FOREWORD

ADJUDICATING THE GUILTY MIND

SAMUEL W. BUELL* AND LISA KERN GRIFFIN**

Criminal law seems to continue always on its long march, which began at least in the distant reaches of the English common law, toward more particularized and theorized doctrines of mental state. In a growing class of cases in criminal adjudication in the United States today, liability turns hardly at all on the act done or the harm caused. Instead, the conception, definition, and resolution of many cases focus on questions about the defendant's thoughts and intentions. With white collar offenses such as fraud, corruption, and obstruction, for example, the victim is often a constructed one. Culpability turns not on what "really happened" to the financial markets, or the body politic, or the investigative process, but on the formation of a guilty state of mind. Defining mens rea clearly and adjudicating it accurately have long been problems where the law requires separation between knowing and hapless actors, or between states such as premeditation and heat of passion. But old puzzles have taken on new significance as the criminal justice system advances into more realms occupied predominantly—sometimes completely—by the question of the guilty mind.

The May 2011 "Adjudicating the Guilty Mind" conference at Duke University School of Law started from the premise that making dispositive mental state determinations requires greater sophistication with respect to both substance and procedure. That conversation, like the Symposium issue that follows, sought to bring different methodologies and perspectives to bear on the difficult question of how the public perceives culpability, how the law defines it, and how the justice system identifies it in a given case. Looking through various lenses—including social and cognitive psychology, moral philosophy, economics, and empirical studies of jury decisionmaking and judicial behavior—the authors offer new ideas about what the criminal law's increasingly heavy reliance on mental state means and requires.[1]

The conversation begins with the question of what a culpable mind consists

of, in terms of how laypersons observe and understand wrongdoing itself. Janice Nadler's article, *Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame*, evaluates how perceptions of moral character relate to conclusions about culpable mental state. Nadler reports experimental findings that more blame falls on a person with a flawed moral character than one perceived as virtuous, even holding actions and the consequences of those actions constant. Legal judgments of culpability thus interact with negative moral emotion, and particularly the extent to which a defendant is viewed as a "bad person." This result obtains not only for flaws like drug addiction and abusive parenting but also for mildly undesirable traits like unreliability. Increased moral emotion in turn leads to more punitive attributions of blame, both within the legal system and outside of it. Moreover, moral emotion affects decisions about causation and intent. Nadler further finds that when character differences are made explicit, inferences about general virtuousness have less influence on perceptions of blame. Nadler, with others in this discussion, raises serious challenges to the criminal law's project of using mental state definitions to discipline adjudication, while forcing us to examine our assumptions about the nature of the inputs into conventional conceptions of mental state.

Moral intuitions have particular salience in the realm of white collar offenses, where the conduct itself may be morally ambiguous, and the line between criminal and noncriminal conduct is most difficult to draw. Stuart Green and Matthew Kugler report an empirical study asking different questions that are nonetheless similarly freighted with the social process that constructs culpability. In *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud*, they query how community attitudes with respect to white collar offense conduct relate to the legal distinctions between crimes. Their experiments use factual scenarios drawn from the elements of fraud, perjury, and bribery offenses. According to their findings, moral intuitions about the boundaries between criminal and noncriminal behavior do not correlate with current doctrinal distinctions. Although subjects can make fine distinctions about culpability, only some of their instincts find expression in legal doctrine. With respect to perceptions of fraudulent conduct, the notion that core misrepresentations are more blameworthy than extraneous ones is consistent with a line that the law itself draws. But when it comes to the contours of the perjury offense, respondents do not concur in the doctrinal distinction between "literally false" and "literally true but misleading" statements. Lay observers perceive closer equivalence between lying in court and lying during investigations than the law recognizes. Green and Kugler also report that moral intuitions are expansive with respect to corruption. Commercial bribery and payments to public officials in exchange for non-official acts appear equivalent to bribery, even though neither falls within the current scope of federal prohibitions.

The discord between moral intuitions and legal line drawing underscores the importance of striving to clearly and carefully define offenses that capture an appropriate level of culpability. In *Corrupt Intentions: Bribery, Unlawful*

Gratuity, and Honest-Services Fraud, Alex Stein critiques the doctrinal boundaries that apply to a particular cluster of white collar offenses. He argues that the Supreme Court has mistakenly limited the scope of its interpretations of the statutes criminalizing bribery, gratuity, and honest-services fraud, by excluding a variety of off-market transactions that benefit public officials and private individuals at the government's expense. Stein contends that a necessary and sufficient corrupt state of mind can be inferred from the economics of a transaction. Any exchange with what he terms a "two-sided off-market benefit" necessarily contains the intent to give and receive a bribe or unlawful gratuity. That intent makes criminal sanction appropriate because it introduces a force or artifice to the transaction that market mechanisms cannot control. This economic understanding of the offense and Stein's market-focused criterion offer one approach to identifying clear signals of a guilty mind that can define liability in a traditionally murky area of the law.

Kim Ferzan considers the guilty mind in terms of cognitive capacity, evaluating the distinction between intention and premeditation with the tools of analytic philosophy. Her primary focus is not the morally ambiguous terrain of white collar offenses but the question whether the most culpable killings are those in which the guilty mind includes premeditation. In Ferzan's view, the premeditation concept is not capable of adjudicating culpability, and *Plotting Premeditation's Demise* imagines a spectrum of culpability that would better account for the nature of decisionmaking in the relative evaluation of homicides. Premeditation, she argues, is both over and under-inclusive in terms of capturing the most culpable actors. Intent formation of any kind involves some additional deliberation, and that closely resembles premeditation. As a result, lawmakers have failed to define premeditation adequately, and fact finders struggle to apply the distinction consistently. Culpability is better understood, in Ferzan's view, as something that can be graded according to a variety of factors that increase responsibility for bad choices. Although premeditation speaks to the amount and timing of an actor's deliberation, it does not address the level of indifference involved. Considering instead the gravity of risks imposed, the reason for imposing them, the defendant's attitude toward the killing, and the nature and extent of a defendant's reasoning process would better address retributivist goals.

Darryl Brown's article shifts the focus from the substance of mens rea standards, and their application by factfinders, to judicial failure to determine which elements of crimes, particularly federal crimes, carry mens rea elements at all. Despite the widely held view that punishment ought to be proportional to fault—and that one who intends a bad result demonstrates more fault than one who intends conduct but not the result it causes—Brown explains that federal courts largely interpret statutes to impose mens rea requirements only as a question of threshold culpability, or eligibility for punishment, and then disregard mental state when it comes to the magnitude of punishment. Mens rea requirements thus apply only to some elements of an offense, with other elements treated as imposing strict liability even if those elements have

substantial normative significance. In *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, Brown explores this inconsistency through a close analysis of several cases, a contrary approach taken by the Supreme Court in a recent case extending a mental state requirement to all significant offense elements, statutory drafting conventions, and canons of statutory construction. He observes that conflicting rules and incompatible institutional preferences about the strength and scope of mens rea elements relate to longstanding puzzles and debates in the criminal law, such as the moral luck problem. More reliable interpretive practices, Brown concludes, could both give better effect to congressional intent and rest the content of federal criminal statutes on more normatively sound accounts of culpability.

The article that we co-authored, *On the Mental State of Consciousness of Wrongdoing*, describes and examines a trend in white collar adjudication to respond to difficulties of definition and line drawing by requiring that an actor have been "conscious of wrongdoing" before imposing criminal liability. Evaluating awareness of wrongdoing captures many of the moral intuitions explored by Nadler, and Green and Kugler; the quality of deliberation concept that Ferzan emphasizes; and some of the normative commitments that Brown explores as well. This mens rea tool can usefully disentangle white collar offense conduct from the benign or beneficial economic activity in which it is often embedded. And using consciousness of wrongdoing as a sorting mechanism arguably fits with justifications for and principles of punishment sounding in blameworthiness, deterrence, and notice requirements. In application, however, a consciousness of wrongdoing standard confronts difficulties with evidence and narrative-based decisionmaking. Factfinders tend to construct mental states from preexisting paradigms of wrongdoing and to rely on their own experiences and emotions. The consciousness of wrongdoing concept licenses the creation of templates for wrongful conduct and stories of moral failing that may pose particular dangers to accuracy. It is precisely when mental state does the most work—marking the only boundary between criminal and noncriminal conduct—that the hazards of associative factfinding loom largest. We suggest, however, that clarity about the content of a consciousness of wrongdoing element, and attention to the mechanics of introducing and reviewing evidence of its presence in a given case, could mitigate these concerns.

Dan Simon asks still broader questions about whether the process of adjudication functions with the precision and accuracy that imposing criminal punishment requires. In *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, Simon reviews the psychological research on decisionmaking and identifies failures in several mechanisms thought to heighten accuracy: cross-examination, jury instructions, jurors' assurances of impartiality, burdens of proof, jury deliberation, and appellate review. Each of these points in the trial, he argues, has limited effectiveness and the occasional detrimental effect. He attributes the poor diagnosticity of the trial to factors such as informational asymmetry on cross; the contorted language of instructions; the failure to provide factfinders with examples, written

instructions, and the opportunity to deliberate before voting; and the need for mechanisms apart from instructions, such as more careful screening of extra-evidential information before it reaches the jury. Simon also advocates more transparent investigations and suggests that epistemic competence turns on interactions far earlier in the process. His comprehensive look at the failure to assure accuracy underscores the acute systematic difficulty in correctly constructing, labeling, and recognizing mens rea.

As with many such projects, the rich conversation that unfolded at the conference and the articles published here do much more to frame the challenges than to provide solutions. Decisionmaking in the criminal justice system—about whether to punish and about how much to punish—turns increasingly on inquiry into the mind. Each of these articles, from different perspectives, illustrates the importance of understanding what a guilty mind is or should be, translating those insights into legally operational concepts, and improving the accuracy with which legal actors treat the ever-growing class of criminal cases that pivot on states of mind.