THE AUTHOR RESPONDS: CULPABILITY THEORIES IN EXTREME CASES

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I am delighted with the thoughtful contributions in this symposium. I am immensely grateful to Meg deGuzman and to Temple University Beasley School of Law for arranging an engaging workshop and symposium. The participants are a group of leading scholars in this hemisphere who are ideally suited for the intersection of ideas in *Justice in Extreme Cases*. I am honored that these scholars gathered together to engage with this book, and I learned a great deal from the deliberations. It was also a wonderful group of colleagues for one of the last in-person gatherings before the era of social distancing. The contributors take up different threads of the book and explore in different directions, which is surely the ambition of any author of a book like this.

Justice in Extreme Cases draws on multiple fields, including, inter alia, international criminal law (ICL), criminal law theory, and different branches of philosophy.[1] To remain manageable in a single book, I had to narrow my topic to one sub-set of criminal law theory: the deontic (non-consequentialist) constraints of justice. That topic is vast and intricate. I often had to compress into a few pages topics that could easily warrant a much more granular treatment, and about which I had more to say. I had to strike balances between different audiences with different interests: some readers would wish to see more on the legal prescriptions, others would prefer more on the theoretical underpinnings.[2] The book is merely an initial foray, introducing a framework for this type of inquiry and showing its possible implications.

In my book, I talk about the importance of conversation. A book itself is not a final word; it is just one contribution to a continuing conversation.[3] In response to thoughtful questions and challenges, the author may (a) *rethink* conclusions, (b) *clarify* arguments, or (c) *expand* on underpinnings. Each of these responses leads to new and better debates. This symposium is an instantiation of that dialogic process.

Several contributors press further with the book's ideas, exploring underpinnings or implications. For example, Adil Haque[4] brilliantly unpacks the question: What is the basis for judges to engage in deontic analysis?[5] He surveys the

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1. DARRYL ROBINSON, JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW 18–19 (2020).

2. *Id.*

3. *Id.*

4. Adil Ahmad Haque, *Jurisprudence in Extreme Cases*, 35 TEMP. INT'L & COMPAR. L.J. 11 (2021).

5. By "deontic" analysis, I mean analysis that focuses not on technical legal arguments (source-based analysis) or on consequences, but on the principled constraints that limit a justice

main accounts, shows that each has challenges, and he does so better than I did or could have done.[6]

Elena Baylis[7] shows that hybrid tribunals may be uniquely interesting venues for conversations that explore principles, because hybrid tribunals actively and consciously draw on different sources and traditions (national and international) to develop convincing accounts. I agree that hybrid tribunals may be particularly promising sites, worthy of greater study, for the reasons she gives.[8]

Caroline Davidson[9] takes up the invitation to use additional challenges of ICL to explore underpinnings of principles and thereby to develop new formulations. She does so with the principle of strict construction—she unpacks the considerations much better than I did in my short foreshadowing and offers a more nuanced set of considerations that could inform interpretation.[10]

Alexander Greenawalt[11] presses further in analyzing two doctrines that I only touched briefly on: joint criminal enterprise (JCE), and aiding and abetting. He convincingly shows that some broad complicity doctrines are of course needed in ICL; the challenge is finding the defensible parameters. He cogently canvasses some of the problems and possible solutions.[12]

Diane Marie Amann[13] voices important concerns about some tendencies in some scholarship and jurisprudence: to favour the most rigorous (or rigid) conceptions of the most well-resourced national systems, standards which are unknown in other systems and which may not even be met in practice, or which may not be sound transplants to ICL. She urges that a conception of command responsibility should acknowledge its origins in international humanitarian law, that the privileges of combatants are rightly accompanied by special duties, and that the

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system's license to punish individuals, such as the principles of personal culpability or legality. ROBINSON, *supra* note 1, at 9.

6. Adil correctly anticipates that I would resist a single foundational jurisprudential theory, although I also agree it is valuable to explore these underpinnings and problems. Adil rightly notes a problem with a positivistic account, when I rely on "context" to draw in fundamental principles, and he suggests that compliance with principles might instead be part of the purpose. *See* Haque, *supra* note 4, at 17. This is an excellent point. On the other hand, for the ICC, principles may indeed be part of the "context," given their recognition in applicable instruments. *See, e.g.*, Rome Statute of the International Criminal Court art. 11, 20–24, July 17, 1998, 2187 U.N.T.S. 38544, (entered into force July 1, 2002); *see also* INT'L CRIM CT., RULES OF PROCEDURE AND EVIDENCE (2d ed. 2013).

7. Elena Baylis, *Extreme Cases in Hybrid Courts*, 35 TEMP. INT'L & COMPAR. L.J. 95 (2021).

8. *Id.*

9. Caroline Davidson, *Strict Construction, Deontics, and International Criminal Law*, 35 TEMP. INT'L & COMPAR. L.J. 69 (2021).

10. *Id.*

11. Alexander K.A. Greenawalt, *Advancing Fundamental Principles Through Doctrine and Practice: Comments on Darryl Robinson*, Justice in Extreme Cases, 35 TEMP. INT'L & COMPAR. L.J. 79 (2021).

12. By contrast, I only outline substantive issues for future discussion. ROBINSON, *supra* note 1, at 234, 249–56.

13. Diane Marie Amann, *On Command*, 35 TEMP. INT'L & COMPAR. L.J. 121 (2021).

duty of commanders legitimates a departure from a knowledge standard.[14] She argues that the ICC Appeals Chamber in the *Bemba* case treated a military commander like an ordinary defendant, without adequate consideration of the special duty, and posited standards that are ungrounded.[15] As noted in the book, I agree with all of these points.[16]

These are just five examples of directions for expansion.[17] In a perfect world, I would honor each contribution by engaging with all of the insights and questions they raise. Doing so advances the scholarly dialogic process. However, given the constraints of the format, I will instead merely touch upon a few key issues where doing so may be illuminating for readers and may help advance future debates.

I. "WEB" VERSUS "PYRAMID": CHALLENGES OF COHERENTISM

Three commenters (Neha Jain, James Stewart, and Alejandro Chehtman)[18] rightly express reservations that coherentism leaves a lot of wiggle room to each individual on how to weigh up the disparate inputs. They are certainly right: coherentism does leave a lot of room to each individual.[19] To recap, coherentism recognizes that we have to work out our beliefs and ideas by reconciling all available clues as best we can, without necessarily having solid foundational theories for belief.[20] I push against common scholarly expectations that we must root our

14. *See generally id.*

15. *Id.* at 124.

16. *See* ROBINSON, *supra* note 1, at 5–7, 52–53, and Annex 4 (discussing the dangers of excessively rigid idealized standards); *see* ROBINSON, *supra* note 1, at 77–107, 120–21, 127–30 (warning against uncritical transplants from national systems). On the special obligations of command, rightly imposed because of the extreme danger, and how this deontically supports a departure from a knowledge standard, see ROBINSON, *supra* note 1, at 213–18, 240–74. On the *Bemba* Appeal Chamber decision as a possible over-correction, see ROBINSON, *supra* note 1, at Annex 4.

17. As other examples, Randle DeFalco and Mark Kersten ponder the implications of coherentist analysis in some of the broader issues that I noted in Chapter 1 as future areas of interest. *See* ROBINSON, *supra* note 1, at viii. Margaret deGuzman compares my framework (which looks at morally salient differences) with hers (which looks at the different communities an institution is responsive to). *See generally* Margaret deGuzman, *Coherentist Deontic Analysis or Dialogic Community Value Identification: Which Way Forward for ICL?*, 35 TEMP. INT'L & COMPAR. L.J. 57, (2021). I agree that the difference in constituencies is among the possible morally salient differences, so our frameworks may generate some similar results. *See* ROBINSON, *supra* note 1, at 125.

18. *See generally* Neha Jain, *A Tale of Two Cities: Reflections on Robinson's Twinning of International Criminal Law and Criminal Law Theory*, 35 TEMP. INT'L & COMPAR. L.J. 25 (2021); *see generally* Alejandro Chehtman, *An "Ongoing Conversation": Method and Substance in Robinson's Justice in Extreme Cases*, 35 TEMP. INT'L & COMPAR. L.J. 37 (2021)*; see generally* James G. Stewart, *How Coherent Is Coherentism? Misgivings About Treating Superior Responsibility as Form of Complicity*, 35 TEMP. INT'L & COMPAR. L.J. 133 (2021).

19. ROBINSON, *supra* note 1, at 111–12.

20. As humans, we go through our lives having to work out which facts to believe, using our flawed senses and other clues, even though almost none of us have a deep foundational theory about reality or perception, and even though none of the inputs is absolutely reliable. With experience, we work out that some sources and some methods of reasoning seem more reliable than others, but even those beliefs about reasoning are provisional and based on their coherence-conduciveness.

contributions in a comprehensive moral theory, or that we must drill down to some sort of bedrock.[21] In this context, I argue that fruitful work can be done debating "mid-level principles," by drawing on patterns of practice, normative argumentation, and considered judgments.[22]

I readily agree that this method leaves a lot of scope for judgment and deliberation in weighing clues. But I believe that there simply is no alternative and better method for working out normative principles. In my view, a system promising to generate clear and verifiably correct answers about fundamental principles could only come at the expense of being false, stipulative, and inadequate. Richard Rorty suggests that we abandon the "Cartesian anxiety": the surprisingly widespread expectation that an account should provide a clear algorithm that generates confirmable answers to complex normative questions.[23]

Given this admitted scope for judgment and disagreement about how to weigh the inputs, what is the value in recognizing the coherentist method? The coherentist method makes clearer the structure of justification: an inferential web, rather than a series of deductions from a universally agreed master theory (the "pyramid" structure). Coherentism paves the way for a sounder conception of rigour. It shows how we can debate problems of a middle level, without requiring that we first resolve all ultimate questions. It exposes our evidence and assumptions to deliberation, rather than cloaking them as metaphysical truths.[24] It encourages humility, by better exposing the degrees of uncertainty underlying our provisional conclusions. The merit of coherentism may not be clarity, but honesty.

II. THOUGHTS ON THE COMMAND RESPONSIBILITY DEBATE

The most eye-opening aspect of the workshop, for me, was the command responsibility discussion. The third part of *Justice in Extreme Cases* dissects some concrete problems in order to demonstrate the sensibilities and value of this method of exploring deontic constraints. I selected command responsibility as my topic

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We use this same process of reconciling clues (intuitions, theories, arguments, and counterarguments of others) in figuring out our moral beliefs. Coherentist method is also applied in identifying mid-level principles or interpreting law, with each using clues appropriate to the subject matter. ROBINSON, *supra* note 1, at 100–02.

21. There are "modest foundationalist" accounts that would not require this; but here I am talking about the common scholarly reflex that each premise must be supported by premises below until we reach bedrock. *See* ROBINSON, *supra* note 1, at 100–02.

22. ROBINSON, *supra* note 1, at 14.

23. *See* RICHARD RORTY, CONSEQUENCES OF PRAGMATISM: ESSAYS: 1972–1980, 160–66 (1982) (rejecting the "neurotic Cartesian quest for certainty" and advocating the pragmatists' preference for deliberation and conversation over the Platonic idea of "method").

24. As a welcome example of this virtue, James Stewart rightly notes that I skipped some clues (or inputs) that would favour a "unitary" system of attribution (an avid interest of his). *See* Stewart, *supra* note 18. I discussed the unitary-versus-differentiated debate only to a limited extent; although I have additional arguments on the subject, I decided it was adequately addressed by others. *See* ROBINSON, *supra* note 1, at 209–13. But James is right to put forward his countervailing evidence and arguments—and indeed I was not aware of some of his supporting examples. This is the coherentist conversation in action. The conversation will continue. Coherentism captures the actual process of these legal-moral deliberations and exposes evidence and arguments to scrutiny.

because it is an important, novel doctrine with a lot to unpack. I knew that there are now so many controversies about intricately-connected issues that it has become difficult to discuss any aspect of the doctrine.[25] The workshop showed me that, if anything, it is even more controverted than I previously appreciated.

The surprise for me was that there was more enthusiasm for the "separate offence" recharacterization than I had previously appreciated. As a result, my background factual statement that command responsibility was traditionally understood as a mode of liability might be misunderstood as a normative argument. Thus, I should clarify that I do not have any strong *normative* preference for the "mode of liability" approach. My primary concern was to show the early failure to engage with the culpability principle, and how it led to an internal contradiction.

My main objection is that Tribunal jurisprudence expressly holds that: (*i*) the Tribunals comply with the culpability principle, (*ii*) under the culpability principle, to be convicted as party to a crime, the accused must contribute, in at least some slight way, to it; (*iii*) under command responsibility, Tribunals in fact convict commanders as party to crimes of subordinates, and yet (*iv*) command responsibility does not require any contribution to the crime. There is a contradiction in these four propositions. There are, of course, different possible solutions, but the contradiction exists and remains unresolved in the jurisprudence. My primary aim was to show the *reasoning* that led to this contradiction, and how it involved inadequate deontic analysis.[26]

In my book, I discussed one of the possible solutions—to recharacterize command responsibility as a separate offence—but I set it aside because (*i*) the Tribunals did not in fact adopt it and (*ii*) judicially creating new crimes would raise legality concerns.

As James Stewart[27] rightly observes, I did not review the precedents showing that it was historically clear that command responsibility was a mode of liability. I see now, with my eyes opened to the interest in this historical question, that an annex on the precedents would have been worthwhile. My interest was in the *deontic* analysis, not the doctrinal analysis. Hence, I deliberately did not repeat a long review of the precedents—several excellent scholars had already done such surveys, all showing that command responsibility was plainly established as a mode of liability. Hence, I simply referred to those surveys for any who might be interested.[28] Even the *Halilović* case, in which an ICTY trial chamber argued for a separate offence characterization, showed that the precedential authority was actually all for the "mode of liability" approach.[29] I took this jurisprudential backdrop as a given.

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25. ROBINSON, *supra* note 1, at 147.

26. Examples include superficial technical doctrinal arguments that failed to engage at all with the culpability contradiction and obfuscatory gestures that made no effort at deontic justification. *Id.* at 143–76.

27. *See* Stewart, *supra* note 18, at 136–40.

28. *See* ROBINSON, *supra* note 1, at 166–67 n.100 (citing scholars such as Greenwood, Sepinwall, Cryer, Bantekas, Triffterer, Cassese, Fenrick, Zahar, and others).

29. *Id.*; Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶¶ 42–53 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005).

Thus, when I say that the prior precedents overwhelmingly support the mode of liability characterization, it is not because of any agenda or preference, but simply because according to my research that seems to be plainly true. Of course, one could nonetheless have convincing *normative* reasons to depart from past characterizations. But the starting point is still to acknowledge the established historical legal backdrop, so that we can consider the legality principle and downsides of judicially recognizing a separate offence.[30]

Two commenters (Alejandro Chehtman and Randle DeFalco)[31] wonder if the coherentist method is too timid and too wedded to practice and applicable law, because I did not join them in recharacterizing command responsibility as a separate offence. Alejandro reads my approach as "ruling out"[32] normative arguments inconsistent with practice.[33] Accordingly, he worries that the method may be too rigid for certain types of critical reflection and proposals for more radical change, and that it cannot guide legislative drafters and treaty makers.[34]

Happily, I can readily address these understandable concerns. The problem is not with the coherentist framework in general; the problem is that I failed to adequately clarify the narrow scope of that particular *case study*.

My general framework is very much open to ambitious, reconstructive inquiries. As I noted, the weight one gives to different sources of reference will depend on one's *project*.[35] In technical legal interpretation, one will likely emphasize internal legal sources (but with recourse to comparative and normative

30. Sometimes in law we can engage in "descending" reasoning, which uses principles and goals to impose a pattern on the sources. Thus one could reason: (1) I want command responsibility to cover non-contributory derelictions, (2) the 'separate offence' characterization lets me cover such derelictions, (3) therefore I perceive it as a separate offence. This is sound enough where the precedents are ambiguous, such that different patterns are plausible. But in this case, the precedents were not very ambiguous. Moreover, the Tribunals have not adopted this route: they do not charge and convict commanders for a separate offence, but rather for war crimes and crimes against humanity.

31. *See* Chehtman, *supra* note 18, at 41–43; *see also* Randle DeFalco, *A Coherentist Approach to Incoherent Law? Some Thoughts on Darryl Robinson's Justice in Extreme Cases*, 35 TEMP. INT'L & COMPAR. L.J. 45, 49 (2021).

32. Chehtman, *supra* note 18, at 41.

33. I do not "simply rule out" normative considerations, nor do I argue that legal practice should prevail over normative considerations or widely shared intuitions. I do however argue in some specific debates that some particular normative arguments are outweighed by other, better normative arguments. *See, e.g.*, ROBINSON, *supra* note 1, at 99–100, 106–09, 114–15, 120–21, 127–38.

Similarly, Randle DeFalco speaks of my desire not to strain the applicable law and to find ways to interpreting existing law consistently with fundamental principles. DeFalco, *supra* note 31, at 47. He is correct on both counts, but that is because, in that case study, I am studying *judicial* reasoning, and I take these to be accepted aims of judicial reasoning. One could certainly be a coherentist and argue that the best reconciliation is to reconceive command responsibility.

More critically, Randle DeFalco perceives me as having a "curious commitment . . . to excuse poor drafting and shoddy compliance with fundamental principles." *Id.* However, on the contrary, the case studies are devoted to *exposing* poor drafting and poor reasoning and departures from fundamental principles. ROBINSON, *supra* note 1, at 143–76.

34. Chehtman, *supra* note 18, at 42.

35. ROBINSON, *supra* note 1, at 114.

analysis). If one is advancing a bold reconstructive account, one will likely emphasize normative and conceptual arguments (but practice may still be valuable as a "humility check").[36]

However, in that particular case study, I was looking at *judicial reasoning* and hence was governed by the restraints applicable to judges (e.g., somewhat less freedom to introduce bold reforms or invent new crimes because of the legality principle). I can improve clarity by noting three different conversations we might have:

(a) Assessing deontic engagement: Did ICTY jurisprudence engage adequately with deontic constraints? Is there a contradiction in the ICTY jurisprudence as currently written?

(b) Interpretive prescriptions: What is your preferred interpretation of the provisions?

(c) Legislative policy: How should a legislator or a treaty drafter, in a position to create new provisions, construct command responsibility?

In that particular case study, my primary focus was on (a), as mentioned above.

I expect that Alejandro and Randle are likely in agreement with my main points: that inadequate deontic analysis is undesirable and that internal contradictions should be avoided.

If we were instead discussing topic (c) (*legislative reform*), then we are no longer bound by the legality principle and other restraints on judicial creativity. In that conversation, I would advocate the German/Korean solution: to adopt *both* a "mode of liability" provision (reflecting the indirect culpability of the commander for crimes he or she culpably facilitated by omission) *and* a "separate offence" provision to capture non-contributory derelictions.[37] That solution advances crime prevention aims without breaching the culpability or legality principles.[38] We might all agree on this as well.

Thus, our disagreement is likely limited to topic (b) (*interpretive prescriptions*). I believe that Alejandro, Randle, and others are arguing that, as ICTY judges, they would have adopted a separate offence recharacterization.[39] I would not have a strong objection to this if it were expressly done and consistently applied. If the Tribunals had adopted this route, and stuck to it, and entered convictions for that separate offence rather than for war crimes and crimes against humanity, then it would at least resolve the culpability contradiction.

We have to recall, however, that Tribunals did *not* adopt that route. The charges and convictions at the Tribunals *expressly* hold the commander responsible as a party to "war crimes" and "crimes against humanity," not separate new dereliction offences.[40] So even if one personally prefers the recharacterization route, it does not

36. *Id.* at 109.

37. *Id.* at 164–65.

38. *Id.* at 164.

39. *See* Chehtman, *supra* note 18, at 43; *see also* DeFalco, *supra* note 31, at 50.

40. The charges and convictions in command responsibility cases literally and explicitly charge and convict the commanders as party to the specific core crimes committed by the

change the fact that the contradiction still remains in actual Tribunal jurisprudence.

We also have to recall that the recharacterization route has a downside: judicial creation of a new crime is problematic under the legality principle. It is entirely possible that proponents of the recharacterization solution can develop a principled, deontic account of why legality concerns are outweighed. To me, the normative desire to catch more commanders did not outweigh the legality problems of judicially inventing a crime,[41] but I see that this could be debated.

I hope that these clarifications show that my general framework is not wedded to *lex lata* in the way that some commenters feared. The method does not preclude radical new conceptions; on the contrary, it invites it.[42] It was simply that this particular case study was an examination of judicial reasoning (which is expected to adhere more closely to *lex lata*).

III. EXPLORING THE LIMITS OF CULPABILITY

Two commenters (Meg deGuzman and Randle DeFalco) question whether the culpability principle really does require a causal contribution to a crime, pointing to "attempt" or "incitement" as counterexamples.[43] However, these are not good counterexamples, because they are actually not modes of liability; they are separate offences.[44] The accused must still causally contribute to the actus reus of those offences.[45] The sounder analogy would be to "accessory after the fact," but this has been rejected as a mode of liability, in national and international practice, precisely

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subordinates and *not* separate dereliction offences. For example, in the much-debated *Hadžihasanović* case, the commanders were charged with "murder," "cruel treatment," "plunder," and "wanton destruction," by virtue of command responsibility. *See* ROBINSON, *supra* note 1, at 154–57; *see also* Prosecutor v. Orić, Case No. IT-03-68-A, Judgment, ¶¶ 5, 185 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008) (noting Orić was charged with murder and cruel treatment; discussing command responsibility as a "mode of liability"); Prosecutor v. Ntabakuze, Case No. ICTR-98–41A-A, Judgment, ¶ 5 (Int'l Crim. Trib. for Rwanda May 8, 2012) (noting that at trial, Ntabakuze was found "guilty of genocide [and] crimes against humanity (murder, extermination, persecution, and other inhumane acts)" and other crimes—not a separate offence of dereliction of duty).

41. *See* ROBINSON, *supra* note 1, at 175–76. The downside of my solution is that isolated derelictions that contribute to no crimes cannot currently be prosecuted before international courts, unless their statutes are changed. Isolated derelictions can still be criminally punished under national systems, as are the vast majority of serious crimes in the world. International courts today tend to focus on "persons most responsible" for the most serious crimes; under current resource conditions, I doubt that an isolated failure to punish would even pass through case selection.

42. *See, e.g.*, *id.* at 13, 106–08, 114–15, 135, 189–90, 233–35 (discussing reconstructive new conceptions).

43. deGuzman, *supra* note 17, at 63–64; *see* DeFalco, *supra* note 31, at 51–52.

44. ROBINSON, *supra* note 1, at 152.

45. In attempts, the actus reus is *attempting*; in incitement, the actus reus is *inciting*. Some commenters point out that there is no requirement of actually causing harm, which is correct, but that is a different issue. In no system does the culpability principle require that one actually cause *harm*; the requirement is that one contribute to the *actus reus* of the offence. Many offences do not require that any particular *harm* materialize (e.g., attempt, incitement, declaring no quarter, or dangerous driving), but one must contribute to the *offence*. *See id.* at 150–51. (highlighting that causal contribution is required to establish actus reus in the accessory context).

because it would impose culpability without any causal contribution.[46] Accordingly, the practice-based response is not as easy as it may seem. A proposal for culpability without contribution will require a more difficult normative argumentation.

Jens Ohlin rightly refers to the proposition that the accessory need only do an act of a nature that would encourage or facilitate crimes; it is not required that the assistance actually arrive and have an impact.[47] Jens reads me as rejecting this position, but actually, I adopt it: "risk aggravation" is sufficient for accessory liability.[48] I only regard Christopher Kutz as an "outlier" when he goes further and muses about extending culpability where there is no possibility of a causal contribution at all, for example, by "ratifying" the crime ex post facto.[49] My account is open-minded even to this more radical suggestion; it is at least conceivable to argue that guilt for the unpunished crime "rubs off" on the commander.[50] I find, however, that the arguments for a new conception (which are still tentative and provisional and which admittedly go against practice in all systems and against most normative argumentation) would still need more development before we rely on them to imprison human beings.[51] I suspect that Jens Ohlin and I are on the same page on this as well.

IV. SUBJECTIVE ALTERNATIVES TO CRIMINAL NEGLIGENCE?

In another illustration, I advance a deontic justification for a criminal negligence standard in command responsibility.[52] While our normal, principled reflex is to be wary of criminal negligence in a mode of liability, I argue that, on closer inspection, command responsibility reflects a sound insight of justice.[53] I draw on Paul Robinson's framework on the underlying justification of inculpatory doctrines.[54] While we normally consider "knowing" to be categorically worse than "not knowing," several scholars have shown that "not knowing" can be just as blameworthy, if created by a breach of duty that shows "culpable disregard" for the beneficiaries of that duty.[55] A commander differs from other citizens, because the legal privileges granted to combatants are accompanied by a crucial duty on commanders, inter alia, to take appropriate steps in the circumstances to remain

46. *Id.* at 152.

47. Jens David Ohlin, *Complicity, Negligence, and Command Responsibility*, 35 TEMP. INT'L & COMPAR. L.J. 109, 112 (2021).

48. ROBINSON, *supra* note 1, at 181–85. This also addresses Randle DeFalco's worry that a commander might repeatedly fail to punish without a "demonstrable" causal connection to later crimes. *See* DeFalco, *supra* note 31, at 51. Accessory liability does not require demonstration of a specific impact; it is satisfied by "risk aggravation"—one performs an act of a nature that would facilitate or encourage crimes, and a crime within that ambit of risk materializes. See ROBINSON, *supra* note 1, at 181–85.

49. ROBINSON, *supra* note 1, at 188.

50. *See id.* at 185–90 (reviewing arguments for a new conception). Indeed, one of this book's themes is that new problems may lead us to revisit established understandings and practices.

51. *Id.* at 189–90.

52. *Id.* at 206–09.

53. *Id.* at 4.

54. *Id.* at 206.

55. *Id.* at 207–08.

informed and require reports of wrongdoing.[56] In the special context of command, with the inherent dangers and the solemnity of the obligation, this form of self-created culpable ignorance can be sufficiently and equivalently blameworthy to knowledge.[57]

Three commenters (Jens Ohlin, Neha Jain, and Meg deGuzman) ask whether familiar subjective standards from the common law—recklessness and wilful blindness—might suffice, thus avoiding the need for negligence.[58] It is an attractive line of thought. I will, however, map out some problems with taking that path. First, in referring to recklessness, one must be referring to awareness of either (*a*) the abstract fact that deployment of forces almost inevitably creates a high risk of individual crimes or (*b*) some more concrete indicator of wrongdoing by one's forces. If one means (*a*), then the problem is that the element is always automatically met, and command responsibility collapses into absolute liability, which is not the aim of the commenters. Alternatively, it means (*b*), but in that case, the commander's breach of the duty to set up reporting systems would successfully insulate the commander from receiving those concrete indicators.[59]

The turn to "wilful blindness" is also attractive, and Neha and Meg are correct that there are "parallels" between wilful blindness and criminally negligently created ignorance.[60] However, as Glanville Williams has warned, wilful blindness is much narrower: it is a "strictly limited" doctrine, applying where the accused actually "suspected the fact, he realized its probability, but he refrained from obtaining the final confirmation"; it only applies where "it can almost be said that the defendant actually knew"; and it must not be conflated with negligent ignorance.[61]

Perhaps our difference is just about the label: it seems like we all share roughly the same view about the deontically sound outcome.[62] Maybe the label should be framed as an expanded conception of wilful blindness, or a carefully circumscribed conception of criminal negligence—as long as culpably "contrived ignorance"[63] is covered.

I can also assist future debates by adding a practice-based argument. My argument for this modified mental standard was not based in practice (i.e., that there is precedent); I advanced deontic argument that returned to the basic building blocks of inculpatory doctrines.[64] But it may help if I add that there is also some support in

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56. *Id.* at 216.

57. *Id.* at 206–09.

58. Ohlin, *supra* note 47, at 117–19; Jain, *supra* note 18, at 33–34; deGuzman, *supra* note 17, at 65.

59. ROBINSON, *supra* note 1, at 203.

60. *See* Jain, *supra* note 18, at 33; *see also* deGuzman, *supra* note 17, at 66.

61. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 157–60 (2d ed. 1961).

62. *Id.*; *see* Jain, *supra* note 18, at 31–34; *see also* deGuzman, *supra* note 17, at 65.

63. *See generally* David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957 (1999).

64. Jain rightly argues that, although there is practice supporting criminal negligence, that is different from whether there is practice supporting criminal negligence in a mode of accessory liability. I agree, and hence I split my argument into distinct steps. For the latter question, I used deontic argumentation, returning to the Paul Robinson's work on deontic justifications of inculpatory doctrines (e.g., culpably creating one's own supposedly exonerating conditions).

practice. For example, one doctrine, in my country (Canada), is "intention in common" liability.[65] If one joins in a criminal plan, one is a *principal* to the planned crimes (co-perpetration), but under this doctrine, one can also be an *accessory* to crimes that were readily foreseeable.[66] There are other examples in other systems of negligence-based accessory liability.[67] Without expressing any views on those doctrines, command responsibility is more defensible because it entails a gross breach of a clear affirmative duty to remain informed, rather than speculations about what a common participant should have foreseen. It is possible that an exploration of such practice might shed further light.

V. COMPASSIONATE CRIMINAL LAW THEORY

Mark Kersten's passionate comment touches on a wide range of topics. To avoid confusion among readers, I must clarify that my book does not advance or attempt any "defence of international criminal law," let alone a "liberal" one.[68] As I noted, the question of whether and how the system as a whole might be justified is indeed an important question for criminal law theory,[69] but it is an enormous subject that would require at least a book of its own. Accordingly, I expressly limited my inquiries to a different set of issues: deontic constraints. To avoid wading into the general justification of the system, I handled deontic constraints as "side constraints."[70] Side constraints do not provide an affirmative *justification* of the system; they are an additional line of *critique*.[71]

Similarly, to avoid confusion: the book does not make any of the claims about liberalism that a reader of Mark's comment might infer.[72] Indeed, in my book, I explained my hesitation about the word "liberal," because it is used to mean so many wildly different things, and it is often used pejoratively or in simplistic caricatured ways.[73] Accordingly, I carefully specified that I use the word "liberal" in one very narrow sense, often used in criminal law scholarship: it means that one is attentive to deontic (non-consequentialist) constraints, as opposed, for example, to a purely authoritarian system or a purely act-utilitarian system (the latter would be concerned

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ROBINSON, *supra* note 1, at 213–18.

65. Canada Criminal Code, R.S.C. 1985 1985, c. C-46, s. 21.

66. *Id.*

67. *See* ROBINSON, *supra* note 1, at 211 n.89 (noting the U.S.'s "Pinkerton" doctrine).

68. Thus, the book does not attempt to "prove that international criminal justice is worth it" or show that it is a "defensibly liberal enterprise" or a "largely unproblematically liberal exercise."

69. ROBINSON, *supra* note 1, at 16–17.

70. Thus, my book follows the H. L. A. Hart distinction between discussing the "general justifying aim" and "side constraints." This is why, for this book's purposes, I adopt a "negative retributivist" posture, looking at deontic principles only as constraints: it is to avoid stepping into the question of the system's affirmative justification. *Id.* at 7–8.

71. In other words, even if the system is justified, a doctrine would be unjust if, inter alia, it breaches these constraints. Indeed, one could even view a criminal law system as *unjustified*, and still think it should be constrained by deontic constraints, because failing to do so is an additional injustice.

72. For example, the book does not offer a "theoretical assessment of liberalism" and does not discuss the "legitimate dominancy of liberalism", nor the "necessity or benevolence of liberalism."

73. ROBINSON, *supra* note 1, at 13, 64–65, 137.

only with optimal social consequences).[74] Mark rightly notes that many non-liberal outlooks might endorse respect for the individual and the resulting non-consequentialist constraints.[75] I heartily agree, and said the same.[76] This is why I endorsed mid-level principles that can be a subject of "overlapping consensus" among holders of some quite different philosophical outlooks.[77]

Mark raises many other topics, including situation selection, case selection, investigations, and the Security Council.[78] These are all extremely important topics. Indeed, as I note in Chapter 1, these other topics are more prominent and more urgent for ICL right now[79] than the relatively fine-grained and philosophical topics that are the subject of this book. I have at times engaged in those bigger debates and hope to engage in them again. However, in this book, I chose to contribute to important ongoing conversations about deontic constraints, such as exploring the culpability principle and assessing compliance with it. The complexity of, and interest in, these issues is shown by the excellent contributions in this symposium.

Having made these clarifications about the book's scope, I would like to endorse a critique that I believe implicitly underlies Mark's piece. I think it could be said that criminal law theorists spend a lot of time on formal philosophical problems that do not engage with uncomfortable questions about bias and power imbalance. Those questions tend to be left to scholars in a critical tradition or to empirical socio-legal researchers. Mark does not say this explicitly, but I think perhaps this sentiment is what underlies his piece. Moral accounts of criminal law can likely do better in confronting problematic origins and hegemonic practices of criminal law, and problems of justice and inequality. Of course, it is still useful to study the familiar puzzles, but perhaps criminal law theorists should also be bringing moral philosophy to bear on bigger, uncomfortable questions more than we have.

VI. CONCLUSION

In conclusion, I am honored and grateful that so many scholars whom I respect so greatly have come together to produce these thought-provoking reactions, criticisms, questions, and expansions on the ideas outlined in *Justice in Extreme Cases*. I suggest in the book that clarifying principles requires a human, deliberative process; this symposium is one example of the reflective conversations that may help refine ideas. I hope that the contributions collectively will contribute to future conversations about the constraints of justice, for both national and international criminal law.

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74. *Id.* at 13, 64–65, 137, 283.

75. Mark Kersten, *Forever Together or a Hope for Better? Liberalism and International Criminal Law*, 35 TEMP. INT'L & COMPAR. L.J. 143, 148 (2021).

76. As I noted, one could be, for example, a communitarian and still agree with the culpability and legality principles. ROBINSON, *supra* note 1, at 65 n.17.

77. *Id.* at 98–99, 122–23, 228.

78. Kersten, *supra* note 75, at 153.

79. *See generally* ROBINSON, *supra* note 1, at 3–19.