.

elements before being found guilty. But I don't have that authority. The state does. The task at hand is to identify the line dividing those who act with a guilty mind from those who don't, not to describe what I believe the state should require by way of culpability for this or that offense once that line has been crossed. The task is to describe in what the guilty mind consists as a limit on state authority, not to describe in what it should consist when the state exercises that authority.

Before moving on, consider an actor who believes that ϕ -ing is morally wrong, but is nonetheless confident that the law permits him to ϕ , i.e., he doesn't even suspect that ϕ -ing is a crime. Secure in his belief that the law permits him to ϕ , he ϕ 's. As it happens, he's mistaken. The criminal law does prohibit ϕ -ing. Our actor erroneously believes he has discovered a loophole in the law, and he exploits it. Does he choose to ϕ with a guilty mind?

In the usual case one imagines that an actor who believes that ϕ -ing is morally wrong will believe that ϕ -ing is criminally prohibited as well. But set the usual case aside. Assume we are dealing with a genuine loopholer. I can see two possible answers to our question. One is to bite the bullet. The loopholer *ex hypothesi* doesn't even suspect that ϕ -ing is criminally wrong, and thus (all else being equal) he acts without a guilty mind when he chooses to ϕ . The loopholer defies morality, but he doesn't defy the law. On the contrary, we can assume his efforts to learn what the law prohibits and what it permits is scrupulous. Indeed, the prudent loopholer needs to be scrupulous in his effort to learn the law, lest he make a mistake in pursuit of his unscrupulous ends.

But I can imagine another plausible line of reply that makes it harder for the loopholer to escape the ascription of a guilty mind. I've said that an actor chooses to ϕ with a guilty mind if in so choosing he dispositionally suspects that ϕ -ing is a crime. The object of his cognitive attitude is p , i.e., the fact that ϕ -ing is a crime. But now imagine that the object of his cognitive attitude is not the fact that ϕ -ing is a crime, but rather p' , i.e., the fact that the state, had it entertained whether or not to subject those who ϕ to criminal liability, would have done so. Our loopholer would now be able to escape the ascription of a guilty mind only if at the moment he chooses to ϕ he believes that ϕ -ing is morally wrong, and at the same time doesn't even suspect that the state, had it thought about it, would have made ϕ -ing a crime. I'd guess that few loopholers would fit that description, and if so, then few would escape liability.

IV. THE GUILTY MIND

When an actor is indeed ignorant of the fact that he's committing a crime (i.e., ignorant of the fact that p), we should ask why? *Why* did he fail to form the belief that p ? The question needs to be asked because the answer might reveal that the actor's ignorance is not exculpatory after all. His ignorance might constitute a *prima facie* excuse forestalling the ascription of a guilty mind, but if we dig deeper, we might discover that

his ignorance is itself culpable. If we travel to the source of his ignorance, we might find a guilty mind when we arrive.

Let me mention one possibility only to set it aside. I'm referring to the idea that an actor who fails to form a belief, including the belief that *p*, is culpable for failing to form that belief because, though the evidence available to him supports its formation, he *chooses* not to form it.³⁶ Any such claim presupposes that we have direct or synchronic freedom or control over what we believe. But, truth be told, we have no such freedom or control. We can't will to believe (or not). Beliefs just happen to us (or not). We can of course *do* things to influence the beliefs we form.³⁷ We have some measure of indirect or diachronic freedom or control over our beliefs, but reason is immune to the will's direct control. Reason, one might say, has a mind of its own.

When an actor is ignorant of the law, we can in principle offer one of three possible reasons to explain why. First, maybe he just didn't have available to him evidence sufficient for him to form the belief that *p*.³⁸ If the available evidence sufficed, then second, maybe he lacked the cognitive powers necessary to form the belief that *p*. If he had the requisite cognitive capacity, together with sufficient evidence, then third, maybe he lacked the quality of will necessary to form the belief that *p*. Maybe his ignorance was due, not to want of brainpower or evidence, but to the fact that his will failed to manifest virtue, and in particular, what might be called the virtue of law-abidance. We can thus trace an actor's failure to form the belief that *p* to some defect or deficiency in the quality of his *evidence*, the quality of his *mind*, or the quality of his *will*.

36. For a sampling of the extensive literature on so-called doxastic or epistemic voluntarism, see, for example, NIKOLAJ NOTTELMANN, *BLAMEWORTHY BELIEF* ch. 7 (2007); BERNARD WILLIAMS, *Deciding to Believe*, in *PROBLEMS OF THE SELF* 136 (1973); William Alston, *The Deontological Concept of Epistemic Justification*, 2 *PHIL. PERSP.* 257 (1988); Andrew Chignell, *The Ethics of Belief*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, <http://plato.stanford.edu/entries/ethics-belief> (last updated June 14, 2010); Neil Levy, *Doxastic Responsibility*, 155 *SYNTHESE* 127 (2007). We can distinguish between an actor who chooses to believe that *p*, when the evidence available to him does not support the formation of that belief, and an actor who chooses *not* to believe that *p*, when the evidence available to him supports the formation of that belief. I'm concerned here with actors of the latter sort, i.e., those who fail to form the belief that *p* when the evidence available to them otherwise supports its formation.

37. Forming cognitive attitudes has thus been compared to vomiting or digesting. See Andrei Bukareff, *Compatibilism and Doxastic Control*, 34 *PHILOSOPHIA* 143, 149 (2006) (vomiting); Brian Weatherson, *Deontology and Descartes' Demon*, 105 *J. PHIL.* 540, 541 (2008) (digesting).

38. I rely here on a theory of evidence that derives from a theory of justified belief known as evidentialism, according to which the only epistemic obligation under which we labor is the obligation to form cognitive attitudes that fit our available evidence. See EARL CONEE & RICHARD FELDMAN, *Evidentialism*, in *EVIDENTIALISM: ESSAYS IN EPISTEMOLOGY* 81, 81 (2004); Earl Conee & Richard Feldman, *Evidence*, in *EPISTEMOLOGY: NEW ESSAYS* 83 (Quentin Smith ed., 2008); Earl Conee & Richard Feldman, *Replies*, in *EVIDENTIALISM AND ITS DISCONTENTS* (Trent Dougherty ed., 2011). I say nothing in defense of this theory, nor do I try to explain what it means for one's evidence to support a particular belief, or for a particular belief to be based on one's evidence. See generally Keith Allen Korch, *The Epistemic Basing Relation*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, <http://plato.stanford.edu/entries/basing-epistemic> (last updated Jan. 21, 2010).

A. QUALITY OF EVIDENCE

Sometimes an actor's failure to form the belief that p is due to the simple fact that he lacked the evidence he needed to support its formation. He couldn't have formed the belief that p at $t=1$ because he lacked the evidence needed to support its formation, even if he would have formed it had he had such evidence.

One might nonetheless say that if such an evidence-deficient actor chooses to ϕ , he can nonetheless properly be called criminally to account because he *should* have gathered whatever evidence he needed to support p 's formation and failed to do so. According to this line of thought, he was obligated at time $t=1-n$ to gather the needed evidence, and his failure to do so renders his choice to ϕ at $t=1$ a choice made with a guilty mind, despite the fact that he was at the time unaware of the fact that ϕ -ing was a crime. The actor's ignorance of p at $t=1$ provides no excuse, as it otherwise would, because his ignorance was itself the product of his own failure to act.

The general strategy here is familiar.³⁹ It locates an actor's guilty mind, not at $t=1$, when the actor chooses to ϕ , but at a prior point in time ($t=1-n$), when he chooses to β , and his guilty mind at $t=1-n$ is then deployed to defeat his otherwise valid claim of ignorance at $t=1$. The simplest way for the criminal law to implement a tracing strategy would be to enact forfeiture rules pursuant to which an actor who lacks a guilty mind at $t=1$ will nonetheless be liable for the criminal wrong he unwittingly commits at that time if his ignorance was the product of his choice to β at $t=1-n$, where β describes some act or omission but for which the actor would not

39. The literature on moral responsibility commonly describes this line of thought as involving "tracing." For discussions of tracing in the philosophical literature, see, for example, Holly Smith, *Culpable Ignorance*, 92 PHIL. REV. 543 (1983); Carl Ginet, *The Epistemic Requirements for Moral Responsibility*, 34 NOÛS 267 (2000). The criminal-law literature tends to describe this line of thought under the heading of "*actio libera in causa*" or "causing the conditions of one's own defense." See Paul Robinson, *Causing the Conditions of One's Own Defense: A Study of the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 2 (1985). The doctrine of *actio libera in causa* is different from what criminal lawyers sometimes call "time-framing." See Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL'Y 84, 100 (1990).

Reliance on time-framing doesn't involve imputed culpability. It identifies the culpably-committed act or omission at $t=1-n$ to circumvent an exculpatory defense that would otherwise have defeated liability at $t=1$ if the relevant act or omission been portrayed as arising at that later time. Reliance on *actio libera in causa* does involve imputed culpability. It identifies a prior act or omission at $t=1-n$ as a basis upon which to withdraw an otherwise available exculpatory defense to a wrong committed at $t=1$ (and in that sense to impute culpability for the subsequent wrong on the basis of the prior act or omission), at least where at $t=1-n$ the actor had some culpable mental state with respect to the fact that his act or omission at that time would or might result in otherwise excusable wrongdoing at $t=1$. See Moore & Hurd, *supra* note 28, at 177-80 (distinguishing between these two different "tracing strategies"). How often or not we realize or should realize that what we do or not at $t=1-n$ will or might result in otherwise excusable wrongdoing at $t=1$ is a matter of debate. Compare Manuel Vargas, *The Trouble with Tracing*, 29 MIDWEST STUD. PHIL. 269 (2005), with John Martin Fischer & Neal Tagnazzini, *The Truth About Tracing*, 43 NOÛS 531 (2009), and Kevin Timpe, *Tracing and the Epistemic Condition on Moral Responsibility*, 88 MODERN SCHOOLMAN 5 (2011).

have been ignorant at $t=1$. The requisite act or omission β can describe a particular act or omission resulting in the actor's ignorance of p at $t=1$, or it can describe any act or omission creating an unjustified risk of such ignorance.⁴⁰ Likewise, β might require the actor to realize that his act or omission at $t=1-n$ will or might result in his ignorance of p at $t=1$, or it might impose strict liability with respect to that result.⁴¹ Whatever the details, a tracing strategy is viable only under the following conditions or limitations.

First, the fact that an actor β 'ed would not alone support ascribing to him a guilty mind and holding him accountable for ϕ -ing if and when he later chooses to ϕ unaware of the fact that ϕ -ing is a crime. He must in addition realize at the time he chooses to β that β -ing is, if not itself a crime, then at least a basis upon which, if he later chooses to ϕ unaware of the fact that ϕ -ing is a crime, he will nonetheless be held criminally accountable for ϕ -ing. He must in other words choose to β with a guilty mind. An actor cannot legitimately be subject to criminal liability unless at some point in the story he has made a choice realizing that in so choosing he has done something that can render him vulnerable to criminal liability. Without such a choice, he remains invulnerable. The state has no standing to call him criminally to account.

Second, when an actor chooses to β with a guilty mind and as a result chooses later to ϕ without a guilty mind the state is free to hold him accountable for both choices. The state is permitted to punish the actor, not only for having β 'ed with a guilty mind, but for having ϕ 'ed without a guilty mind insofar the latter is the but-for and proximate result of the former. Having said that, the punishment the state finally imposes on the actor for having β 'ed with a guilty mind and for having as a result ϕ 'ed without a guilty mind must not be grossly disproportionate taking into account the gravity of the act or omission β committed with a guilty mind and the gravity of the wrong ϕ arising from its commission. A state is free to adopt whatever theory of punishment it wants, but it acts *ultra vires* if the theory it embraces leads it to impose grossly disproportionate punishments.⁴²

40. In the limiting case β might consist in the actor's failure to perform some mental act that, had he performed it, would have resulted in the formation of the belief that p . For example, one might say that the actor would have formed the belief that p if he had just "stopped to think." The idea here seems to be that had the actor performed whatever mental act or acts are involved in "just thinking" he would have formed this or that cognitive attitude, which in turn would have supplied additional evidence to his mind, which in turn would have resulted in the formation of the belief that p .

41. For discussions of the various forms a tracing strategy might take, see Alexander, *supra* note 39, at 102–04; Moore & Hurd, *supra* note 28, at 177–78.

42. I realize that more needs to be said about when a punishment is "grossly disproportionate." But what needs to be said will need to wait. Perhaps the idea might also, or perhaps more honestly (if not any more determinately), be captured in the claim that punishment should not "shock the conscience" or should not "shock the conscience of a law-abiding citizen."

B. QUALITY OF MIND

If the reason an actor failed to form the belief that p is not lack of evidence, perhaps the problem lies instead with his quality of mind or reason, in the cognitive machinery through which he forms beliefs.⁴³ At the extreme we can imagine an actor lacking altogether the cognitive capacity to form the belief that p . Any evidence rationally supporting the formation of the belief that p is warped and twisted in the actor's mind such that p never forms. We'd be inclined to describe such an actor as delusional.⁴⁴ He'd fit nicely into the *M'Naughten* mold of insanity, lacking the capacity to tell legal right from legal wrong.⁴⁵ His failure to form the belief that p was beyond his cognitive reach, not only in this world, but in any nearby possible world in which his cognitive powers (such as they are) remained fixed.

Sometimes an actor will fail to form the belief that p because his quality of mind or reason was limited in some way short of complete lack of capacity. The nature or causes of such cognitive limitations are many, ranging from relatively fixed and enduring mental diseases and defects, like retardation, Alzheimer's, or other mental disorders, to relatively temporary and transient impairments arising from intoxication, fatigue, stress, and the like. The machinery through which such limited actors form beliefs is not as powerful as it might be, and as a result, they fail to form the belief that p when an otherwise similarly-situated actor with better machinery would have formed that belief. When a cognitively-compromised actor chooses to ϕ in ignorance of the fact that ϕ -ing is a crime, and when his ignorance is the result of his diminished quality of mind, can we ascribe to him a guilty mind in spite of his ignorance?

One could of course try to rely on the tracing strategy described above. Imagine an actor who drinks too much and thereby diminishes his cognitive powers compared to what they would otherwise have been had he been sober.⁴⁶ Now imagine he creates in his intoxicated state an unjustified risk of causing another's death. Indeed, the risk materializes and

43. The cognitive machinery through which we form beliefs is complex, as are the corresponding defects that can diminish the quality or efficacy of that machinery. See Moore & Hurd, *supra* note 28, at 167–68 (observing that cognitive shortcomings “are of a vast and heterogeneous sort”); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 440 (“[T]he capacity for rationality is a congeries of skills, including the ability to perceive accurately, to reason instrumentally according to minimally coherent preference-ordering, and to appreciate the significance of reasons and their connection to our actions.”).

44. What makes a “delusion” a “delusion” is controversial. See, e.g., LISA BORTOLOTTI, DELUSIONS AND OTHER IRRATIONAL BELIEFS 21–59 (2010); JENNIFER RADDEN, ON DELUSION (2010); Lisa Bortolotti, *Delusion*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/delusion> (last updated Oct. 11, 2013).

45. The canonical language from *M'Naughten's Case* does not speak in terms of an actor's lack of capacity to tell right from wrong. The test has nonetheless come to be associated with such incapacity.

46. Intoxication can of course have other effects on an actor's moral psychology. It can compromise not only the quality of his mind, but the quality of his will too. See Douglas Husak, *Intoxication and Culpability*, 6 CRIM. L. & PHIL. 363, 372 (2012) (“When intoxicated defendants commit criminal acts that express insufficient concern for the interests of

someone dies. Now imagine that the actor never realized he was creating a risk of causing death because he was intoxicated (and thus never realized he was committing a crime). Does his ignorance excuse? Not under existing law.⁴⁷ An actor who becomes voluntarily intoxicated, and thus diminishes his cognitive powers, cannot escape responsibility because those powers failed to work as they otherwise would have worked. His ignorance won't excuse.

A state could choose to generalize this strategy. It could provide that any actor who chooses to ϕ at $t=1$, but who fails at that time to realize that ϕ -ing is a crime because he chose to β at $t=1-n$, which choice diminished his cognitive powers, will nonetheless be accountable for his choice to ϕ , despite so choosing without a guilty mind. Any such effort would of course be permissible only insofar as it adhered to the conditions described above.

But what about actors whose cognitive limitations cannot plausibly be traced back to a prior choice to β ? What if their limitations are no fault of their own? Responsibility for the cognitive impairments associated with mental retardation, Alzheimer's, and other such disorders can hardly be laid at the doorstep of those suffering them, nor can those suffering from these and kindred impairments be held responsible when, as a result of them, they fail to form the belief that p .

Or can they? One might say that if an actor fails to realize he's committing a crime when he chooses to ϕ because the quality of his mind is diminished, then too bad for him. If the quality of his mind was such that he failed to form the belief that p , then (on this line of thought) his diminished powers of reason alone would warrant imputing to him a guilty mind. No tracing needed. His diminished mind might of course mitigate the measure of his guilt. Perhaps, for example, the state should offer him a partial defense of diminished capacity.⁴⁸ An actor who fails to form the belief that p due to the diminished quality of his mind nonetheless expresses (on this line of thought) insufficient concern or regard for the law and its ends, and as such, his choice to ϕ displays a guilty mind despite the fact that he had no idea that ϕ -ing was a crime.

This line of thought is hard to swallow. Michael Moore and Heidi Hurd put the point well: "[B]eing generically stupid is not a plausible vice, however undesirable such a characteristic might be."⁴⁹ I agree. I don't see how one can ascribe a guilty mind to an actor who fails to form the belief

others, we know all we need to know about them to make the required inference to the person we punish." It can also compromise his powers of self-control.

47. See, e.g., MODEL PENAL CODE § 2.08 (1985).

48. If the law recognizes diminished capacity as a defense at all, it usually limits its effect and scope insofar as it operates only to mitigate murder to manslaughter and affords a defense only to murder. For an argument to the effect that the law should embrace a generic partial defense of diminished capacity, see Stephen Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003).

49. Moore & Hurd, *supra* note 28, at 170. The Model Penal Code apparently disagrees. See MODEL PENAL CODE § 2.02 cmt. 4 (1985) ("[T]he . . . intelligence . . . of the actor would not be held material in judging negligence."). For well-taken criticism of the

that *p* just because his powers of mind were, through no fault of his own, less than we and he might wish they were. Such an actor has a stupid mind, not a guilty one. He deserves pity, not blame. He should regret any criminal wrong he does in ignorance of its wrongfulness. He should apologize and make any needed material amends. But I can't see how his choice to ϕ is one made with a guilty mind, and as such I can't see how that choice can render him liable to the state's censure, let alone the suffering that turns censure into punishment.

C. QUALITY OF WILL

If an actor's failure to form the belief that *p* arises neither from any defect in the quality of his evidence nor from any defect in the quality of his mind, the only remaining possibility is the quality of his will: the configuration of desires constituting his "will" at the moment of choice.⁵⁰ An actor might upon reflection identify with or endorse the quality of his will, or he might reject it. Likewise, the quality of his will at any moment might reflect the quality of his will over time, or it might not. The quality of his will at any moment in time might thus be consistent with his character, or it might for some reason be out of character. But the fact that an actor's quality of will at any moment in time possesses (or not) such synchronic or diachronic integrity or coherence doesn't matter to the quality of his will at that moment.⁵¹ At any point in time, the quality of an actor's will is what it is.

We can readily understand how the quality of an actor's mind can thwart the formation of the belief that *p*, but how can the quality of his will do likewise? The answer lies in the power of desire to move the mind to work in mysterious ways. Desire can distort how the actor's reason interprets the available evidence or how it tests hypotheses. It can shift the actor's attention such that some evidence becomes salient, entering the limelight of reason, while other evidence recedes into the shadows.⁵² When desire thus influences the workings of reason, an actor can end up seeing the world in ways he would otherwise not. Reason is most apt to

Code on this point, see Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 149 (2008).

50. What I have in mind can be described in various ways, e.g., an actor's "configuration of desires and aversions," his "overall motivational structure," his "overall evaluative attitudes," and so forth. See Smith, *supra* note 6, at 127, 138, 141.

51. A state might nonetheless decide, for example, that an actor who chooses to ϕ with an ill will and who identifies with his will so constituted has a mind more guilty than one who is alienated from it. The state might likewise decide that an actor who chooses to ϕ with an ill will and whose will is characteristically ill chooses with a mind more guilty than one whose will is not characteristically ill. See Sarah Buss, *Autonomous Action: Self-Determination in the Passive Mode*, 122 ETHICS 647, 658–59 (2012).

52. See generally DELUSION AND SELF-DECEPTION: AFFECTIVE AND MOTIVATIONAL INFLUENCES ON BELIEF FORMATION (Tim Bayne & Jori Fernández eds., 2008). The process I have in mind is associated with so-called "hot" (i.e., motivated) biases in contrast to so-called "cold" (i.e., non-motivated) heuristics and biases, which I consider part of our (limited) cognitive machinery.

discover the truth when the only desire at work is the desire for the truth. When other desires move the mind, reason can be led astray.

When an actor chooses to ϕ unaware that ϕ -ing is a crime, his ignorance ordinarily undercuts the ascription of a guilty mind. We've seen that one possible way to hold an actor accountable for choosing to ϕ , despite the fact that his choice was made without a guilty mind is to trace his guilt-free commission of ϕ back to his guilty commission of β . Set that possibility aside for now. We've also seen that the state cannot ascribe a guilty mind to an actor whose ignorance arises from some defect in the quality of his mind. But can the state ascribe a guilty mind when an actor's ignorance arises from a defect in the quality of his will, i.e., when the quality of his will precludes the formation of the belief that p ?

Yes, at least sometimes.⁵³ Consider an actor whose quality of will fails to conform to that of a law-abiding citizen. A law-abiding citizen embodies the virtue of law-abidance inasmuch as the quality of his will consistently displays or manifests sufficient concern or respect for the law and its ends.⁵⁴ Our imagined actor's will, in contrast, displays or manifests a reprehensible lack of such concern or respect. Compared to the law-abiding citizen, he cares too much for his own ends or too little for the law's. When the quality of such an actor's will prevents him from forming the belief that p , the actor's choice to ϕ manifests a guilty mind, even though he never realized he was crossing the line into criminality. His mind's guilt is manifest, not in any choice to defy the law's demands, since he's made no such choice, but in his failure, as a result of ill will, to appreciate

53. In the philosophical literature on moral responsibility, those who believe likewise are sometimes called "attributionists." See, e.g., T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME* ch. 4 (2008); T.M. SCANLON, *WHAT WE OWE EACH OTHER* ch. 6 (1998); Pamela Hieronymi, *Responsibility for Believing*, 161 *SYNTHESE* 357 (2008); Angela Smith, *Control, Responsibility, and Moral Assessment*, 138 *PHIL. STUD.* 367 (2008); Angela Smith, *Responsibility for Attitudes: Activity and Passivity in Mental Life*, 115 *ETHICS* 236 (2005) [hereinafter Smith, *Responsibility for Attitudes*]. In the criminal-law literature, a similar position is held among those who argue that an actor should be regarded as negligent if his failure to perceive a risk he is creating or imposing results from indifference to the well-being of others, or in other words, if he would have perceived a risk he was creating or imposing had he not been indifferent to the well-being of others. See, e.g., R.A. DUFF, *ANSWERING FOR CRIME* 296 (2007); MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* 273 (2003); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 *J. CONTEMP. LEGAL ISSUES* 365, 388 (1994); Westen, *supra* note 49, at 151. I read Dan Kahan to be making a similar point. See Kahan, *supra* note 21, at 130 ("[A] person is rightly condemned as a criminal wrongdoer not only for knowingly choosing to violate the law, but also for exhibiting the kind of character failing associated with insufficient commitment to the moral norms embedded in the community's criminal law.").

54. My description of the virtue of law-abidance is admittedly pretty vague and bare-boned. What, more precisely, does it mean to say that a law-abiding citizen has sufficient concern or regard for the law and its ends? For helpful and extended discussion of the virtue of law-abidance, which may or may not be consistent with the way in which I deploy the idea here, see William A. Edmundson, *The Virtue of Law-Abidance*, 6 *PHILOSOPHERS' IMPRINT* 1 (2006). Peter Westen's account of the "reasonable person" seems close to what I have in mind. See Westen, *supra* note 49, at 160 (A "reasonable person . . . consists of every physical, psychological, and emotional trait an actor possesses, with one exception—the exception being that he possesses proper respect for the values of the people of the state as reflected and incorporated in the statute at hand.").

the law's demands in the first place. If the criminal law calls such an actor to account, it does so not for any ill will he expresses in choosing to defy the law's demands, but for the ill will he expresses in being blind to those demands in the first place.⁵⁵

Perhaps the most powerful reply to this line of thought comes from those who insist that we can be called to account only for that over which our will *qua* executive capacity has direct control.⁵⁶ We have such control over the intentions we choose to form, as well as the special intentions called volitions that translate our intentions into actions. But we lack such direct control over our beliefs and the qualities of mind and will upon which their formation depends. We cannot at any moment in time choose the content or quality of our minds or wills. They are what they are. The state can therefore ascribe to us a guilty mind if and when we choose through the exercise of our will to ϕ , realizing that in so choosing, we are committing a crime, but it cannot do so when we choose to ϕ without realizing that we are entering criminal territory. Ignorance undermines any effort to underwrite a guilty mind, save where such ignorance can be traced to a prior guilty-minded choice.⁵⁷ No control, no guilty mind.

We shouldn't dismiss this objection lightly, but neither should we regard as self-evident the premise from which it proceeds. We often call to account in one way or another those who've wronged us, even when we realize the wrongdoer didn't realize he was doing anything wrong, at least when we suspect that his ignorance was due to the fact that he just didn't, so to speak, give a damn: when his ignorance was due to a quality of will defective in its lack of concern for others. Moreover, we regard ourselves as perfectly justified in calling such unwitting wrongdoers to account. Shouldn't the same go for the state? Shouldn't the state be permitted to call to account those who unwittingly wrong it, as long as their ignorance arises from a quality of will unbecoming a law-abiding citizen? If so, then perhaps responsibility can exist without control.

Which side has it right? Does the guilty mind consist only in choosing to ϕ where that choice is made with the realization that ϕ -ing is a crime? Or does it also consist in the choice to ϕ where that choice is made in ignorance, itself the product of an ill will? We shouldn't expect to reach consensus. The answer after all involves drawing the metaphysical bound-

55. In language likely to be more familiar to criminal lawyers, I'd say that an actor's ignorance of the law should be an excuse, unless we can characterize his ignorance as "unreasonable," and we should only characterize his ignorance as "unreasonable" if he would have formed the belief that *p* but for the fact that the quality of his will at *t*=1 failed to conform to that of a law-abiding citizen.

56. What it means to say that an actor has "control" over this or that, or to say that this or that is immune or vulnerable to "luck," is more complicated than it might at first appear. Having said that, I hope the argument made in the text can for now do without an extended inquiry into the meaning or meanings we can attach to the concept of "control." For a helpful description of the conceptual landscape, see generally Michael J. Zimmerman, *Moral Luck: A Partial Map*, 36 CAN. J. PHIL. 585, 590-94 (2006).

57. For example, if he has diminished the force of countervailing desires as a result of self-induced intoxication. See Husak, *supra* note 46, at 373 ("[I]ntoxication frequently alters the degree of care we exhibit for the interests of others.").

aries of the responsible self.⁵⁸ Can we bear responsibility for the wrongs we choose to do only if we realize we are choosing to do wrong? Is the responsible self confined to the will *qua* executive capacity? Or can we also bear responsibility for the quality of our will, at least when the quality of our will is ill and blinds us to the wrong we do? Does the responsible self also include the will *qua* conative capacity?

Insofar as my aim here is to describe the threshold or minimal conditions necessary for the ascription of a guilty mind, I'm presently inclined to believe that when an actor chooses to ϕ but does so unaware of the fact that he is committing a crime, the state can fairly ascribe to him a guilty mind, despite his ignorance, if his ignorance itself arises from an ill will.⁵⁹ A state could of course choose to impose additional limits on when it will ascribe a guilty mind. It could choose, for example, to ascribe a guilty mind only to actors who choose to ϕ realizing that ϕ -ing is a crime. But it remains within the bounds of its authority if it chooses instead to include among the guilty-minded those whose choice to ϕ is made in ignorance, itself resulting from an ill will.

Now, some cases in which an actor fails to form the belief that *p* may *appear* to be cases in which the actor's ignorance results from an ill will, but appearances can sometimes be deceiving. The quality of an actor's will consists, as I've said, in the configuration of desires influencing at any given moment the way in which the actor's mind forms beliefs based on the evidence available to him at that moment, and sometimes, as I've said, those desires can preclude the formation of the belief that *p*. Yet sometimes an actor's ignorance results not from the net effect of the desires constituting his will but from the undue influence of a single de-

58. See Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 961 (1992) (describing a "constitutive paradigm" of responsibility that "enables us to reinterpret disputes about the ascription of responsibility as reflecting the plasticity of the self and as involving a negotiation over the self's relevant boundaries"); Smith, *Responsibility for Attitudes*, *supra* note 53, at 263 (arguing that attributionism "gives us a satisfying account of the boundaries of the moral self . . . [and that t]heories [of responsibility that] make choice or voluntary control a precondition of moral responsibility . . . leave us with an impoverished conception of moral personhood.").

59. This claim presupposes that an actor is responsible for the quality of his will. If one asked why that should be so, one answer would be that we are responsible for the quality of our wills because we just *are* our wills. See MICHAEL MOORE, *PLACING BLAME* 569 (1997); Dan-Cohen, *supra* note 58, at 974. Drawing inspiration from the so-called manipulation argument, see, e.g., ISHTIYAQUE HAJI, *INCOMPATIBILISM'S ALLURE* 119–20 (2009) (formulating the argument), some philosophers (sometimes called source incompatibilists) nonetheless insist that determinism undermines the proposition that we are responsible for the quality of our wills, and as such, no one is responsible for the quality of his will, nor for his acts or omissions. See, e.g., DERK PEREBOOM, *LIVING WITHOUT FREE WILL* (2001). The debate between those who claim we can be responsible for the quality of our wills and those who claim otherwise focuses on which, if any, historical causes but for which the quality of one's will would be otherwise than it is undermine one's responsibility for the quality of one's will, and which do not. Some maintain that responsibility for who we are and what we do is or can be vulnerable to the vagaries of one's history, while others maintain that the historical story behind who we are and what we do is (more or less) neither here nor there. A full defense of the position I describe in the text would need to defend the claim that we can be responsible for the quality of our will, but that defense will need to wait for another occasion.

sire (or some sufficiently small subset of desires). If so, it would be a mistake to attribute to him an ill will when in ignorance he chooses to ϕ . The culprit in such cases is not the actor's will. The culprit is a *part* of his will, and a part doesn't fairly reflect the whole.⁶⁰

Let me try to describe two such cases: one involving what might be called a *rogue* desire, the other what might be called a *pathological* desire. In both cases, a single desire manages to capture the actor's reason, focusing its light on some of the evidence available to the actor, while casting other evidence into darkness. As a result countervailing desires never have their day in reason's court. They never get the chance to direct the actor's reason to evidence that would have lead the actor to realize that ϕ -ing was a crime.

Consider so-called rogue desires. Suppose an actor fails to form the belief that *p*, not as a result of the quality of his will, but as a result of a single desire that somehow succeeds in commandeering the actor's reason, focusing or directing it such that some of the evidence presently available to the actor becomes salient and other evidence obscured. This single desire for some reason manages to exercise its influence without any countervailing desires managing to exercise their influence in the opposite direction. As a result, the actor fails to form the belief that *p*. The actor's failure to realize he is committing a crime thus reflects the work of a single rogue desire, not the quality of his will as such. His ignorance tells us something about the actor, but it doesn't tell the full story, which is the story we need in order to impute to him a guilty mind when he chooses to ϕ unaware of the fact that in so doing he is entering criminally forbidden territory.⁶¹

A metaphor might help. Imagine a stage, and imagine the forthcoming performance includes many different actors. Now imagine that one member of the ensemble darts out on stage and starts a soliloquy telling the

60. See Smith, *supra* note 6, at 140 (arguing that an actor is blameworthy for a "bad," "non-voluntary response" to a "situation" just in case that response arises "solely" from the actor's "desires and aversions" and those desires and aversions "represent a sufficiently complete set of [the actor's] desires and aversions which are relevant to [the] situation"). How can we tell whether or not an actor's ignorance is the result of a rogue desire? All else being equal, an actor's ignorance is less likely to have been just the result of a rogue desire if the actor characteristically or routinely fails to form the belief that *p* when the evidence otherwise supports its formation, or if the actor's failure to form the belief that *p* is part of a pattern of such failures. See Levy, *supra* note 6, at 252-53. One might also ask a counterfactual question: Would the actor have chosen to ϕ if he realized that ϕ -ing was criminal? See Smith, *supra* note 6, at 143-44. If yes, then all else being equal, the actor's ignorance is again less likely to have been just the result of a rogue desire.

61. An analogy can, I think, be drawn here to cases involving actors who commit crimes while asleep, unconscious or hypnotized. Such cases are commonly thought to be cases in which the criminal law's voluntary act requirement is unsatisfied, not because the actor's body moves in the absence of volition or volition-like states causing that movement, but because, as Michael Moore has put it, "[c]onsciousness seems essential as part of our self-boundaries, so that if *we* (our conscious selves) are asleep or are otherwise not active, then *we* don't will anything—even if volition-like states execute certain of our background states of desire, belief, and general intention." MICHAEL MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 257 (1993) (emphasis in original).

audience to direct its attention this way or that. The audience naturally does as the rogue performer directs. A rogue desire is like the rogue performer, and reason is like the audience. The rogue performer steals the attention of the audience much as a rogue desire steals the attention of the actor's reason. What the audience sees under the influence of the rogue performer is not what it would have seen had the entire cast of performers been on stage. Likewise, what reason sees under the influence of a rogue desire is not what it would have seen had the actor's entire cast of desires taken to the stage of his mind.

Next, consider so-called pathological desires. Here the problem is not so much that a single desire manages to commandeer the actor's reason without other desires managing even to make it on stage. The problem is that a single desire manages to command the attention of the actor's reasons inasmuch as it drowns out any effect the actor's other desires might otherwise have had. It succeeds in overwhelming or silencing them such that, once again, the actor's reason attends only to that which a single desire directs its attention. A single desire has once again assumed an outsized role in the actor's psyche such that the actor's failure to form the belief that *p* reflects not so much the quality of his will as it does the undue influence of a solo desire.

But what kind of desire could have such influence? An unsatisfied desire can cause disappointment, dismay, sadness, anxiety, and so forth. But it sometimes does more. It sometimes causes *pain*. Not just any old pain, but unremitting, intense, hegemonic pain.⁶² Once in the grip of such pain, one can think of nothing else.⁶³ We might imagine that only so-called "abnormal" desires associated with paraphilias or phobias, or perhaps those associated with addiction, can cause such pain. Perhaps, but it seems to me that *any* desire causing such pain deserves for that reason to be called pathological,⁶⁴ and when such a desire takes command of an actor's reason and causes him to fail to form the belief that *p*, it would be a mistake to ascribe to him a guilty mind. A pathological part of his will

62. See Buss, *supra* note 51, at 662 (observing that "'clinical depression' is far more debilitating than the 'depression' of one who feels 'low' or 'down in the dumps' . . . largely, if not entirely, because the former condition is more unremitting, more intense, more hegemonic"). Pain of this sort is not just something one takes into account in forming one's beliefs or deciding what to do; it determines what one takes into account in the first place. See *id.* at 670. How much pain must an unrequited desire cause before it deserves to be labeled "pathological"? A bright line here would be nice, but alas, none is to be had. See *id.* at 675 ("[T]here is no determinate, specifiable point at which a 'personality trait' becomes just extreme enough to qualify as a trait of 'pathology.'")

63. See *id.* at 667 ("Sickness is like a hostile takeover in which the part of your mind which hurts manages completely to dominate and silence the rest of you.") (quoting WILFRED SHEED, *IN LOVE WITH DAYLIGHT: A MEMOIR OF RECOVERY* 21 (1995)).

64. See Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1634 (1994).

Although I am sympathetic to claim that the rationality of desires or ends is difficult to assess, I am finally convinced, by malignantly circular reasoning perhaps, that it must be irrational to want to produce unjustified harm so intensely that failure to satisfy that desire will create sufficient dysphoria to warrant an excuse.

Id.

has produced his ignorance, but a pathological part of an actor's will isn't really part of *his* will at all.⁶⁵

Return to the stage metaphor. Unlike a rogue desire, which rushes to take to the stage alone, leaving the other performers in the wings, a pathological desire is one that takes to the stage along with all the other performers in the show. Nonetheless, unlike the other performers with whom he shares the stage, a pathological performer appears, not with a microphone in hand, but with a bullhorn. He delivers what's in effect a soliloquy, drowning out anything the other performers might have to say, and as a result the audience hears nothing else. Likewise, when a pathological desire takes to the stage, the pain it produces when left unsatisfied leaves the actor's reason attending to nothing else. The pathological desire prevents the actor's reason from acknowledging evidence that would otherwise have produced the belief that *p*.

Let me now switch gears to make a final point. I've proposed that the state is free to ascribe a guilty mind to an actor whose choice to ϕ is done in ignorance of the fact that *p*, provided the actor's ignorance reflects an ill will (and not just the malign effect of a rouge or pathological desire). Such an actor is criminally liable in the eyes of the state. But *being* criminally liable is one thing. *Holding* such an actor liable is another.⁶⁶ What does it mean for the state to hold an actor criminally liable? What options does a state have when it decides to hold liable an actor who has chosen to ϕ with a guilty mind and thereby rendered himself liable to be so held?

The first thought that comes to mind when we ask how a state holds someone criminally liable is punishment. Saying that an actor is criminal liable is commonly understood to mean that the state is morally permitted to impose on him some form of punishment. Nonetheless, criminal liability need not be understood as liability to punishment, and indeed, it shouldn't be so understood when an actor chooses to ϕ without forming the belief that *p*, and where the ascription of a guilty mind therefore rests on the fact that he failed to form that belief as a result of ill will.

Punishment is conventionally, if not uncontroversially,⁶⁷ understood as

65. See Buss, *supra* note 51, at 660 (“[T]here is an important respect in which even well-integrated, long-standing psychological and physiological conditions are external to a human agent’s identity insofar as they are causes or symptoms of human malfunctioning.”); *id.* at 668 (Sickness “is an attack on a person by something *external* to the human being she truly is.”) (emphasis added).

66. See, e.g., Angela M. Smith, *On Being Responsible and Holding Responsible*, 11 J. ETHICS 465, 467 (2007) (arguing that “we must be very careful about drawing any conclusions about a person’s responsibility and culpability for a thing from our intuitions about whether and when it would be appropriate for a particular person to ‘hold’ her responsible for that thing.”). For a response to Smith and defense of the position associated most prominently with P.F. Strawson and R. Jay Wallace (according to which the norms of appropriate *holding* are taken to be constitutive of *being* responsible), see Chauncey Maher, *On Being and Holding Responsible*, 12 PHIL. EXPLORATIONS 129 (2010).

67. Recent challenges come from Vincent Chiao, *Punishment and Permissibility in the Criminal Law*, 32 LAW & PHIL. 729 (2013), and Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1 (2012). Both challenges presently strike me as efforts aimed (not without reason) at conceptual revision rather than conceptual analysis.

the intentional infliction of some hardship, burden, suffering, and so forth on a culpable wrongdoer for the wrong he culpably committed with the intent thereby to censure or condemn him for that culpably-committed wrong. So understood punishment has two parts: hardship and condemnation. But we can easily separate the hardship associated with punishment from the condemnation associated with it. The state can express censure or condemnation in the form of a criminal conviction without imposing any (additional) hardship or suffering.⁶⁸ Criminal liability necessarily renders an actor liable to a judgment of conviction, but it needn't also render him liable to punishment. Indeed, efforts to justify punishment are efforts to justify, not condemnation or censure, but the hardship or suffering that when added to condemnation or censure produce punishment.

When an actor chooses to ϕ without realizing that ϕ -ing is a crime, and when his failure to so realize is due to ill will, he has thereby rendered himself liable to the state's censure, but has he also rendered himself liable to its punishment? I don't think so.

The quality of will he reveals in his choice to ϕ warrants *some* response, but insofar as he chooses to ϕ without being aware that ϕ -ing is a crime, he hasn't *defied* the law. He hasn't chosen to ϕ realizing that the law demands that he not so choose. If he had been aware he *might* of course have chosen to defy the law, but the fact remains he wasn't aware and didn't so choose. The extent to which the state can hold him to account should thus be limited to the expression of censure.⁶⁹ The state can convict and thereby condemn an actor for choosing to ϕ with a guilty-but-unwitting mind, but it can convict and *punish* him only when he chooses to ϕ with a guilty-and-witting one. Punishment should be limited to those whose disregard for the law takes the form of defiance.⁷⁰

68. The state can also do the reverse. It can impose hardship without condemnation, in which case we should call the hardship something other than punishment. *See, e.g.,* Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 398 (1965) (characterizing such impositions as "penalties").

69. How might this proposal play out in the real world? I imagine something like this. The actor is charged with ϕ -ing. He interposes a defense based on reasonable ignorance of the law (as herein understood). The jury would be asked specifically to accept or reject the defense. If the defense is accepted, the defendant is acquitted. If the defense is rejected, the jury would have to say why. If it was rejected because the defendant realized he was doing something criminal, then the defendant would be convicted of ϕ -ing and would thereby become liable to punishment. If it was rejected because the defendant didn't realize he was doing something criminal, but failed to so realize due to ill will, then he would be convicted of ϕ -ing but would only be liable to censure.

70. More needs to be said here about *why* the state's response to the defiant can involve punishment, while its response to the non-defiant must be limited to censure. My sense is that imposing the hardship or burden or whatnot associated with punishment is simply *unfair* unless the actor has had a fair opportunity to avoid it, and he's had no such opportunity unless he realized he was doing something to put himself at risk of being on the receiving end of such hard treatment. In any event, the claims made in the text presuppose that wrongful actions performed in ignorance of the fact that *p*, provided the actor's ignorance arises from ill will, are sufficient to warrant the ascription of a guilty mind, a judgment that the actor is blameworthy, and the expression of that judgment in the form of a criminal conviction. Moreover, when the state convicts such an actor and thereby ex-

One might object that a liberal state worthy of the name cannot countenance the censure, let alone the punishment, of an actor *for* the quality of his will, ill or otherwise.⁷¹ It cannot countenance censuring, let alone punishing, an actor who chooses to ϕ unaware of the fact that ϕ -ing is a crime even when his ignorance results from ill will, because doing so would in reality amount to punishing him for being who he was at the moment he so chose, inasmuch as he just was his will at that moment. A liberal state, the objection continues, can only censure or punish its citizens for what they choose to do or what they choose not to do, but it cannot censure or punish them for who they *are*. It can censure and punish its citizens for the choices they make, but not for the quality of their wills, no matter how ill those wills might have been.

But an actor who chooses to ϕ and whose ill will renders him ignorant of ϕ 's status as a crime is not being censured *just* because the quality of his will failed to synch with that of a law-abiding citizen. A state should indeed have its liberal credentials confiscated if it punished, or even only censured, its citizens just because the quality of their wills at any particular moment happened not to manifest the virtue of law-abidance. An ill will alone doesn't give a liberal state permission to condemn, let alone punish. But an actor who chooses to ϕ in ignorance of the fact that ϕ -ing is a crime, and whose ignorance arises from ill will, is not vulnerable to state censure just because he lacks virtue, just because his ignorance arises from an ill will. He becomes thus vulnerable only when he *chooses to* ϕ , albeit a choice made in ignorance of the fact that ϕ -ing is a crime.

But this reply gives rise to another objection. Consider two actors A and B. Assume that A's will and B's will at time *t* are both equally ill. As it happens B never finds himself in circumstances in which he chooses to ϕ having been blinded as a result of his ill will to the fact that ϕ -ing is a crime. Lucky B. A isn't so lucky. He finds himself in circumstances in which his ill will does indeed blind him to the fact that ϕ -ing is a crime and he chooses to ϕ in blissful ignorance of that fact. A and B are equally lacking in virtue. Both possess an ill will. Yet only A finds himself convicted and condemned for the ill quality of his will, and he find himself in that predicament only because he was unlucky enough to have found himself in circumstances in which his ill will blinded him to the fact that ϕ -ing was a crime. Criminal liability, one might say, should be immune from luck, at least from such circumstantial luck. Thus, if the state cannot punish B, then neither can it punish A, because the only thing separating them is luck.

Some theorists insist that luck should indeed be irrelevant to the criminal law. Lotteries should have no place in the distribution of punishment.

presses censure, its expression should not be understood as consisting in (merely) the expression of an aretaic judgment, but in the expression of blameworthiness.

71. See Moore & Hurd, *supra* note 28, at 173 (arguing that "punishing people for bad character (either directly or indirectly by punishing people for harms that are the product of character-related inadvertence) . . . [is] incompatibl[e] . . . with the philosophical tradition of political liberalism to which American law generally pays homage.").

The criminal law should thus be structured in such a way that criminal liability is immune to luck. Others believe that the influence of luck cannot be expunged from the criminal law, and as such, the criminal law needs to make peace with luck. Criminal liability needn't be immune to luck because it can't be. But luck's role in the criminal law is one on which reasonable minds notoriously disagree.⁷² In what does luck consist? Can a criminal law be written in which criminal liability depends in no way on luck? If it can be, should it be? Good questions, and disagreement on how to answer them is likely to persist. Yet such persistent disagreement and the need to settle it, however provisionally and tentatively, is the good we gain from having a state vested with authority.

If so, then the state gets to decide what role luck will play when it turns its attention to A. Perhaps the state will decide that luck should have no role, and that if it cannot punish B just because he had an ill will, then neither can it punish A just because he was unlucky enough to find himself in a situation in which his ill will blinded him to ϕ 's criminality. But the state might decide otherwise. It might decide that luck isn't irrelevant. It might decide that A's ill will, together with his choice to ϕ , suffices to render him liable to its censure, and if it does so decide, it can keep its liberal credentials. It will not have censured A *just* for the quality of his will. It will have censured A for the choice he made to ϕ , albeit a choice made in ignorance resulting from ill will.

V. CONCLUSION

Deep within the criminal law rest two time-honored Latin maxims. The first we know as *actus non facit reum nisi mens rea*. I've suggested that we should understand this maxim as a limit on the state's authority to subject its citizen to criminal liability in whatever form. It bans the state from censuring, let alone punishing, those who choose to commit a crime unless in so doing they manifest mens rea, or a guilty mind, understood as an insufficient regard for the criminal law and its ends, or what in an older lexicon might have been described as a vicious or ill will.

The second we know as *ignorantia legis neminem excusat*. I've suggested that this maxim, at least as commonly understood, conflicts with the first, and that the mens rea maxim should prevail. Despite its longevity the *ignorantia* maxim is misguided. Ignorance of the law *does* excuse. Except when the actor's ignorance can be traced to a prior breach itself committed with a guilty mind, or when his ignorance itself manifests the ill will that marks the presence of a guilty mind, ignorance of the law entails the absence of mens rea. *Ignorantia legis excusat*.

72. For a recent entry in the ever-ongoing debate, see, for example, Kenneth Einar Himma, *If You Ain't in Prison, You Just Got Lucky: Luck, Culpability, and the Retributivist Justification of Punishment*, 1 JURISPRUDENTIA (forthcoming 2014).

