

LEGAL, MORAL,
AND METAPHYSICAL
TRUTHS

THE PHILOSOPHY OF
MICHAEL S. MOORE

Edited by
Kimberly Kessler Ferzan
and Stephen J. Morse

OXFORD

LEGAL, MORAL, AND METAPHYSICAL TRUTHS

Legal, Moral, and Metaphysical Truths

The Philosophy of Michael S. Moore

Edited by

KIMBERLY KESSLER FERZAN

University of Virginia

STEPHEN J. MORSE

University of Pennsylvania

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© The Several Contributors 2016

The moral rights of the authors have been asserted

First Edition published in 2016

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2015951309

ISBN 978-0-19-870324-2

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

For my parents—K. K. F.
For Elisabeth A. Morse—S. J. M.

Table of Contents

<i>List of Contributors</i>	ix
1. Editors' Introduction <i>Kimberly Kessler Ferzan and Stephen J. Morse</i>	1
2. Living with Genius: The Life and Work of Michael S. Moore <i>Heidi M. Hurd</i>	5
3. Modest Retributivism <i>Mitchell N. Berman</i>	35
4. What Do Criminals Deserve? <i>Douglas Husak</i>	49
5. Retributive Desert as Fair Play <i>Peter Westen</i>	63
6. The Wrong and the Free <i>Victor Tadros</i>	79
7. Legal Moralism and Public Wrongs <i>R. A. Duff</i>	95
8. Moore in Jeopardy, Again <i>Gideon Yaffe</i>	111
9. Do We Need a Doctrine of Complicity? <i>Leo Katz</i>	125
10. Reluctant Pluralist: Moore on Negligence <i>Kenneth W. Simons</i>	139
11. Putting (and Keeping) Proximate Cause in its Place <i>John Oberdiek</i>	155
12. Causation: Metaphysics or Intuition? <i>Richard W. Wright</i>	171
13. The Moral Asymmetry Between Acts and Omissions <i>Horacio Spector</i>	187
14. Moore and the Metaphysics of Causation <i>Richard Fumerton</i>	203
15. Self-Defense: Tell Me Moore <i>Kimberly Kessler Ferzan</i>	219
16. Moore on the Mind <i>Stephen J. Morse</i>	233
17. The Means Principle <i>Larry Alexander</i>	251
18. Moral Dilemmas and Moral Theory: Toward a Viable Deontology <i>Phillip Montague</i>	265

19. “Just No Damned Good” <i>Jeremy Waldron</i>	279
20. Conceptual Breakage and Reconstruction: Michael S. Moore’s Natural Law Theory of Interpretation <i>Michael H. Shapiro</i>	293
21. Metaphysical Realism and Legal Reasoning <i>Brian H. Bix</i>	311
22. Law and the Role of a Judge <i>Leslie Green</i>	323
23. Responses and Appreciations <i>Michael S. Moore</i>	343
 <i>Bibliography of the Works of Michael S. Moore</i>	 427
<i>Name Index</i>	433
<i>Subject Index</i>	437

List of Contributors

Larry Alexander is Warren Distinguished Professor of Law and Co-Director of the Institute for Law and Philosophy at the University of San Diego.

Mitchell N. Berman is the Leon Meltzer Professor of Law, Professor of Philosophy, and Co-Director of the Institute for Law and Philosophy at the University of Pennsylvania.

Brian H. Bix is the Frederick W. Thomas Professor of Law and Philosophy at the University of Minnesota.

R. A. Duff is Professor of Philosophy Emeritus at Stirling University.

Kimberly Kessler Ferzan is Harrison Robertson Professor of Law and Caddell and Chapman Professor of Law at the University of Virginia.

Richard Fumerton is F. Wendell Miller Professor of Philosophy at the University of Iowa.

Leslie Green is the Professor of the Philosophy of Law at the University of Oxford, and a Fellow of Balliol College. He is also Professor of Law and Distinguished University Fellow at Queen's University in Canada.

Heidi M. Hurd is David C. Baum Professor and former Dean of the College of Law, Professor of Philosophy, and Co-Director of the Program in Law and Philosophy at the University of Illinois at Urbana-Champaign.

Douglas Husak is Distinguished Professor of Philosophy at Rutgers University and Co-Director of the Institute for Law and Philosophy at Rutgers University.

Leo Katz is Frank Carano Professor of Law at the University of Pennsylvania.

Phillip Montague is Professor of Philosophy Emeritus at Western Washington University.

Michael S. Moore is Charles R. Walgreen University Chair at the University of Illinois. He is also Professor of Law, Professor of Philosophy, Professor of the Center for Advanced Studies, and Co-Director of the Program in Law and Philosophy at the University of Illinois at Urbana-Champaign.

Stephen J. Morse is Ferdinand Wakeman Hubbell Professor of Law, Professor of Psychology and Law in Psychiatry, and Associate Director of the Center for Neuroscience and Society at the University of Pennsylvania.

John Oberdiek is Acting Co-Dean and Professor at the Rutgers Law School, and Co-Director of the Institute for Law and Philosophy at Rutgers University.

Michael H. Shapiro is Dorothy W. Nelson Professor of Law at the University of Southern California.

Kenneth W. Simons is Chancellor's Professor of Law, University of California, Irvine School of Law.

Horacio Spector is Professor of Law and former Dean and former Provost at the Universidad Torcuato Di Tella in Buenos Aires. He is also Professor of Law at the University of San Diego.

Victor Tadros is Professor of Law at Warwick University.

Jeremy Waldron is University Professor, Professor of Philosophy, and Professor of Law at New York University.

Peter Westen is Frank G. Millard Professor of Law Emeritus at the University of Michigan, Ann Arbor.

Richard W. Wright is University Distinguished Professor and Professor of Law at the Illinois Institute of Technology Chicago-Kent College of Law.

Gideon Yaffe is Professor of Law, Professor of Philosophy, and Professor of Psychology at Yale.

1

Editors' Introduction

Kimberly Kessler Ferzan and Stephen J. Morse

Ordinarily, the editors' introduction to a festschrift would both systematize the honoree's work and taxonomize the contributions. But anyone who knows the dynamic duo of Heidi Hurd and Michael Moore will fully understand that both of them have beaten us to the punch. Heidi's contribution, "Living with Genius," details Michael's life's work, setting forth not only his arguments, but also their causal antecedents. It is an unadorned and unabashed look at the man behind this monumental body of work, full of both triumphs and sadness. To explore not only what Michael has written but who he is, we refer you to her contribution.

Our other duty would have been to cast the remaining contributions in order. Of course, Michael has done this in his reply. So, we shall only restate, without taking any credit for his systemization. After Heidi's contribution, this volume engages with Michael's work in criminal law. Michael, famous for his retributivism, is taken to task by three friendly critics, who seek to elucidate retributivism's value in a theory of punishment, and to unpack its dimensions (Mitchell Berman, "Modest Retributivism"; Douglas Husak, "What Do Criminals Deserve?"; Peter Westen, "Retributive Desert as Fair Play"). From here, the contributions turn to Michael's theory of criminalization, asking whether and in what form the fact that an action is morally wrong can appropriately serve as the reason why the conduct ought to be prohibited by the criminal law (Victor Tadros, "The Wrong and the Free"; Antony Duff, "Legal Moralism and Public Wrongs").

Next, the volume addresses Michael's work in the various aspects of the general part of the criminal law. Chapters consider Michael's position on how to understand criminal acts for double jeopardy purposes; Michael's claim that accomplice liability is superfluous; and Michael's views about the culpability of negligence and the relationship between that view and proximate causation (Gideon Yaffe, "Moore in Jeopardy, Again"; Leo Katz, "Do We Need a Doctrine of Complicity?"; Kenneth Simons, "Reluctant Pluralist: Moore on Negligence"; John Oberdiek, "Putting (and Keeping) Proximate Cause in its Place"). Three further contributions press Michael on his claims with respect to the metaphysics of causation (Richard Wright, "Causation: Metaphysics or Intuition?"; Horacio Spector, "The Moral Asymmetry Between Acts and Omissions"; Richard Fumerton, "Moore and the Metaphysics of Causation").

Michael has also greatly contributed to our understanding of justifications and excuses. Continuing the engagement with the general part, one of the volume editors presses him for more details about self-defense, the other questions conclusions reached within Michael's vast work at the intersection of psychiatry, cognitive

neuroscience, and criminal law (Kimberly Kessler Ferzan, “Self-Defense: Tell Me Moore”; Stephen J. Morse, “Moore on the Mind”).

As though conquering act, mind, causation, and justifications and excuses were not sufficient for his life’s work, Michael has also elucidated the deontological theory that his theories presuppose. Two further contributors take on delineating the nature of this deontological morality. (Larry Alexander, “The Means Principle”; Phillip Montague, “Moral Dilemmas and Moral Theory: Toward a Viable Deontology”). Leaving no stone unturned, Moore also has meta-ethical views about these moral positions, which are challenged in a further contribution (Jeremy Waldron, “Just No Damned Good”).

As is readily apparent, Michael does not conquer a topic unless he conquers all aspects of that topic. Hence, this already impressive body of work would cover (1) a meta-ethical view; (2) a position on the content of moral obligations; (3) a stance on the implications of that content for the criminal law, both in terms of what to punish and why; (4) a theory of mental states fully informed by the cognitive sciences; (5) a view on voluntary actions, backed by action theory; and (6) claims about the nature of causation, contextualized within a full metaphysical theory. But that would leave us without the role of the criminal law in a system of *laws*, and Michael’s expansive reach includes contributions to general jurisprudence as well. Hence, the final group of contributions concludes with Moore’s view about statutory interpretation and the role of a judge (Michael Shapiro, “Conceptual Breakage and Reconstruction: Michael S. Moore’s Natural-Law Theory of Interpretation”; Brian Bix, “Metaphysical Realism and Legal Reasoning”; Leslie Green, “Law and the Role of a Judge”).

We’ve also granted Michael the last word (Michael S. Moore, “Responses and Appreciations”).

But we shall take the first last words here.

Kim: No one who witnessed the first few interactions I had with Michael would ever think that I would play a role in this festschrift. Michael first spoke to me when Heidi had a potluck dinner for her Torts students at their home in October 1992. As I was placing my cheesecake on the table, Michael came up to me and said, “Hi, I’m Michael.” I (ever fearful of grown-ups), smiled, nodded, and (hopefully gracefully) walked away. Our second and third interactions were in the spring of 1993, when I took Michael’s class, “Legal Personhood.” During or after class, our two interactions were (1) my musing as to whether animals have mental states because my cat at the time clearly dreamed, and (2) my querying what Michael thought about the view that we could just be brains in a vat (blame my dad, he raised it when I was ten, and I have never fully gotten over it). All I can say is that I wish Michael had just smiled, nodded, and gracefully walked away. I am sure he was surprised when I did well in that class.

But taking Legal Personhood at the same time I was taking Criminal Law with Stephen was momentous and life-changing for me. My love of all things criminal law, and all things philosophy, is directly attributable to the joy I found in those puzzles that semester. Had I not taken those two classes, I would never have found this path.

On this path, Michael is my lodestar. For him, there is no puzzle too deep, no query too wide, no discipline too tall that they should not be conquered. And, the reason is simple. He seeks truth.

Over the years, one truth I have had to face is that part of the reason that he manages the taxonomizing, systemizing, and other discipline-resolving that he does is that he is just smarter than many of us mere mortals. Anyone who has attended a conference with him has witnessed with awe that moment when Michael deftly summarizes what appeared to be an hour of scattered discussion. I used to think that was just what senior scholars did until another senior scholar remarked to me how tremendous it was that Michael can do this because he is so absurdly smart. So, maybe I'll never leap tall disciplines in a single bound, as he does. Though, I maintain, we should all try ...

Most of all, I am just grateful that the distributor of eye-rolling in Legal Personhood turned to mentor for my student note, evolved to colleague, and ultimately became a good friend. Whether he's teasing me about an incident in Death Valley (it's a long story) or I'm smack talking him during a game of poker or pool, it's just been tremendous fun to know the person beyond the work.

Stephen: I second everything Kim said about Michael, who has been my good friend and colleague for four decades (where have the years gone?). It is always intellectually and personally invaluable to spend time with Michael, whether we are at a conference, hiking the Grand Canyon rim to rim, running the San Francisco Marathon, or just hanging out to watch USC football. As Kim says, his intellect is simply extraordinary, but he is also a great bon vivant, as the contributors to this volume know. Michael is no unidimensional brain in a skull.

Here's a recent anecdote that sums Michael up. It will surprise no one who knows him or has ever seen Michael in action. A few years ago, a philosopher in Aachen, Germany organized at the local university a conference to celebrate Michael's causation book. The invited speakers were luminaries from Germany, England, and other places. The format was for each speaker to present their papers, which Michael had not seen previously, for about 45 minutes, followed by Michael's response and then some general discussion. Most of the papers were technical and difficult. There were probably six or seven papers the first day. Recall that Michael was hearing these presentations for the first time. The generic Moorean response went as follows. "[Polite thank you.] Your paper makes three major arguments, each of which has three sub-arguments. Let's take them in turn." Then, in perfect sentences and paragraphs, with no misspeaking or empty interjections, Michael would dissect the paper, after having offered the presenter a better organization and argument structure than the presenter realized he had. This was true of Michael's response to every paper. At the end of the day, the obviously bedazzled organizer came up to me and asked, "Is Michael always this good?" I mused for a second and responded straightfaced, that no, he's usually much better but he's jet-lagged after the long flight from Australia. The poor organizer had no idea whether I was kidding or serious. By the end of the two-and-a-half days of exactly the same extraordinary level of Moorean performance, the organizer knew that I had been dead serious. And at the conclusion of the conference, rather than collapsing, Michael suggested that we repair to the finest, ritziest restaurant in Aachen, located in a luxurious, imperial-style hotel. We ate a most satisfying, one might even say extravagant, dinner, accompanied by an exquisite Bordeaux that Michael had chosen.

Michael's exceptional organizing talents deserve special mention. He, and also our mutual friend, Larry Alexander, have organized numerous criminal law theory conferences that have been the most intellectually stimulating meetings I have ever attended. Michael knows how to structure a conference as well as a general conversation. Michael has been the unofficial leader of a group of scholars who think of themselves primarily as criminal law theorists and many of the contributors to this volume have benefitted enormously from frequent attendance and interaction with Michael. We are all in his debt.

Let us both conclude with some general thanks. We owe a great debt to our co-conspirator, Heidi Hurd, with whom we consulted from the beginning. We were particularly delighted that she organized a conference for Michael's 70th birthday, where the agenda for the day was—what else?—a somewhat less formal conference devoted to his work. Although Michael knew the topic, little did he know that the papers presented were intended for this festschrift in his honor. Our birthday present to Michael was to surprise him with this volume, which had recently been accepted by Oxford. We could not have done it without Heidi's masterful ingenuity.

Finally, we share Michael's belief that people ought to get what they deserve. So, celebrating Michael's work is not gratuitous; it is simply the right thing to do. We are delighted that the book has come to such fine fruition and warmly thank the scholars who have contributed. It is a fitting tribute to our friend, Michael Moore. We can think of no one more deserving.

2

Living with Genius

The Life and Work of Michael S. Moore

*Heidi M. Hurd**

I. Introduction

During my many years with Michael Moore—years that reached from my first semester in law school at the University of Southern California (USC) where he was my first-year Torts professor, through years of marriage, co-parenthood, co-authorship, and collegueship—I have enjoyed countless, indeed daily, spirited debates. We have argued about such things as the nature of causation, the possibility of free will, the coherence of compatibilism, the demands of retributivism, the scope of legitimate consequentialist reasoning, the morality of mercy, and the question that is always good for a round or two over a glass of wine: whether angels are angelic because they do the good in the face of being tempted by the bad, or because they are not tempted by the bad at all. Quite frankly, I'm exhausted. If I were to pick some new philosophical fight with Michael, I would have to dedicate the next six months of breakfasts, lunches, dinners, and dates to defending my views on the topic—and, more onerously, to listening to his views, all of which would come in enumerated parts, with multiple sections and subsections—to the exclusion of hearing about our children's school days, discussing the latest necessary home repair, or gossiping about our colleagues. I simply don't have it in me.

So, instead, I have chosen to do something with which Michael cannot argue. In this introductory contribution, I will synthesize Michael's lifetime of work, organizing the topics and restating the theses that he has defended within the diverse fields he has explored, and extracting from these theses a number of common themes. Along the way, I will draw on personal experiences in Michael's life that may have influenced his scholarly choices. On pain of committing the genetic fallacy against which Michael has often warned,¹ one cannot think that explaining beliefs in terms of their causal antecedents goes any distance towards either bolstering or debunking them. Still, the causal antecedents of beliefs can be interesting for their own sake. So my project is to provide a systematic and comprehensive taxonomy of Michael's work and to salt it with biographical events, relationships, triumphs, and tragedies that illuminate how personal the ideas that have defined his extraordinary academic legacy have been.²

* I have enjoyed a great deal of help from Michael in writing this piece. I have also put up with a lot of back-talk. I am grateful for the former. I am also grateful to Caitlyn McCutcheon (Illinois Class of 2014) for her extensive research assistance—which was provided without nearly as much back-talk.

¹ Moore, 1982a; Moore, 1984a; Moore, 1997b, ch. 3; Moore, 2004c, ch. 1.

² Some of the experiences I will relate are from my own knowledge, having shared Michael's life all these years; others I have explicitly solicited from him in conversations recorded in recent months.

II. Topics Raised and Theses Defended in the Scholarship of Michael Moore

It is no small task to get one's arms around the work of a career that has spanned forty-nine years and produced 138 publications covering a dizzying array of issues. Fortunately, some years ago Michael himself provided something of a roadmap to his own work when paying tribute to his thirteen years on the faculty of the USC Law School.³ At the risk of costing our family a month of dinners spent debating the merits of so doing, I have taken the liberty of reorganizing Michael's own taxonomy, altering the number and content of the categories to which his writings can be assigned, and updating the references to accommodate the fourteen years of work that Michael has done since writing his Southern California "remembrance."

A. The metaphysics of mind, action, and causation

Although Michael often presents his work on the metaphysics of human action, mental states, and causation as if his interests in these areas were entirely motivated by the role such states, events, and relations play in ascribing responsibility, in fact his interest in metaphysics is as much free-standing as it is dependent upon his moral and legal interests. He regards acts and other events, mental states like intention and belief, and relations such as causation, as presenting puzzles worthy of attention in their own right. I have thus separated Michael's work in pure metaphysics from his application of that work to responsibility issues (which I deal with below as his fourth area of scholarly interest).⁴

Michael's main preoccupation in the metaphysics of mind, action, and causation has been to naturalize phenomena often seen as recalcitrant to ordinary scientific description and explanation. These phenomena have included: the Intentionality of mental states and of some actions;⁵ the supposed mystery of human agency and the actions through which that agency is expressed; causation (both *of* human choice and *by* human choice) as a natural relation; the entities causation relates as natural entities; causal laws as framed in terms of induction about such natural entities and relations; and counterfactual dependence as a natural relation in this, the actual world (despite counterfactuals having on their face seemingly "otherworldly" qualities).

Michael has long been fascinated by what many regard as the hardest problem in the philosophy of mind, namely how content is to be ascribed to Intentional mental

³ Moore, 2000d.

⁴ Some commentators on Michael's work treat it as a contribution to metaphysics independent of its implications for legal and moral responsibility. For example, Stephen Mumford wrote: "Moore's book [*Causation and Responsibility*] is an outstanding contribution not just to the philosophy of law but also to the metaphysics of causation." Stephen Mumford, "Causes for Laws," 4 *Jurisprudence* 109 (2013), 114.

⁵ "Intentionality" or "Intentional states" are technical terms referring to representational states that have content. These terms are capitalized to distinguish them from the more idiomatic use of the term "intentional" which refers to just one kind of Intentional state, namely intentions. Beliefs and desires are Intentional states because they have content, despite, of course, not being intentions. This usage of "Intentional" was revived by Roderick Chisholm in *Perceiving* (Ithaca, NY: Cornell University Press, 1959).

states.⁶ Early in his career, he explored Quinean skepticism about such content.⁷ He then tentatively proposed the very non-Quinean solution that propositions (rather than events or sentences) form the content of what Russell dubbed the “propositional attitudes.”⁸ These explorations in the content of Intentional states have been, as he would admit, tentative. His only certainty has been that *some* answer must be given to the question of content,⁹ both for purposes of assessing moral responsibility and for purposes of keeping the psychology of Intentional states scientifically respectable.¹⁰

Human actions also come in for their share of non-natural or “otherworldly” analyses. To forestall the need to resort to the mysterious, Michael has consistently sought to analyze human actions as events are analyzed generally, which (in the Davidsonian tradition at least) is as spatio-temporally located particulars. More specifically, Michael has analyzed each human action as a complex event consisting of both a volition (or willing) and a bodily movement where the bodily movement is both the effect and the object of the willing—in short, as a willed bodily movement.¹¹ This analysis places human actions squarely within the causal-explanatory nature of the world, and does so for two reasons. First, the peculiarities in action descriptions (that tempt some philosophers to become mysterious) are conceived as just that, namely peculiarities in *descriptions* of actions rather than in actions themselves. And second, such an analysis is a species of what is generically called the causal theory of action (or “CTA”), which importantly asserts that human agency is not irreducible or mysterious, but rather is fully explicable as a form of mental state causation. This is a conclusion Michael explicitly draws from his own version of the CTA.¹²

Such agency does have further aspects to it, however, beyond those required by the CTA. Michael’s work describes two such important attributes, both involving causation. The first is that human beings often cause the existence of the objects of their willings, wants, and intendings. Michael argues that this causal capacity is fundamental to the agency of persons, and he defends the existence of this capacity against the challenge of recent neuroscientific findings that purport to show that willings are merely epiphenomenal with the actions willed, rather than causes of such actions.¹³ The second aspect of human agency which Michael defends is that the causation of intendings, wantings, choosings, and willings by factors outside the control of an actor does not impact upon an actor’s agency.¹⁴ All that is needed for such agency is the capacity to have chosen otherwise,¹⁵ which according to Michael is a capacity which persons possess despite their causings being caused.

⁶ Michael tells me that Judith Thomson once advised him (when both were teaching at Berkeley in the early ‘80s) not to even try to solve this problem; that so doing would be “crazy” in light of the numerous philosophical lances that had already been broken on this tournament field.

⁷ Moore, 1993a; Moore, 1997b, ch. 8.

⁸ Moore, 1987c; Moore, 1997b, ch. 11.

⁹ It has been gratifying to Michael to observe younger scholars whom he is proud to have influenced tackle some of the complexities here. See particularly Kimberly Ferzan, “Beyond Intention,” 29 *Cardozo Law Review* 1147 (2008); Kimberly Ferzan, “Intention,” in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2nd edn. (Oxford: Blackwell, 2010); Gideon Yaffe, *Attempts* (New York: Oxford University Press, 2010), discussed at length by Michael (Moore, 2013c, 150–77).

¹⁰ Moore, 2011b; Moore, 2013c. ¹¹ Moore, 1993c; Moore, 1994c; Moore, 1997b, ch. 6.

¹² Moore, 2010. ¹³ Moore, 2011a.

¹⁴ Moore, 1985c; Moore, 1997b, ch. 12; Moore, 2014b; Moore, 2014e.

¹⁵ Moore, 2014d.

As Michael insists, causation is basic to our understanding of human agency. But then, causation is basic to our scientific understanding of the universe. Michael has accordingly devoted substantial energies to pinpointing the nature of causation within the natural world.¹⁶ He identifies causation as a relation naturally existing between states of affairs, and only constructively between events and facts as derivative causal relata. Such states of affairs do not include omissions or other absences, and the causal relation is singularist and not to be identified as probabilistic chance-raising, nomic sufficiency, or counterfactual necessity. Michael seems to think such singular causal relations may be either physicalist in nature, or *sui generis* (“primitive”); in either case, the singular relation is scalar, not bivalent. Causal laws are derived from such singular relations, and not the other way around; such laws are sometimes at least to be seen as giving sufficient conditions; and every singular causal relation presupposes the existence of some causal law(s). Importantly, Michael rigorously distinguishes counterfactual dependence from the causal relation, yet nonetheless finds counterfactual dependence to be a real relation as well.¹⁷ Such counterfactual dependence relates absences as well as presences, and it too is scalar, but in ways that differ from causation.¹⁸

The biographical antecedents of Michael’s metaphysical apparatus appear to reach all the way back to his college days. Having found the US Naval Academy shockingly anxious to enforce rules of order and decorum against an Oregon kid who mostly liked to ski, Michael survived as a midshipman for only three months, twenty-two days, and ten hours. Having turned down the chance to study mathematics at MIT for the prospect of giving orders on the bridge of a destroyer, Michael’s departure from Annapolis left him with little choice but to return to his home in Eugene. There, however (while living in the fraternity next door to the iconic wreck used in the movie *Animal House*), he entered the newly founded Honors College at the University of Oregon where he found ample intellectual nourishment during his undergraduate years (1961–4). Honors College graduates had to take year-long core courses and comprehensive year-end exams in US history, economics, calculus, chemistry, physics, English literature, philosophy, and a foreign language. Students could petition to waive one such core course and Michael promptly petitioned to waive philosophy, on the stated ground that he was “an empiricist for whom knowledge consisted of testable facts, whereas philosophy was just moving concepts around (and around and around) so that no progress was possible and no new knowledge gained.”¹⁹ Remarkably, his petition was granted (presumably by a member of the science faculty!).

Michael’s interest in and respect for empirical science has thus been long standing. Indeed, he has always had a mathematics/hard science bias, regarding the standards of those disciplines as the standards of rational thought. (He was always proud of the fact that when his high school math teacher, Mr. Oscar Schaaf, heard that Michael had headed to Harvard Law School, his comment to Michael’s father was, “What a waste!”)

¹⁶ Moore, 1987b; Moore, 1997b, ch. 7; Moore, 1998d; Moore, 2000b; Moore, 2002d; Moore, 2003b; Moore, 2005a; Moore, 2009a; Moore, 2009d; Moore, 2011c; Moore, 2011f; Moore, 2012a; Moore, 2012d; Moore, 2013a; Moore, 2013b.

¹⁷ Moore, 1987b; Moore, 1997b, ch. 7; Moore, 2003b; Moore, 2007e; Moore, 2009b; Moore, 2009d; Moore, 2012d.

¹⁸ Moore, 2012d. ¹⁹ From a recorded conversation, December 2013.

What Michael didn't appreciate at the time was that his interest in science was the philosopher's interest, not the scientist's interest. He liked, as he has put it, "theories, overviews, knowledge about the world in large clumps" and, unsurprisingly, he thus found that he did as poorly in lab courses as he did well in lecture courses (earning three As in Chemistry, and a C, D, and W (in lieu of an expected F) in Chemistry Lab). And so, after disdaining philosophy for the sciences, Michael found his way to metaphysics, which for Michael is literally that; namely physics (and science generally) at a higher (or "meta") level of abstraction. But his interest in the discoveries of the empirical sciences continues to the present time, and when he isn't reading the latest work in neuroscience, he is indulging the bedtime hobby of exploring the history of physics, from Maxwell's equations to string theory.

B. The philosophy of science applied to the psychological sciences

One of the earliest areas of scholarship which Michael undertook was the application of the philosophy of science to academic psychology. Although interdisciplinary, his work in this arena was not concerned with his primary discipline of law, but rather with the disciplines of philosophy and psychology. More specifically, Michael applied the philosophy of science to psychological science (that is, psychoanalysis, psychiatry, behaviorism, cognitive psychology, and neuroscience).

Three theoretical aspects of psychoanalytic science drew Michael's attention early in his career: the psychoanalytic understanding of dreams, the claimed existence of a dynamic unconscious, and the subdivisions of self posited by the five metapsychological viewpoints of Freud's version of psychoanalytic theory. Michael cautiously conceded that in various senses of the word, *unconscious* mental processes existed.²⁰ He sought, however, to decouple that thesis from Freud's more specific and more animistic conclusions. In the theory of dreams, for example, Michael reconstrued each of the three levels of explanation of Freudian dream theory so as to dispense with Freud's animistic reliance on the notion of unconsciously motivated actions.²¹ For example, Michael urged that instead of thinking of dreams as satisfying a motive or wish to sleep, as Freud hypothesized, we should think of dreams as fulfilling the function of sustaining sleep. Similarly, Michael sought to de-animize Freud's putatively motivational explanations of parapraxes (such as slips of the tongue) and neurotic symptoms. And finally, he sought to defuse the supposedly radical disunities that stemmed from Freud's division of the self along the three lines of experienced conflicts, consciousness versus unconsciousness, and differential functional roles. Michael concluded that these three divisions of self did not evidence any fracturing of the agency that marks each of us as but one person, nor did the three divide personality in congruent ways.²²

By de-animizing psychoanalytic theory, Michael left open the question of how much of the theory (so reconstrued) could be taken seriously as an attempt by Freud to state an ontologically respectable, functionalist theory of mind. Michael's answer came as a divided verdict: some parts of the theory, such as the dream-work, Michael took to be a

²⁰ Moore, 1984d, ch. 7.

²¹ Moore, 1983e; Moore, 1984d, chs. 1, 8.

²² Moore, 1983d; Moore, 1984d, ch. 11.

genuine attempt at functionally specifying sub-personal states that underlie the ordinary mental processes of whole persons; other aspects of the theory, such as the structural metaphysics (ego, id, superego), Michael saw as less successful. The ego, for example, Michael took to be a “far too smart general” to serve as a vehicle for gradually reducing the intelligent to the mechanical via the strategy known as “homuncular functionalism.”²³ In general Michael evinced skepticism that the conflicts persons experience in dreams, neurotic symptoms, or everyday slips of the tongue or movement could give rise to useful starting points for the general functional subdivision of mind that should be part of a truly general psychology.²⁴

Apart from reconstructing psychoanalytic theory in a more scientifically respectable way, Michael’s other early topic in this area was psychiatry’s conceptualization of mental illness. There were, as Michael saw it, two errors to be avoided within psychiatry. One was the error of thinking that mental illness “was a myth,” as was the conclusion of Thomas Szasz, R. D. Laing, and other members of the radical psychiatric movement of the 1960s and 1970s in the US and the UK. The opposite error was to “medicalize morals” in the expansive way that Karl Menninger (Michael’s supervisor during his time as a lecturer at the Menninger Foundation in the early 1970s) and those like him were wont to do. Michael avoided the first error by showing how the claims of “myth” were based on inadequate philosophies of mind and science.²⁵ He sought to channel psychiatry away from the second error by cabining the criteria that were used by the psychiatric profession for a “mental disorder” so as to avoid its equation with socially deviant behavior or attitudes.²⁶ Michael did this with the express purpose of keeping psychiatry within the bounds of concern for the aberrational and exceptional phenomena commonly thought of as mental illness, and with an eye to discrediting any claimed psychiatric expertise about the ethics of the good and virtuous life.

Given his interest in science, it is no surprise that some of Michael’s earliest work was in the philosophy of science.²⁷ In the late 1960s, he would arrive at his law firm in San Francisco (then Howard, Prim, Smith, Rice, & Downs; but now Arnold & Porter) by 6:00 a.m., typically a good two hours before anyone else, in order to work on his first paper on dream theory. As he describes it, it had a kind of “mad scientist” feel to it, given the disjunction between his early morning theoretical work and the practicalities of the typical workday.

His general interest in science explains some such activity; but why the philosophy of science as applied to psychology, psychiatry, and psychoanalysis? One of his specific interests within psychology/psychiatry is perhaps easily explained; the interest in how mental illness should be conceptualized. Such an interest was somewhat forced on Michael by the fact that many of those who were closest to him suffered from serious mental diseases, ranging from classic paranoid schizophrenia to clinical depression and bipolar disease. His mother lost custody of Michael (for a period of about six years)

²³ Moore, 1988b; Moore, 1997b, ch. 10.

²⁴ Moore, 1988b; Moore, 1997b, ch. 10.

²⁵ Moore, 1975a; Moore, 1975b; Moore, 1984d, ch. 4.

²⁶ Moore, 1978a; Moore, 1984d, ch. 5; Moore, 2014f.

²⁷ In the 1970s, Michael became friends with the three leading philosophers of science in America, Carl (or “Peter,” as he was known to friends like Michael) Hempel, Adolf Grunbaum, and Ernst Nagel, and all three were quite encouraging of his work.

when he was only seven, partly because she was a lesbian and was thus thought to possess a mental disease in the psychiatry of early 1950s Oregon. As if it weren't enough to lose his mother to a period of involuntary commitment in the state mental institution for this "deviance," others very near and dear to Michael, both during his childhood and in the formative years of early adulthood, battled textbook conditions that proved tragic. He spent years seeing those he loved go in and out of mental hospitals, and he remembers quite desperately seeking to unravel the delusions symptomatic of their psychotic disorders and working fruitlessly to lighten the burdens of severe depression. He grappled with five instances of attempted suicide by five people to whom he was deeply bonded, two of which were heart-breakingly successful.

Given those experiences, it is no surprise that one of Michael's earliest efforts in this area was to refute those radical psychiatrists who loudly proclaimed that mental illness was a myth. In Michael's experience, mental illness was a cruel reality that robbed children of parents, parents of children, brothers of sisters, and lovers and friends of kindred spirits. But it is also no surprise that Michael worked to limit expansive psychiatric conceptions of mental disease. He was affronted by the idea that life choices considered "abnormal" by a majority could be designated as "deviant" by a profession such as psychiatry. Given his experience with his mother and her life partner by whom he was eventually jointly raised, Michael applauded the self-described feminists who disrupted the annual meeting of the American Psychiatric Association in San Francisco in 1970 to protest what they took to be a dishonest medicalizing of mere (conventional) morals.

Tracing the origins of Michael's interest in theory-construction vis-à-vis psychoanalysis particularly is a little less easy. Bored out of his mind by the standard Harvard Law School courses offered in the mid 1960s, Michael wandered into a then-new class offered by Alan Stone and Alan Dershowitz, "Psychoanalysis and Law." He quickly discovered that the "and Law" part taught by Dershowitz interested him very little, so Michael began attending only Stone's half of the lectures. Stone's detailed analysis of psychoanalytic theory fascinated Michael, both for its promise of personal wisdom and for its wildly speculative nature as a theory of human behavior. Michael's final paper in the course, entitled "The Wish to Bleed," was a send-up of Freud's run-away anthropomorphization of human phenomena. Facetiously positing that we bleed when cut because we unconsciously want to bleed, this intended *reductio* was the direct antecedent of the de-animation of Freudian theory that characterized Michael's later published papers.

Psychoanalysts often say that people become psychoanalysts because of a morbid fascination with their own psychology. I don't think this is true in Michael's case: I think he has never thought that there are any particularly interesting recesses in his psyche that merit either his attention or anyone else's. Instead, when asked, Michael will trace his interest in psychoanalysis to growing up with a father and three strong women—his mother, her life partner, and his sister—amongst whom interpretations of hidden motives abounded. Here is Michael's account in his own words:

I recall some examples of free-of-charge, intra-familial interpretations by my mother. On my casual mode of dress: "You just think you are so much better than everyone else that you don't have to dress well." And on my choice of slim women as romantic

partners: “Are you sure you wouldn’t really prefer boys?” But even my less overtly interpretive father could deliver up some zingers on all aspects of my choices, from cars to careers to women. Some of them were quite good, as when he said of the woman for whom I left my first wife: “Ah, you are seeking your mother then?” Between the four of them I developed a taste for the kind of interpretation of human behavior that is the meat and potatoes of the psychoanalytic enterprise.²⁸

C. The challenges of academic psychology to the folk psychology on which personhood and responsibility is based

Michael’s interest in psychiatry, psychoanalysis, behaviorism, cognitive psychology, and neuroscience has not only been to keep such theories respectable as psychological sciences. He has also had an interest in defending the folk psychology of persons (and the doctrines of responsibility that are built on such folk psychology) from the attacks of Freud, James, Skinner, and other academic psychologies. So this I shall count as the third area of his scholarship.

He has recently taxonomized six challenges to folk psychology that have inspired his response: (1) the hard determinist challenge that all of our actions and choices are caused by factors that we do not control; (2) the epiphenomenal challenge that our choices do not cause the actions chosen but only accompany such choices as psychological side-shows; (3) the eliminative materialist challenge that there is no place for folk psychological entities like intentions or beliefs in the best explanations of human behavior (explanations which are rightly framed in terms of brain states, if eliminative materialists are right); (4) the reductionist challenge that persons are nothing but mechanisms, their actions and mental states no more than dumb clockwork-like robotics; (5) the epistemic challenge that persons are often in error and have no privileged access to the mental states that cause their behavior; and (6) the consequentialist challenge that the greater predictability of human behavior made possible by advances in the psychological sciences will lead to the replacement of responsibility assessments in law and morals by legal strategies and social philosophies that pursue preventative rather than punitive regimes.²⁹ Although psychoanalytic and behavioral psychologies have in the past mounted most of these six challenges at one time or another, it is neuroscience today that is seen as the most threatening harbinger of change in who we conceive ourselves to be. Michael has accordingly focused his recent work there, charting in detail these challenges as they are presented by contemporary neuroscience.³⁰

As part of his work in this area, Michael has mapped the salient aspects of folk psychology that are challenged in these ways by various academic psychologies. Throughout his work Michael has described persons as free, rational, autonomous, emotional, Intentional, unified, reasons-responsive, character-possessing creatures—in short, as possessing the defining characteristics assigned to persons by folk psychology³¹—and he has dealt in detail with some of these folk-psychological attributes of persons and the challenges presented to them by certain academic psychologies. Early in his career he examined the challenges presented by the existence of unconscious mental states, as

²⁸ From a recorded conversation on the topic, December 2013.

²⁹ Moore, 2014e. ³⁰ Moore, 2012g.

³¹ Moore, 1997b, ch. 15; Moore, 2011b; Moore, 2012g; Moore, 2014c; Moore, 2014f.

these were conceived in psychoanalytic theory.³² Certain Freudian interpretations of such states threatened both to diminish personal responsibility to the vanishing point, because we were made mere puppets in the control of the unconscious puppeteer, and to enlarge responsibility to alarming levels, because *we* became as much puppeteers as puppets, our agency identified as much with our unconscious as with our conscious mental states.

Michael's work in the philosophy of science that de-animated the unconscious was part of his answer to these specifically Freudian challenges. More recently, Michael has sought to defuse a more contemporary version of the epistemic challenge—the version issuing from such explorers of the “new unconscious” as psychologists John Barge and Daniel Wegner.³³ Michael concedes to these psychologies a greater scientific respectability than that accorded their psychoanalytic predecessors. Still, he defends the view that the weak privileged access that folk psychology attributes to persons is in fact untouched by these more contemporary psychologists of the unconscious.

Apart from addressing different versions of the epistemic challenge to the folk psychology of persons and responsibility, Michael has also gone after the epiphenomenal challenge. Here he has defended autonomy (the capacity to cause the objects of one's willings) against recent challenges of neuroscientists like the late Benjamin Libet, concluding that their epiphenomenalist views are based on a faulty philosophy of mind.³⁴ Michael urges, first, that a better philosophy of mind would reveal that our willings (properly conceived) do cause the bodily movements that are the objects of such willings, just as folk psychology postulates; and second, that sometimes, when this isn't true, we are responsible nonetheless for some real-world harms that counterfactually depend on our willings, even when we achieve such harms other than by causing them through willed bodily movements. (This second point constitutes a kind of compatibilism between responsibility and epiphenomenalism.)

The third challenge with which Michael has dealt at length is that of the hard determinist.³⁵ Early in his career Michael sought to show how the established excuses (the ones commonly accepted in both law and morality) are not in fact based on the supposition that causation of choice or action is an excuse.³⁶ More recently, Michael has undertaken a more general defense of the compatibilist view.³⁷ Michael's conclusion is that being responsible for some choice or action is fully compatible with that choice or action being sufficiently caused by factors not within the control of the actor. Michael distinguishes a variety of compatibilisms within philosophy, and defends what is usually called “classical compatibilism”—the view that we were able to choose and do other than we did even if our choices and actions were fully caused by factors over which we had no control.

Michael has also focused on two more particular sorts of excuses as a means of shedding light on the folk-psychological attributes that persons must generally have in order

³² Moore, 1979b; Moore, 1980b; Moore, 1984d, chs. 9–10. ³³ Moore, 2012g.

³⁴ Moore, 2011a.

³⁵ When I first met Michael he was preoccupied with this issue, and we devoted our first lunch in 1985 to the debate about free will and determinism. For the record, I was and remain a committed incompatibilist, despite, or perhaps because of, listening to almost thirty years of argument-lite dogmatism from Michael, the assertions of which tellingly lack parts and subparts.

³⁶ Moore, 1985c; Moore, 1997b, ch. 12. ³⁷ Moore, 2014b; Moore, 2014e.

to be responsible. First, he has used the excuse of insanity to plumb the contours of the kind of rationality a creature must possess in order to be a person and a moral agent.³⁸ Second, he has drawn on the family of excuses that fall under the rubric of “compulsions”—duress, natural necessity, addiction, provocation, and the like—in order to map the kinds of freedom a creature must have to be a person and a moral agent.³⁹

D. Moral responsibility and its role within criminal law

Michael’s fourth broad area of work leaves the psychological sciences and their challenges to responsibility to focus on responsibility itself. In a very considerable body of work, Michael has pressed the questions: “When and for what is a person responsible and blamable?” Given what Michael has always seen as a close tie between moral responsibility and the defensible conditions of punishment within Anglo-American criminal law, Michael’s work in this area is as much substantive criminal law scholarship as it is moral philosophy.

Michael bases his work in this area on two major suppositions: first, that absent moral blameworthiness, no one should be liable to punishment; and second, that moral blameworthiness (or responsibility) itself exists only if certain natural properties and relations exist, such as acting, intending, causing, etc.⁴⁰ Michael’s contributions in this area thus both blend moral philosophy and criminal law analysis, and appeal to the scientific insights about the nature of actions, intentions, causation, etc., that Michael achieved in earlier work.⁴¹

Michael divides his work on responsibility into three parts: the “theory of responsibility proper”; the theories of the “nature of the elements of responsibility”; and the theory of the subjects of responsibility, or “a theory of personhood.”⁴² He has pursued the first of these in assessing the “conditions of fair fault ascription” that are reflected in “the general part of the criminal law.”⁴³ He urges that one can be responsible for some harm H if: one caused H; one failed to prevent H when one had a duty to do so; one aided another to cause H; one procured another to cause H; one tried to cause H; one consciously and unreasonably risked causing H; or one agreed with another that she would cause H.⁴⁴ With some overlap and combination, these possibilities yield the four “theories of liability” within Anglo-American criminal law: principal liability; accomplice liability; inchoate liability; and conspiracy liability.

Michael has sought to refine criminal law’s four-part general structure by demonstrating, for example, that accomplice liability is superfluous given the other bases for liability;⁴⁵ that inchoate liability consists of two very different bases—trying and risking;⁴⁶ and that principal liability is in fact predicated on two quite distinct relations—causation and counterfactual dependence.⁴⁷ But despite these recommended emendations, Michael is by-and-large both appreciative of, and an

³⁸ Moore, 1975c; Moore, 1979a; Moore, 1984d, ch. 6; Moore, 1997b, ch. 14; Moore, 2014f.

³⁹ Moore, 2014d. ⁴⁰ Moore, 2009d, vii. ⁴¹ Moore, 2009d.

⁴² Moore, 1997b, 35. ⁴³ Moore, 1990b; Moore, 1997b, ch. 1; Moore, 2012f.

⁴⁴ Moore, 2012f. ⁴⁵ Moore, 2007c; Moore, 2009d, ch. 13. ⁴⁶ Moore, 2013c.

⁴⁷ Moore, 2009b; Moore, 2009d, ch. 18.

uncommon defender of, the coherence and systematicity of Anglo-American criminal law and its underlying morality.⁴⁸

Much of Michael's work on responsibility has concerned the second part mentioned above—the nature of the discrete natural properties on which the moral property of responsibility supervenes. One of the most basic requirements for responsibility is that one must *act*,⁴⁹ and Michael has thus employed his work in the philosophy of action to chart the relation between action and responsibility.⁵⁰ In Michael's theory of action (that every action is a willed bodily movement), one's responsibility for a harm begins with one's willing an act. Following Bentham and Austin, Michael argues that two sorts of elements—circumstance elements and consequence elements—combine with such simple acts to comprise the more complex act types that law and morality more typically care about, act-types like burning, killing, disfiguring, etc.⁵¹

The consequential complexity of actions has led naturally to Michael's second discrete enquiry, which is into the causal relations between an act and a harm that render such a harm a "consequence-element" of some (criminal or moral) wrong. Causation being the labyrinth that it is, Michael spends considerable effort mastering and mapping its metaphysical complexities and its relation to responsibility.⁵² Michael carefully isolates the jurisdiction of causation as a determinant of an agent's responsibility for a harm. Distinguishing counterfactual dependence as a desert-determinant independent of causation, Michael finds that it is this relation, not causation, that grounds both moral responsibility and legal liability for omissions, preventions, allowings, double-preventions, and *de minimus* caused remote harms.⁵³ He further distinguishes the "matching" aspect of the culpability requirement from the causation requirement; the matching condition being the requirement that the harm that actually occurs match the type of harm intended, foreseen, or consciously risked.⁵⁴ Such a culpability requirement is often treated as a causation requirement, but the two, Michael urges, are distinct, and liability as a principal for a completed crime requires culpability in addition to causal or counterfactual relations.⁵⁵

Michael has also charted in detail the role of causation in marking the boundaries of permissible consequentialist justifications.⁵⁶ In so doing, he assigns causation a quite different moral role than it typically plays when increasing an agent's blameworthiness, for, in his argument, it is the absence (or at least the weakness) of the causal connection in the enabling, accelerating, redirecting, omitting, and allowing cases that makes such cases eligible for consequentialist justifications.

Michael's major effort in explicating legal (or "proximate") causation is made in his compelling critique of the three leading tests of proximate causation in

⁴⁸ Moore, 2012f.

⁴⁹ Michael does allow for omission liability on an exceptional basis, where omissions are conceived of as absences of certain types of action. Moore, 1993c, chs. 2–3; Moore, 1994c; Moore, 1997b, ch. 4; Moore, 2009b; Moore, 2009d, ch. 18; Moore, 2013b.

⁵⁰ Moore, 1993c; Moore, 1994c; Moore, 1997b, ch. 4; Moore, 2010. ⁵¹ Moore, 1993c, ch. 8.

⁵² Moore, 1987b; Moore, 1993a; Moore, 1994b; Moore, 1997b, chs. 5, 7–8; Moore, 1998d; Moore, 2000b; Moore, 2002d; Moore, 2005a; Moore, 2007e; Moore, 2009b; Moore, 2009d; Moore, 2011e; Moore, 2011f; Moore, 2012a; Moore, 2012d; Moore, 2013a; Moore, 2013b.

⁵³ Moore, 2009b; Moore, 2009d, ch. 18. ⁵⁴ Moore and Hurd, 2002a.

⁵⁵ Moore, 2011f; Moore, 2012d. ⁵⁶ Moore, 2008a; Moore, 2009d, ch. 3.

Anglo-American criminal law: foreseeability,⁵⁷ harm within the risk,⁵⁸ and direct causation.⁵⁹ Michael advances, instead, a quantitative test based on the substantiality of a factor's (or agent's) causal contribution; a test that depends, of course, on the success with which Michael vindicates a scalar understanding of the metaphysics of the causal relation.

In addition to the core conditions of action and causation, the third discrete element of responsibility that Michael has examined is culpability. Michael distinguishes intending from foreseeing and from predictively believing,⁶⁰ and urges that intending reflects greater culpability than does foresight.⁶¹ He has joined me in distinguishing intentions from motivations and in urging that bias, prejudice, hate, ill feeling, and other such unfortunate motivations have no place in determining criminal culpability.⁶² And together, we have examined whether the inadvertent creation of an unreasonable risk (negligence) can be a further basis for culpability, reluctantly (and quite counterintuitively, given our common experience with our teenage children Aidan and Gillian) concluding that inadvertence, even when unreasonable, generates no moral blame, and thus provides no basis for punishment when the risks to which the actor was inadvertent materialize.⁶³

Action, causation, and culpability together make up what criminal law professors call the *prima facie* case of criminal liability. But there are also the defenses to be considered before a *prima facie* liable defendant is *actually* liable to criminal punishment. Such defenses are usually divided between justifications and excuses, and Michael so groups them for separate treatment.

Michael's work on the justificatory defenses has focused on the most general "balance of evils" defense, so called because it seemingly provides that one can do any act prohibited by a criminal code so long as the evil of the act is less than the evil it prevents. The central problem with the balance of evils defense is to determine how it avoids licensing morally appalling actions such as rape, pillage, and murder whenever a net balance of good consequences will ensue—a result most (except the most die-hard of utilitarians) find morally outrageous. Michael attempts to cabin the use of good consequences in the justification of *prima facie* evil actions, allowing only three opportunities for consequentialist justifications: (1) where there is an exception to the norm that prohibits the evil act done, as self-defense is an exception to the prohibition on killing; (2) where the consequentially justified act lies outside the jurisdiction of a norm (as is the case, for example, when the bad consequences of the act (by virtue of which the act is *prima facie* prohibited) are merely foreseen, but not intended); and (3) where the consequences of not doing the *prima facie* wrongful act are so awful that they place the act beyond the "threshold" that determines when categorical obligations apply.⁶⁴

Despite their heteronomous appearance, Michael has insisted that it must be possible to give a general theory of the excuses. He distinguishes the causal theory of

⁵⁷ Moore, 1993a; Moore, 1997b, ch. 8. ⁵⁸ Moore and Hurd, 2002a; Moore, 2009d, chs. 7–10.

⁵⁹ Moore, 2000b; Moore, 2009d, chs. 11–12. ⁶⁰ Moore, 1987e; Moore, 1997b, ch. 11.

⁶¹ Moore, 1995b; Moore, 1997b, ch. 9; Moore, 2011b; Moore, 2013c.

⁶² Hurd and Moore, 2004b. ⁶³ Moore and Hurd, 2011d; Hurd and Moore, 2011e.

⁶⁴ Moore, 1989h; Moore, 1997b, ch. 17; Moore and Alexander, 2007d; Moore, 2008a; Moore, 2009d, ch. 3; Moore and Alexander, 2012e.

excuse⁶⁵ from the character and choice theories, and throws his intellectual weight behind the last of these three,⁶⁶ advocating that the touchstone of excuse is to be found in the lack of opportunity⁶⁷ or the lack of capacity to have chosen other than one did.⁶⁸

This “alternate possibilities” view of excuses is later applied to the compulsion excuses such as duress, necessity, addiction, and provocation.⁶⁹ Michael urges that an actor *could* have done other than he did when he *would* have done otherwise in certain close possible worlds, namely worlds where he either tried very hard to do otherwise, or where he wanted very much to choose to do otherwise.⁷⁰ Significantly, Michael does not think that insanity fits this theory of excuse,⁷¹ because he does not think that insanity is a true excuse. Rather, insanity is a status exemption like that provided for infants.⁷² As Michael concludes, we excuse the mentally ill not because their choices to do what is right are too difficult for them, but rather because they lack the status of being moral agents to start with.

Early in his career when he was writing a series of papers on discrete topics within responsibility, Michael’s Harvard mentor, Alan Stone, commented that in his seemingly disparate papers Michael was implicitly working out a general theory of the person. Michael has since been quite explicit about the need for a sub-theory of personhood within the theory of responsibility. (This is the “third part” of his theory of responsibility earlier distinguished.) His own view of persons is that persons must be rational, autonomous, emotional, character-possessing agents. What is not required is that persons stand outside the natural causal order so as to be contra-causally free in their choices. When possessed of the properties described, persons, while of the natural order, can rightly be praised or blamed in morality, rewarded or punished in law.

Michael’s extended investigation into responsibility and the conditions of its ascription probably wears its motivation and genesis on its face. As his friend Sally Salter once said of him, he has a very strong sense of being in control of his life in all of its phases; professional, financial, and personal. With the strong sense that he controls his destiny comes a strong sense of responsibility. On pain of elitism, he takes others to be as responsible for their choices, and the consequences of those choices, as is he, even if they lack a similarly strong *sense* that they are in control of their fate. But if this sounds harsh, it should also be understood that he is the first to make excuses for his children; he is shockingly generous in forgiving the transgressions of his friends and family; and he carries very few grudges, allowing people to reinvent themselves with him even when a good retributivist would consider them quite undeserving of ready forgiveness. So all of his tough talk about responsibility masks a remarkable facility for indulging the weaknesses of others!

E. Political philosophy

The fifth area in which Michael has devoted considerable scholarly energy is in the field of political philosophy, and specifically, the political philosophy that undergirds the

⁶⁵ Moore, 1985c; Moore, 1997b, ch. 12. ⁶⁶ Moore, 1990a; Moore, 1997b, ch. 13.

⁶⁷ Michael seems to have changed his mind on the opportunity branch of this. See Moore, 2014d.

⁶⁸ Moore, 1985c; Moore, 1990a; Moore, 1997b, chs. 12–13. ⁶⁹ Moore, 1989c; Moore, 2014d.

⁷⁰ Moore, 2014d; Moore, 2014e. ⁷¹ Moore, 2014f.

⁷² Moore, 1975b; Moore, 1975e; Moore, 1979a; Moore, 1984d, ch. 6; Moore, 2014f.

substantive criminal law. Michael has written extensively in the two areas of political philosophy of greatest relevance to criminal law, namely the theory of punishment and the theory of the justified scope and limits of legitimate criminal legislation within a democracy.

As to the first of these, Michael has famously defended a retributive account according to which we should impose punishment because and only because an offender deserves it.⁷³ Such a theory contrasts sharply with utilitarian theories according to which punishment, even of those who deserve it, is an evil that can be justified only by its contribution to some greater good such as crime prevention. Such a theory also contrasts sharply with rehabilitative and mixed theories of punishment. As Joel Feinberg admiringly described Michael's retributivism:

It is marked not only by profundity and subtlety but also clarity. This work . . . deserves to become a classic . . . [and] is all the more valuable in being uncompromising. He knows very well what rehabilitation is, and he rejects it. He knows what vengeance is, and he rejects it. He knows what mixed theories are, and he rejects them. He is the pure retributivist . . . , a person who will not back away from the sufficiency thesis.⁷⁴

Michael's main argument for retributivism has come to be called "the experiential argument," for it is intuitionistic and emotion-based. Rejecting what he calls the "tired metaphors" of "paying a debt to society" or "restoring some moral balance," Michael premises his defense of retributivism on the feeling of guilt that virtuous people feel when they have culpably done wrong. In Michael's view, the judgment to which such virtuous feelings lead is a judgment of deserved suffering. Not only is the imposition of such suffering on those who deserve it an intrinsic good, it is also the good uniquely served by criminal law, and it should thus be thought to define the proper function of such law.⁷⁵

Michael's "experiential argument" for retributivism is explicitly built on the guilt feelings virtuous people feel when they have culpably done wrong. As Michael says in his most recently published work about this form of argument: "Anyone who wants to live the academic moral philosophy they write about, and who has felt the compelling power of deep guilt feelings for harms caused, will brush such arguments [about the irrelevance of guilt feelings] aside."⁷⁶ ⁷⁷ Michael's friend and mentor Herb Morris also built his "moral education" defense of retributivism on feelings of guilt, shame, and remorse (although in a quite different way from Michael).⁷⁸ That led many to speculate about the events in Herb's life that made him so deferential to these emotions. No doubt some might indulge similar speculations about what in Michael's past so convinced him

⁷³ Moore, 1982e; Moore, 1987e; Moore, 1993b; Moore, 1997b, chs. 2–4; Moore, 2002c.

⁷⁴ Joel Feinberg and Jules Coleman, *Philosophy of Law*, 6th edn. (Belmont: Wadsworth, 2000), 685.

⁷⁵ Moore, 1990b; Moore, 1997b, ch. 1. ⁷⁶ Moore, 2009d, 30–31.

⁷⁷ He has been pleased that others (such as John Gardner in his review of Michael's experiential argument) have joined him in thinking that personal experience of guilt compels judgment. John Gardner, "Wrongdoing by Results: Moore's Experiential Argument," 18 *Legal Theory* 459 (2012).

⁷⁸ Herbert Morris, "A Paternalist Theory of Punishment," 18 *American Philosophical Quarterly* 263 (1981).

that feelings of guilt have “compelling power.” And so I asked him. Here is his quite touching confession:

I have felt guilty about many small experiences of hurting, or at least, not helping others. But the big ones? Here are some real possibilities—take your pick: One was on the occasion of leaving my first wife, Leslie, and two young daughters, to pursue a kind of romantic relationship that I had long desired but never had. Sitting in my children’s bedroom, the scene of many of their happy early childhood memories, I was hit with overwhelming guilt that left me at rock-bottom on the depression scale. Another was undertaking to help, but not carrying through in a meaningful way, with the mental health problems of the woman, Janean, for whom I left Leslie. Seeing that she was suicidal I had arranged for therapy with the best psychiatrist I knew, Alan Stone, but he had graciously agreed to do it only with the admonition that this had to be really important to me because what I was asking took extraordinary effort on his part. I released Alan from his agreement, and Janean left my apartment in Cambridge to go to her parents in Kansas to seek therapy at the Menninger Foundation. Knowing that homes we have left are dangerous places in such circumstances, I called Janean after about a month to say that I was coming for her, but she urged me not to come. That was the night before she shot herself with her father’s pistol. Janean’s suicide also left me at ground-zero on the depression scale. Another occasion was when I undertook to help my mother a few years later after her own serious suicide attempt, also due to mental health problems. I was also not very successful in this effort, in part due to my own perceived inability at that point in my career (when I was in the midst of a visit at Stanford) to devote the kind of time needed to help my mother fill her days in Palo Alto.

I actually do not think that it matters much what one’s experiences might be. Anyone who has lived anything but an extraordinarily benign life—and anyone not so benighted that he doesn’t notice the havoc he has sometimes sown—will have some such experiences, and some such corresponding judgments. As Dick Hare once said, moral wisdom requires moral experience, and if you don’t have enough yet, just wait a little.⁷⁹

Michael’s retributivism is of a piece with his deontological view of morality and his moral realist view of meta-ethics. These same ethical and meta-ethical views motivate similar justice theories of other areas of law, such as a corrective justice theory of torts (and also of contracts), natural rights theories of property and constitutional law, etc. In Michael’s view, such justice theories compete in many areas of law (not just in criminal law) both with utilitarian and with egalitarian theories. Michael’s extended defense of retributive justice is only the best known of his justice-based accounts of an area of law. Less well known (because less well developed in print) are Michael’s corrective justice and natural rights views of torts, contracts, property, and constitutional law. Inasmuch as Michael teaches all of these subjects within the first-year law school curriculum on a rotating basis, his students get what they would think of as very well-defended accounts of the justice behind correcting wrongs, enforcing promises, protecting property, and

⁷⁹ From a recorded conversation, December 2013. Michael’s reference to Hare was to Richard Hare, *Freedom and Reason* (Oxford: Clarendon Press, 1963), where, in the Introduction, Hare urges those of his readers who have not faced a serious moral problem in their lives to come back to his book when they have gained more moral experience.

constitutionally enshrining rights to privacy, speech, association, etc. One suspects that if Michael's classroom-tested views were fully worked out in print, they would be the pure, uncompromising justice views of these core areas of law that comprise his retributivist view of the criminal law.⁸⁰

The second kind of political philosophy in which Michael has engaged has been what is sometimes called the theory of criminalization. The central questions in this arena are those of John Stuart Mill: In a democracy, are there any principled limits to what can be prohibited within a just and rational criminal code, beyond the requirement of democratic promulgation, and if so, what are those limits? Michael's answers to Mill's questions are carefully layered.⁸¹ First, contrary to majoritarians like J. F. Stephen and Robert Bork, there are substantive and principled limits to the criminal law that even democratic majorities should respect. This follows for Michael from his "bully pulpit" view of democratic leadership, according to which democracy is best practiced by leaders who lead by their own principles rather than by attempting to represent the principles held by a majority of their constituents. Second, there are values that generally counsel restraint in the use of criminal sanctions, values that Michael believes justify a presumption in favor of negative liberty (and thus against the criminalization of behavior). The minor good that derives from punishing minor wrongdoers is insufficient, Michael argues, to overcome this presumption. Third, citizens have what Michael calls a "derived right of liberty." This right is derivative of a more basic duty on the part of legislators to aim at some things and not others as they pass criminal legislation. Echoing Mill, Michael singles out for particular condemnation criminal legislation that is paternalistically motivated. Fourth, citizens also enjoy what Michael calls, the "basic" (or sometimes "strong") right to liberty. This is a right protecting self-defining choices from state coercion for any but the most compelling of reasons.⁸²

Michael thus defends a broadly libertarian view of the limits of criminal legislation. Such libertarianism is part and parcel of his retributive theory of punishment. And both his libertarianism and his retributivism are related to the good that Michael assigns to personal autonomy, even when it is badly deployed. Both depend on the sense that we are in control of much (even if not all) of what matters in our lives. Such control not only generates a sense of guilt and of responsibility at the root of retributivism, but also

⁸⁰ The exception for Michael appears to be the law of contracts; see Moore, 2007b. For Michael shares my view (Heidi M. Hurd, "Promises, Schmomises," unpublished manuscript) that the obligation to keep one's promises (if such an obligation exists at all) is far too weak to ground an entire area of law such as contracts. Even here, however, he eschews utilitarian defenses. Instead, he follows me in finding that promises (and their legal expressions in contracts) merit enforcement when they have generated reliance interests that would leave promisors deserving of corrective justice if breached.

⁸¹ Moore, 1984e; Moore, 1989d; Moore, 1989i; Moore, 1997b, chs. 16, 18; Moore, 1998a; Moore, 1998b; Moore, 2005b; Moore, 2007b; Moore, 2009c; Moore, 2014c.

⁸² These four aspects of Michael's liberty-protecting views motivated his first public foray into this area of political philosophy, a newspaper debate with Senator John Briggs on Proposition 8 on the 1978 California ballot (Moore, 1978b). This Proposition would have banned gays from teaching in the California public school system. Michael was outraged that his mother, a schoolteacher during the Depression before becoming an accountant, would have been prevented from teaching by this kind of law. The problem, as he saw it, was not the Millian objection that Briggs was using the wrong kind of argument in support of the law—namely an argument that appealed to notions of immorality. The problem was with the kind of morality that Briggs brought to the debate.

supports a right to be left alone to decide who we will be and how we will act to the greatest extent possible consistent with our obligations to others.

These three views—retributivism, responsibility, and the right to liberty—combine in a philosophy that has a distinctive “carry-your-own water” flavor to it. The general view is that persons generally deserve the fruits of their labors, both good and bad, and that because each *can* do the good and avoid the bad, there are limited duties of beneficence that are owed by those who succeed to those who do not. On such a largely libertarian view, need often loses out to accomplishment as a desert-base for social redistribution.⁸³

F. Meta-ethics

The sixth area in which Michael has written extensively is meta-ethics, which (as the name implies) concerns itself with study of such “external” moral questions as whether moral qualities exist, whether moral propositions are capable of being true or false, and what meanings there might be for moral statements. Michael began in this area by charting nine tempting routes to skepticism.⁸⁴ He then applied what he called the “parallel argument,” which drew parallels between such moral skepticisms and more general cognitive skepticisms.⁸⁵ He urged that, given the parallel vulnerabilities of science and morals to such skepticisms, if such skeptical considerations did not erode one’s realism about scientific truths, they should not erode one’s realism about moral truths either.

Ten years later, Michael expanded his defense of moral realism beyond the conditional defense provided by his “parallel argument.” He argued more positively, on inference-to-the-best-explanation grounds, that moral qualities and entities had the kind of mind-independent existence distinctive of metaphysical realism in all domains of knowledge.⁸⁶ He then turned his naturalist realism to instrumental goods, and specifically, to those particular instrumental goods constituting (as Michael saw it) most legal properties.⁸⁷ By pressing the multiple realizability of moral qualities by natural properties, of legal properties by moral and natural properties, and of mental properties by physical properties, Michael defended a kind of supervenient, yet still reductivist, analysis in all three fields of ethics, law, and psychology.

From the start, Michael recognized that his moral (as well as scientific) realism was related to the kind of semantics that he had independently defended in his work on interpretation (See section II.H. below). This is often called “K–P semantics,” after its two most famous purveyors in philosophy, Saul Kripke and Michael’s early teacher in the philosophy of language, Hilary Putnam. On this semantics, the meaning of a word is not to be given by a Lockean concept (definition, Fregean “sense”), that is, a set of

⁸³ That said, nothing appalls Michael more than to be mistaken for a Republican! For, despite his deontic libertarianism, Michael has ample capacity to make room in his moral psychology, his ethical ontology, and his personal life for a set of aretaic obligations that, if satisfied, will compel the development of personal virtues that will be expressed in considerable generosity on the part of those who have to those who do not. In his view, deontic duties have substantial limits, and inasmuch as the law should respect those limits, it is not entitled to make us as good as we should be. But on aesthetic grounds alone he finds it unseemly to join the political ranks of those who are positively proud of the vices that the law cannot touch and the inequalities in wealth and opportunity that those vices permit.

⁸⁴ Moore, 2004c, “Introduction”. ⁸⁵ Moore, 1982a; Moore, 2004c, ch. 1.

⁸⁶ Moore, 1992b; Moore, 2004c, ch. 2.

⁸⁷ Moore, 2002b; Moore, 2004c, ch. 6.

properties analytically necessary for proper usage of the word; rather, the meaning of a word is given by the essential nature of the thing(s) to which it directly refers. Michael used such a semantics not to argue for the truth of realism (in ethics or anywhere else),⁸⁸ but, rather, as a helpful handmaiden to realism defended on other, non-semantic grounds.⁸⁹

While I was born a Platonist, and was thus inclined toward moral realism from an early age (so as to find Michael's contentious objectivism perfectly sensible upon our first dinner over the subject),⁹⁰ Michael entered the academy as a committed Glauconian skeptic, and was thus youthfully dubious of claims about the objectivity of things that could not be quantified and tested. Michael's favorite slogan as an undergraduate, which he often proclaimed in his classes, was "Morality is expediency!" His political theory professor, puzzled about why Michael was such a skeptic, asked him what he had read. "Nothing! I figured it out for myself!" was his brazen reply. Jim Klonoski, Michael's undergraduate Political Science Department advisor, had a firm view of the objectivity of morality (and Klonoski had a far easier time convincing Lee Bollinger, also a student in the UO's Political Science Department a few years later, of the objective goodness of affirmative action than he had of convincing Michael of anything at all). Klonoski was so disgusted with Michael's skepticism that he said, "If you ever get committed to some normative ideal, you let me know; send me a telegram!"

Klonoski's words came home to roost, for Michael eventually found that "such skepticism doesn't live very well."⁹¹ With increasing philosophical sophistication, such skepticism seemed less compelling, and eventually, unsustainable. But Michael's mode of investigating the plausibility of moral objectivity was clearly influenced by the heavy dose of moral skepticism that he had injected into his thinking at an early age. His first article for the meta-ethics series in 1982, "Moral Reality," spends most of its time trying to separate out the various strands of skepticism before it uses the parallel argument to answer them. What he was doing, of course, was simply systematizing his own earlier skepticism, the better to answer it.

In the 1990s Michael took a rather surprising detour into theology, spending the summer of 1994 steeped in the literature of religious ethics. His self-assigned task was to investigate the relationship between theism and moral realism. One can guess at his conclusions. He decided, first, that theism did no work in defending objectivity in ethics, and second, that theists typically betrayed a skeptical cast of mind about morality by accepting what are usually skepticism-producing tenets. Such "inchoate skeptics" are saved, Michael concluded, only by one last desperate maneuver in metaphysics—namely the positing of a personalized god.⁹²

It would be easy to assume that Michael would have reached these judgments without spending the summer meticulously poring over dusty texts in theological ethics. After all, despite being the great-grandson of a well-known American theologian, he has been a lifelong atheist, and an arrogant one at that! At the age of four he was warned

⁸⁸ Moore, 2007a. ⁸⁹ Moore, 2014a.

⁹⁰ As Stephen Morse declared at our wedding in 1987, ours was "a marriage forged in metaphysics," for, rather than either of us influencing the other to the view, our attraction was in part a product of our mutual commitment to "crazy realism."

⁹¹ Moore, 2004c, ix. ⁹² Moore, 1995a; Moore, 2004c, ch. 3.

not to lean over the rail at the mill race in Eugene, Oregon, and when his sister Sharon declared, “Don’t worry, Jesus will save him,” Michael retorted: “Naw, he’d just fall in too.” This motivated some hasty home-schooling by his conventionally religious mother, who he then frustrated with the usual questions that a curious child asks: “Where does God live?” “If He created everything, who created Him?” Her inability to squelch these inquiries won him enrollment in an evening Bible study class, in which he humiliated both himself and her. The children were lined up along one wall and asked questions that tested their mastery of a particular biblical text. When they gave correct answers, they crossed to the other wall. Every week, when Michael’s mother came to collect him, there he was, standing alone, his back pressed to the original wall, defiantly insisting, as an example, that he didn’t know who built the Ark. And he didn’t.

Still, while Michael did not delve into theology in adulthood to satisfy any sense of spiritual hunger, he did so with genuine meta-ethical honesty. His was not a quest for footnote fodder for a paper already written in his head. It was a genuine search for an argument that might provide some surprising insight into how objectivist ethics might be alternatively motivated for those with the luxury of a metaphysical trump card in their Sunday pockets. I think it surprised him to find real moral skepticism among those who needed God in order to be confident in their morals, for only by considering moral maxims true relative to someone’s beliefs (in this case, God’s) could they imagine them being true in any sense at all.

G. Substantive ethics

Side by side with his work in meta-ethics, Michael has also worked in substantive ethics in both the aretaic and deontic arenas. His work in aretaic ethics has been limited to conceptualizing the categories of aretaic evaluation, such as the supererogatory, the suberogatory, the quasi-erogatory, and the aretaically indifferent. Proposing the revision of Aristotle’s square of opposition, Michael has advanced a considerably more complicated set of aretaic relations.⁹³

Michael’s work in deontic ethics has been more extensive and more ambitious, focusing on how best to demarcate the divide between legitimate consequentialist (or “agent-neutral”) and deontological (or “agent-relative”) moral decision-making. Michael began his work in this area by focusing on a particular problem in ethics: the use of torture by Israeli intelligence services during the period of 1967–84.^{94,95} Despite finding the norm against torture to be as categorical, as “absolute,” as any in morality, Michael followed his best arguments to the conclusion that there are three instances in which torture might nonetheless be justified by its good consequences. One is when a certain threshold of terrible consequences will be reached if torture is not inflicted. A second is when exceptions (such as self-defense) are plausibly thought to be part of more complete statements of applicable moral norms. And the third is when one or more of what

⁹³ Moore, 1998b. ⁹⁴ Moore, 1989h; Moore, 1997b, ch. 17.

⁹⁵ He came to this topic by virtue of a seminar in 1989 that he and Joseph Raz co-taught on deontological ethics. Upon hearing of their inquiries, a group of Israeli civil rights groups asked Michael to assess the then recently released Landau Report on the use of “pressure” (the Israeli euphemism for torture) during custodial interrogation.

Michael calls “scope-limitations” apply—that is, those general attributes about the content of moral norms that determine their applicability to particular situations.

I was present at the initial public presentation at USC of Michael’s paper on “Torture and the Balance of Evils.” My own dissertation advisor, Barbara Herman, was the commentator on the paper, and she was prescient when she warned that although Michael thought he was engaged in an academic exercise of applied ethics, he would be taken by those beyond the ivory tower to be making a political statement about a matter of great controversy. Her prediction was correct. Michael’s paper drew an immediate, very critical response from Amnesty International, which invited him to its annual meeting in New York to defend “this rubbish.” Some of the members of the civil rights groups in Israel that had invited the paper adamantly disavowed it (Michael’s friend, Ruth Gavison, telling him, for example, that his paper would “hang in every torture chamber in the Middle East”). And Michael subsequently received invitations to speak on the topic at universities and bar association meetings in Israel, Argentina, Germany, Switzerland, Ukraine, Canada, the UK, and China, as well as throughout the US. Some of these fora proved quite hostile, so much so that after a vigorous exchange at the annual meeting of the German Bar Association in Dresden, Michael had to ask in all seriousness whether he was still going to get lunch. Even the American CIA took an interest in the paper, inviting Michael to address the then newly formed Joint Task Force on Terrorism, several weeks after September 11, 2001.⁹⁶

Out of this rather colorful beginning, Michael developed his well-known, partially agent-relative, partially agent-neutral, conception of deontic morality.⁹⁷ Michael now presents his conception as a “three-layer cake.”⁹⁸ The first layer is a mix of consequentialist reasons given by good and bad states of affairs. The second layer consists of two kinds of overrides of the consequentialist calculations constituting the first layer; these overrides consist of agent-relative prerogatives and of agent-relative obligations. The latter have both exceptions and scope limitations that are drawn in terms of the act/omission, doing/allowing, intending/foreseeing, and other such distinctions.⁹⁹ The third layer is the override of both agent-relative prerogatives and agent-relative obligations which may be accomplished by there being over-the-threshold amounts of good or bad consequences that would follow from actions that, absent these consequences, would violate these rights and duties. As Jeffrey Brand-Ballard has declared, this “three-layer cake” view of the mixed consequentialist and deontological structure of morality is “as internally consistent and plausible as any deontological position with which I am familiar.”¹⁰⁰

⁹⁶ Since I had begged him not to lend his reputation to the CIA on this matter, I was relieved when the invitation was withdrawn the day before his scheduled address because the US Senate Judiciary Committee began issuing subpoenas to anyone thought to know about CIA practices of custodial interrogation.

⁹⁷ Moore and Alexander, 2007d; Moore, 2008a; Moore, 2009d, ch. 3; Moore and Alexander, 2012e.

⁹⁸ Moore, 2009d, ch. 3.

⁹⁹ The agent-centered (versus patient-centered or rights-based) nature of Michael’s view is particularly revealed in the limitations that define the scope of deontological obligations (limitations that reveal the significance of the distinctions between acts and omissions, intent and foresight, doing and allowing, etc.). It is just this agent-centered focus that caused Michael’s co-author, Larry Alexander, to insert his own patient-centered view for contrast in their jointly authored entry on “Deontological Ethics” for the *Stanford Encyclopedia of Philosophy*. Alexander and Moore, 2007d; Alexander and Moore, 2012e.

¹⁰⁰ Jeffrey Brand-Ballard, “Moral Emotions and the Culpability for Resultant Harm,” 42 *Rutgers Law Journal* 315 (2011), 317.

On the strength of this more general work in ethics, Michael had recent occasion to return to particular moral dilemmas, applying his general view of deontic morality to an assessment of the current American and Israeli practices of “targeted killings,” finding some (but limited) room for justified assassination within his three-layered view of ethics.¹⁰¹

One distinctive feature of Michael’s view is that his deontology is conjoined with the naturalist-realism in meta-ethics described earlier. While deontologists are not untypically moral realists in their meta-ethics, they are less typically naturalists; for maximizing welfare or some other natural state of affairs comes more easily than does deontology to those with a naturalist meta-ethics. Michael here is an exception.

Michael would deny that his essentially deontological moral views have any deep psychological or experiential roots. Religion is probably a natural source of deontology for many, because the agent-relative nature of moral norms (the hallmark of deontology) fits nicely with the view that those norms are commands by God directed to each of us personally that tell us to keep our own moral houses in order without regard to maximizing the moral cleanliness, or minimizing the moral filth, of others’ houses. But inasmuch as Michael is a thoroughgoing non-believer, his deontology is rather an honest attempt to capture the subtleties and tensions of intuitive moral thought.¹⁰² It isn’t very “pure,” as John Dreher noted at USC in 1988, because it allows for lots of consequentialist calculations. Still, as Michael has said, “it is what I think we think, messy as it is.” And in Michael’s hands it isn’t messy at all; it’s just complex.

H. Interpretation in the hermeneutic disciplines

The eighth area of Michael’s scholarship centers on the practice of interpretation. Michael has had both a parochial (in the sense of discipline-specific) and non-parochial (in the sense of interdisciplinary) interest in interpretation. His parochial interest is that of a lawyer interested in the interpretation of legal texts. His non-parochial interest is in the broad claims that remain in current intellectual fashion—claims that purport to debunk objectivity in fields as diverse as aesthetics, literary interpretation, psychoanalysis, history, psychology, and even physics. The “truths” discovered by these disciplines, so it is often claimed, amount to no more than some observer’s “interpretation.”

Michael’s parochial interest in interpretation is part and parcel of his general interest in how judges both do and should reason in deciding disputed law cases (see section II.I. below). Interpretation in this context, as Michael sees it, is a means by which judges connect general legal texts to the facts of specific cases in order to render decisions.¹⁰³ A theory of legal interpretation is thus a necessary part of any judge’s tool kit, joining logic, a theory of law, an understanding of the facts of a case, and applicable values to form an overall theory of adjudication.¹⁰⁴

¹⁰¹ Moore, 2012b.

¹⁰² This contradicts the kind of “closet religiosity” that Stephen Morse has long attributed to Michael because of Michael’s deontological and realist ethical views. Michael does allow, however, that Stephen’s accusation here did partly motivate Michael’s one foray into religion (Moore, 1995a). As Michael puts it, “I had vowed at some point to answer [Stephen’s] charge of theism.” Moore, 2000d, 246.

¹⁰³ Moore, 1981; Moore, 1985b.

¹⁰⁴ Moore, 1995e.

The right theory of interpretation in law, as Michael sees it, consists of, first, a theory of semantics (of what words used in legal texts mean in a natural language such as English); second, an understanding of speakers'-meaning (what a speaker means to say as opposed to what she actually said) to the extent necessary to secure a determinate reference for the words used (what Michael calls "essential context"); third, a theory of precedent for prior, authoritative interpretations of the same legal text; fourth, the value, purpose, or function served by the rule or principle in which the word appears; and fifth, a "safety-valve" question of general common sense and justice.¹⁰⁵ Values can enter into all five parts of this interpretive recipe, and the main criterion of good judging, as Michael sees it, is for a judge not to inject too many¹⁰⁶ or too few¹⁰⁷ of her values in her own assessment of these five ingredients.¹⁰⁸ Michael reminds us that a secondary feature of good judging, of course, lies in a judge having the right values with which to inject her judging.¹⁰⁹

A salient feature of Michael's general theory of legal interpretation is his advocacy of the use of K-P semantics to provide the content of the first part of the five-part theory.¹¹⁰ Michael has repeatedly applied this aspect of his general theory of legal interpretation to the special case of American constitutional interpretation.¹¹¹ Here Michael insists that we should interpret the rights-conferring clauses of the US Constitution as those clauses were understood by their natural rights-subscribing authors, Madison and Hamilton; that is, such clauses should be seen not as creating rights, but as referring to pre-existing moral rights whose nature gives the meaning of the words that refer to them.

Michael's non-parochial interests in interpretation were made evident by his critical survey of what he calls "the interpretive turn" in modern theory.¹¹² Michael surveyed the view that all knowing is a kind of interpretation (Heidegger, Rorty, Fish, Gadamer, etc.); the idea that the sciences of human understanding (the *geisteswissenschaften*) are interpretive even if the natural sciences (the *naturwissenschaften*) are not; and the idea that particular activities within certain disciplines like psychoanalysis and law can credibly lay claim to being interpretive. His final word on interpretation appears to be his general theory of when an activity in any field or discipline is usefully thought to be *interpretive* (as opposed to descriptive, explanatory, or predictive).¹¹³ Working through what he calls the "four hermeneutic disciplines" of psychoanalysis, law, theology, and literary criticism, Michael advances the thesis that interpretation is an activity we do when we have some reason to treat something as a text, interpretations of which are capable of generating content-independent reasons either for belief or for action.

Michael maintains that his parochial interest in specifically *legal* interpretation stemmed from the accidents of teaching assignments early in his teaching career. As he finished his Senior Fellowship at Harvard in 1977, and with it his stewardship of Harvard's Law and Humanities Program, he was hired at USC to revise the (still-) required first-year course "Law, Language and Ethics" (LL&E) which had been inaugurated by

¹⁰⁵ Moore, 1981; Moore, 1985b. ¹⁰⁶ Moore, 1985d; Moore, 1985e; Moore, 1985f; Moore, 1986a.

¹⁰⁷ Moore, 1983b; Moore, 1987f; Moore, 1988c; Moore, 1989d. ¹⁰⁸ Moore, 1986d; Moore, 1987g.

¹⁰⁹ Moore, 1991b. ¹¹⁰ Moore, 1981; Moore, 1985b.

¹¹¹ Moore, 1989b; Moore, 1989g; Moore, 2001b; Moore, 2001e; Moore, 2008b.

¹¹² Moore, 1989f; Moore, 2000a, ch. 10. ¹¹³ Moore, 1994a; Moore, 2000a, ch. 11.

Bill Bishin and Chris Stone in the 1960s.¹¹⁴ He packed up his motorcycle and embarked on a pilgrimage that was designed to put behind him the demise of his first marriage to Leslie and Janean's ensuing suicide, and to give himself a sense of a fresh start. He left Cambridge on his 750cc Honda, rode through the Deep South, up the backbone of the Rockies to Alaska, down the Inland Passage to Vancouver, and on to Los Angeles. His odyssey took all summer, during which time his only reading material was the LL&E course book by Bishin and Stone. As he warmly recalls, he "couldn't make hide or hair of its organization." Herb Morris had told him a year earlier that he had gotten so frustrated with the book that he "threw it across the room and left it there."¹¹⁵ The one thing that stood out for Michael as a centrally important lesson was the need to master the amorphous set of factors that appropriately went into the interpretation of legal texts. So his substantially revised course materials (which he never published) and his early writings¹¹⁶ reflected that early jurisprudential focus.

Once launched into the peculiarly fashionable interpretation debate of the 1980s, Michael combined his earlier interest in interpretation within psychoanalysis with his even earlier work in Continental philosophy (Nietzsche, Heidegger, Sartre, Kierkegaard, Husserl, etc.)¹¹⁷ to broaden his work on interpretation into its cross-disciplinary, non-parochial form. This was motivated by his sense that in the 1980s "interpretation" was becoming the new refuge for sloppy, relativistic, or skeptical thought. As he put it:

Like the "form of life" and "paradigm" pattern that Wittgenstein and Kuhn visited upon earlier decades, our "interpretive" pattern does very little work in discovering or justifying any conclusion . . . "It is only your interpretation" has descended to the level of cocktail conversation as our preferred way of expressing metaphysical or epistemological skepticism about anything, but it rarely does any work in justifying such skepticism.¹¹⁸

As with theological ethics, Michael dug deep into the writings of Gadamer, Barth, Habermas, Ricoeur, Foucault, and the like, piling their books about his desk until it took acrobatic feats to reach his chair. While reasonably sure that he would disagree with their fundamental tenets, he wanted his criticisms to be well-informed and fair to their subjects, so he persisted in weeks of reading that was far from being to his adult philosophical tastes (even as the study reminded him of his more youthful appetite for Continental philosophy years before).¹¹⁹ He then road-tested his critique by, for example, debating Stanley Fish on numerous occasions and within numerous venues; engaging

¹¹⁴ This course culminated in their book, William Bishin and Christopher Stone, *Law, Language, and Ethics* (Mineola: Foundation Press, 1972).

¹¹⁵ Only when he arrived at USC did then-Dean Dorothy Nelson explain that to get the book finished she had intervened to assign Bishin and Stone alternating chapters. So it is no surprise that the overall organization of the book was opaque.

¹¹⁶ Moore, 1981; Moore, 1985b.

¹¹⁷ Michael's "Continental phase," as he calls it, began in law school where in his second year he read all of Nietzsche's collected works and then talked his skeptical law dean, Erwin Griswold, into letting him take Stanley Cavell's course on Heideggerian metaphysics; the phase continued at UC Berkeley where he took courses with Bert Dreyfus and Phillipa Foot on existentialism, phenomenology, and French literature.

¹¹⁸ Moore, 1994a, 1; Moore, 2000a, 424.

¹¹⁹ The one exception (as he himself hints at in Moore, 1989f, 872) was the Critical Legal Studies literature of the 1980s, which he couldn't bring himself to "wade through," relying instead on the research of his assistant at Berkeley, (now Professor) Linda Helyar.

in a semester-long seminar on interpretation at the Humanities Research Institute at UC Irvine with the likes of Jacque Derrida, J. Hillis Miller, Geoffrey Hartman, Fish, and others; accepting Richard Rorty's invitation to defend his own natural law theory of legal interpretation at a day-long, university-wide faculty seminar at the University of Virginia, at which Rorty, A.J. Simmons, Christine Korsgaard, and others gave comments; and by fielding critical questions about his theory at a seminar on interpretation on Heidegger's home turf at Albert-Ludwigs University in Freiburg, Germany.

I. Jurisprudence and philosophy of law

Michael's ninth area of scholarship is one on which virtually all philosophers of law sharpen their teeth. (Michael calls this the "compulsory figures part of his skating program.") This is the field of jurisprudence, consisting both of general jurisprudence (which asks the question of what law is generally) and particular jurisprudence (which asks the more particular question of what law is within a particular legal culture such as that of the US or the UK). Michael recognizes this traditional way of dividing up the jurisprudential pie, but urges that such a distinction is not congruent with a distinction that interests him more, namely the distinction between the theory of law proper and the theory of adjudication. Michael thus resists classifying his work in the theory of adjudication as being exclusively either general or particular.¹²⁰

Although he rarely classifies other legal philosophers besides himself by use of the general/particular jurisprudence distinction, Michael has critically worked through "the usual suspects" in both camps. Thus, he summarized H. L. A. Hart's legal positivism in general jurisprudence;¹²¹ examined in detail the functionalist natural law theories of Lon Fuller, John Finnis, and Ronald Dworkin, all of which were written in reaction to Hart;¹²² took a "hard look" (as Neil MacCormick once called it)¹²³ at the central notion of Joseph Raz's legal positivism, the notion of second-order, exclusionary reasons;¹²⁴ engaged one of the central implications of Ronald Dworkin's theory of adjudication, the right answer thesis;¹²⁵ and examined and rejected the skepticism about law that is the hallmark of the Legal Realists and their latter-day descendants, the "critical this-and-thats," as Michael calls them.¹²⁶

In addition to assessing the jurisprudential thoughts of others—what Michael (borrowing a line from Hegel) calls, "educating oneself in public"¹²⁷—Michael more positively engaged in a detailed analysis of three concepts of rules as they relate to law;¹²⁸ gave a similarly detailed analysis of legal principles;¹²⁹ and worked through his own theory of the force and content of precedent.¹³⁰ In the latter essay Michael indulged his familiar penchant for reaching beyond the law to place precedent in the context of more general concerns, namely those about universalizability and generalization in science and ethics as well as in law.

¹²⁰ Moore, 1998c; Moore, 2000a, ch. 3. ¹²¹ Moore, 1990c; Moore, 2009a, ch. 3.

¹²² Moore, 1992a; Moore, 2000a, ch. 9.

¹²³ Neil MacCormick, "Preface," 62 *Southern California Law Review* 743 (1989), 745.

¹²⁴ Moore, 1989c; Moore, 2000a, ch. 5; Moore, 2003a; Moore, 2004c, ch. 5.

¹²⁵ Moore, 1987a; Moore, 2000a, ch. 8.

¹²⁶ Moore, 1984b; Moore, 2000a, ch. 6; Moore, 2003a; Moore, 2004c, ch. 5.

¹²⁷ Moore, 2000a. ¹²⁸ Moore, 1991a; Moore, 2000a, ch. 4.

¹²⁹ Moore, 1997a; Moore, 2000a, ch. 7. ¹³⁰ Moore, 1987d.

Michael has also lavished considerable attention on the jurisprudential question concerning the relationship between law and morality.¹³¹ In Michael's view, morality necessarily enters into the reasoning of judges, and thus into the truth conditions of those singular propositions of law decisive of disputed law cases. Morality also necessarily enters into the truth conditions of certain general propositions of law, namely those propositions expressed in common law rules and legal principles.

Finally, Michael has taken some pains to apply his jurisprudential views to the judicial reasoning of particular judges and nominees for judicial office.¹³² Having never thought of his theory as belonging to the ivory tower, he has both taught it to sitting judges in innumerable judicial education sessions and used it for purposes of judging such judges' performance.

Freud once wrote that the only things deeply satisfying in adult life are those things which satisfy either an actual or a sublimated desire of childhood. I doubt that jurisprudence is one of those things for very many people, no matter how rarified the sublimation. It is simply too dry, too bloodless, a subject. Such was Michael's early reaction to the general jurisprudence of John Austin, Jeremy Bentham, and Herbert Hart. It seemed neither difficult nor important. And the older natural law writers that he had read during his undergraduate days in international law (such as Grotius, Puffendorf, and Lauterpacht) he thought even worse. So Michael resolved early on to do philosophy *and* law—that is, philosophy applied to discrete legal concepts and problems such as action, intention, causation, and responsibility—and to leave philosophy *of* law—that is, jurisprudence—to others.

Two things combined to change his mind. First, Michael overlapped at Harvard in 1976–7 with Ronald Dworkin, where they had a formal public exchange about Dworkin's new book, *Taking Rights Seriously*. It was friendly, if competitive, and Dworkin was a good enough philosopher to make Michael reconsider whether philosophy *of* law might not be worth pursuing. The second was teaching "Law, Language and Ethics" at USC, starting in the fall of 1977, which persuaded him that the theory of adjudication—the theory of how judges should reason in particular cases—was at least neither dull nor academic (in the pejorative sense of the word).

Michael's interest in the theory of adjudication had a long run, but it too eventually waned. As he described his loss of interest in the subject, the issues and arguments simply ceased to be sufficiently difficult to be sustaining. After giving a paper in the philosophy of science at the Third Annual Meeting of the Union of the History and the Philosophy of Science in Montreal in 1980, Michael was stung by a comment made to him by a distinguished philosopher of science: "Why do you ever waste your time and obvious talents in the philosophy of law? Why don't you get a lab and get down to serious work?" And so Michael eventually skated off from the compulsory figures of jurisprudence to work on his philosophical triple Lutz and quadruple Salchow.

¹³¹ Moore, 1981; Moore, 1985b; Moore, 1987d; Moore, 1989g; Moore, 1992a; Moore, 2001a; Moore, 2001b; Moore, 2001c; Moore, 2004c, ch. 4; Moore, 2007b; Moore, 2008b; Moore, 2012c.

¹³² Moore, 1985d; Moore, 1985e; Moore, 1985f; Moore, 1986a; Moore, 1986d; Moore, 1986e; Moore, 1987f; Moore, 1987g; Moore, 1989d; Moore, 1991b.

III. General Themes in the Life and Work of Michael Moore

Michael's voluminous portfolio of scholarship and his life-long enthusiasm for debate and discussion exhibit a number of general themes, both methodological and substantive. While the teachings of his work across the above nine fields of inquiry cannot be overlooked by those who work in those fields, these larger themes are the lessons of his career as a whole. None of us own our legacies, for like our reputations, which exist in the minds of others, our legacies reside in the lessons that others take from our work. Still, if Michael could choose his own intellectual legacy, it would be comprised of the following commitments.

1. *An enthusiasm for the life of the mind.* Michael's favorite form of social interaction is the joint pursuit of ideas. For him, ordinary conversation typically pales in comparison to what he calls "chasing rabbits around the room." This is because ideas animate Michael in a way few other things do. As Colin Diver, our much-admired dean at the University of Pennsylvania Law School once put it, "Michael Moore has a ... prodigious appetite for knowledge."¹³³

2. *A faith in the power of reason and of good argument.* A self-declared son of the Enlightenment, Michael values careful and precise argumentation not just for its own sake, but because he believes that only in this way can one discover and verify the truth about anything. As David Richards emphasized in characterizing Michael's early work, "There is no stridency here, no sterile self-promotion, no confusion of academic prestige with good argument, no debasement of academic standards. There is, simply, the quiet voice of a reasonable person working through problems and subjecting himself, as the humility of learning requires, to the highest standards of good argument observed anywhere today."¹³⁴

3. *The conviction that knowledge is storable.* Michael's faith, like that of the logical positivists, is that what can be known can be said, difficult as it may be sometimes to find the right words. This is true for Michael even for areas of knowledge that seem to resist clear statement, such as the vagueness of expression, the emotional life of persons, or the meaning of life. As Michael puts it at one point, "there is no necessity that one speak vaguely even when discussing vagueness."¹³⁵ Michael's ideal here seems close to that of another of his early teachers, Paul Grice, who famously enjoined speakers to take on his "maxim of manner:" try to be clear and brief, and as orderly as one can in what one says, and avoid obscurity or ambiguity.

4. *A disdain for academic mush.* Relatedly, Michael has little tolerance for what he pejoratively calls "mush"—academic writing that is unclear, confused, obfuscating, disorganized, vague in reference, and/or pretentious. One of his favorite quotations is by John Searle about the work of Derrida: "This stuff is in danger of giving bullshit a bad

¹³³ Colin Diver, Dean Emeritus of the University of Pennsylvania Law School and President Emeritus of Reed College, quoted with permission at Michael's investiture in the University Walgreen Chair at the University of Illinois.

¹³⁴ David A. J. Richards, "Law, Psychiatry, and Philosophical Analysis: Review of *Law and Psychiatry: Rethinking the Relationship* by Michael S. Moore," 73 *California Law Review* 1659 (1985), 1669.

¹³⁵ Moore, 1985b.

name.”¹³⁶ As Michael himself says about the mantras of the day, “Intellectual fashions are like metaphors ... Although they may begin life fresh and full of promise, they eventually become the tired counters in a patter that prevents insight rather than conveys it.”¹³⁷

5. *A devotion to the systematicity of ideas.* Michael further believes in the interrelatedness of all knowledge. Ideas for him are not isolated data points; they share relationships that require systematicity in one’s thought if one is to capture their interconnectedness. Thus Michael casts his nets widely, relating common law reasoning from precedents, for example, both to generalization in ethics and inductive reasoning in science;¹³⁸ or finding parallels between the one-box solution to the Newcomb paradox and certain solutions to the epiphenomenalist challenge to responsibility issued by some neuroscientists.¹³⁹ As Jeffrey Brand-Ballard summed it up, Michael “is a major system builder for our time.”¹⁴⁰

6. *The necessity of logical organization.* Because Michael is always seeking to capture the systematicity with which ideas are related, organization is a crucial feature of his writing. Some have likened his work to a kind of “poetry in logic” because of its careful attention to logical organization. Michael typically gives each paper numerous oral presentations because, as he says, if the organization is not right, “the paper won’t talk” (i.e., it cannot be given orally without notes). The result of Michael’s attention to organizational tightness is a body of work that has won high praise for the rigor with which it accommodates “both the metaphysical implications of legal doctrines and the theoretical standards of intelligibility, coherence and stringency called for in philosophical analysis.”¹⁴¹

7. *The need to cross disciplinary boundaries.* Michael believes that often issues and the arguments needed to resolve them refuse to honor the boundaries by which we separate the various academic disciplines. The result is that scholars cannot help but pursue interdisciplinary scholarship if they are successfully to engage such topics.

Michael’s standard for good interdisciplinary scholarship is a high one. As he recently stated that standard: “Good interdisciplinary scholarship cannot be dilettantish on either side of the equation; to be good at it, one needs sufficient expertise to be able to advance the cutting edge of understanding in each discipline.”¹⁴² Capturing Michael’s success in living up to this standard, the famous sociologist Jean Floud wrote that Michael’s professional pedigree is “happily unclear,” for as a “true interdisciplinaryian, he works comfortably in all three areas” of law, philosophy, and psychiatry.¹⁴³

The interdisciplinary nature of Michael’s scholarship is of a piece with the interdisciplinary nature of his intellectual entrepreneurship within the academy. As the Senior

¹³⁶ John Searle, “The Word Turned Upside Down,” 30 *New York Review of Books* 74 (1983), 78 n. 3. Quoted in Moore, 1989f, at p. 871.

¹³⁷ Moore, 1994a, 1; Moore, 2000a, 424. ¹³⁸ Moore, 1987d. ¹³⁹ Moore, 2011a.

¹⁴⁰ Jeffrey Brand-Ballard, “Moral Emotions,” 315.

¹⁴¹ Dieter Birnbacher and David Hommen, “Omissions as Causes—Genuine, Quasi, or Not at All?” in Benedikt Kahmen and Markus Stepanians (eds.), *Critical Essays on Causation and Responsibility* (Berlin: De Gruyter, 2013), 133.

¹⁴² Moore, 2013c, 137.

¹⁴³ Jean Floud, “Pleading Insanity,” *The Times Higher Education Supplement*, July 13, 1984, 18. For a very similar assessment, see Gerard Casey, “Review of Moore, *Law and Psychiatry*,” 39 *Review of Metaphysics* 576 (1986).

Fellow in charge of the Harvard Law and Humanities Program, he marshalled the considerable resources of the Harvard/MIT community to educate law professors about how their teaching and scholarship could be enriched with the insights of the arts and social sciences. He continued this work ten years later at UC Berkeley as co-chair (with Jeremy Waldron) of the jurisprudence component of the Jurisprudence and Social Policy Program, which is devoted to training legal academics in philosophy, politics, economics, sociology, and anthropology. He has, over the years, also joined several multi-disciplinary think tanks, such as the Humanities Research Institute for the University of California system, located on UC Irvine's campus, and the Research School for Social Sciences of the Australian National University.

This career-long dedication to high-level interdisciplinary work has garnered Michael some of his highest praise. David Richards, for example, lauded Michael for revealing "the power of interdisciplinary legal scholarship when it holds itself to uncompromising standards of rigor, precision, and clarity of argument."¹⁴⁴ Douglas Husak wrote that the details of Michael's application of philosophy of action to law "are bound to baffle readers who specialize in one discipline but only dabble in the other. Only the handful of theorists who possess a genuine expertise in both areas are in a position to appreciate the outstanding quality of Moore's important contribution."¹⁴⁵ Marcelo Ferrante declared that "[w]ith a remarkable combination of genius and erudition, he establishes profound connections between legal and philosophical discussions."¹⁴⁶ And other admirers concluded that "[on]e would be hard pressed to find another contemporary thinker with a comparable grasp of the problems and an equally sovereign command of the relevant literature in jurisprudence, action theory, moral theory, philosophy of language, ontology and metaphysics."¹⁴⁷

8. *Metaphysical realism.* Michael's long-time friend and colleague Simon Blackburn once introduced his son to Michael, saying, "Now here is a real realist, not a half-baked job like myself."¹⁴⁸ Blackburn was right: Michael is a realist about quite a few things—not just natural kinds, but also moral kinds, human-made artifacts, legal kinds, law itself, etc. And of course, as Blackburn himself makes clear, Michael is a realist about causation: "[Moore's] work pulsates with arguments and examples, all in the service of an integrated picture of the interactions between law, morals, the philosophy of mind, and the metaphysics of causation. Moore's uncompromising realism brings a remarkable unity to his argument ..."¹⁴⁹

Michael's substantive commitment to realism about various classes of entities seems to be consistent with his methodological distaste for "mush." He is fairly convinced that the various forms of relativism and skepticism are all-too-common refuges for those

¹⁴⁴ David A. J. Richards, "Law, Psychiatry, and Philosophical Analysis," 1659.

¹⁴⁵ Douglas Husak, "The Relevance of the Concept of Action to the Criminal Law," 6 *Criminal Law Forum* 327 (1995), 327.

¹⁴⁶ Marcelo Ferrante, "Book Review of Michael S. Moore's *Causation and Responsibility*," 14 *New Criminal Law Review* 162 (2011), 162.

¹⁴⁷ Benedikt Kahmen and Markus Stepanians (eds.), "Introduction," *Critical Essays on Causation and Responsibility* (Berlin: De Gruyter, 2013), 1.

¹⁴⁸ Simon Blackburn is a well-known, self-proclaimed "quasi-realist" about moral qualities. See e.g., Simon Blackburn, *Essays in Quasi-Realism* (Oxford: Oxford University Press, 1993).

¹⁴⁹ Blackburn, book cover of Michael S. Moore, *Causation and Responsibility* (Oxford: Oxford University Press, 2010).

“too lazy or too ill-disposed to work through difficult terrain.”¹⁵⁰ However, Michael is not a realist about everything, of course; no sensible person is. He is specifically skeptical about the existence of religious entities, for example, and he isn’t even slightly amused by persistent town gossip that our house is haunted by a woman wearing a long white gauzy dress who many townsfolk claim to have seen floating in our upper bedrooms. I sometimes think he is just too lazy or ill-disposed to work through the spectral complexities of such residential metaphysics!

9. *Monistic naturalism.* Michael is both a monist and a naturalist about minds, morals, causation, events, actions, and law. He is, as he himself puts it, a “one-worlder,” and that one world is the natural world studied by the sciences. Thus, he rejects G. E. Moore’s non-naturalist realism about moral qualities; he rejects any form of Cartesian or Kantian dualism about minds and persons; he rejects any form of causal dualism that proclaims that causation by persons is a different kind of causation (e.g., Chisholm’s “agent-causation”) from the causation between natural entities; and he rejects any view that makes disciplines such as law autonomous in their ontological posits, as if each discipline could construct a world according to its own unique needs (e.g., that legal subjects are free in their choices if legal responsibility demands that they be free). Everything that allegedly exists, for Michael, has to be shown to exist by occupying a place in the best explanations we have of our experience. This is true for moral qualities like goodness as much as for natural properties like temperature.

10. *Reductionism.* Given the seemingly disparate kinds of things there are in the world, anyone with Michael’s “one-worlder” view has to be some kind of reductionist. That is, in order to get everything into one natural world, one must endorse some scheme for reducing apparently non-natural entities to natural ones. Thus, Michael explicitly endorses a reduction of law to a blend of moral and social facts, a reduction of social and other mental facts to physical facts, and a reduction of moral facts to natural facts. Such reductions, however, are of the multiple-realizability kind, such that one supervening property can be realized by different base properties in different contexts.

11. *Non-foundationalist epistemology and emotional knowledge.* Throughout his career, Michael has relied on a non-foundationalist, coherence mode of justification. This is a style of justification that eschews there being any natural starting points for argumentation; for if they existed, such starting points would be some unquestionably foundational (or “self-evident”) beliefs from which the truth of other beliefs could be inferred. While Michael confesses that he too “share[s] the wish that [he] had proofs anyone with a lick of understanding could not resist,” he knows that this is precluded by the coherentist epistemology that he adopts. Still, “a satisfying certainty in philosophy is possible despite the lack of such proofs.”¹⁵¹

In his adoption of a non-foundationalist mode of argument, Michael was pretty plainly influenced by one of his early teachers in ethics, John Rawls. Still, Michael’s style of justification differs from Rawls’s in at least two significant respects. One is the metaphysical realism about morals that Michael, but not Rawls, marries to the coherence style of justification. How one extracts realism in metaphysics from a coherentist mode

¹⁵⁰ From a recorded conversation, December 2013.

¹⁵¹ Moore, 2004c, xiv.

of justification in epistemology is a well-known conundrum in philosophy,¹⁵² but one which Michael has only glancingly addressed. Michael's other difference with Rawls lies in Michael's greater reliance on emotions. In his "experiential argument" for retribution, for moral luck, and for other moral phenomena, Michael allows the emotions a justificatory role that finds no analogue in Rawls's "considered judgments" about morality. Joel Feinberg, for one, thought that this was one of the great strengths of Michael's approach to moral epistemology:

[Moore] treats us to one of the most thorough and sensitive discussions of the relations between moral judgment and the emotions since Aristotle proclaimed that the realm of moral philosophy concerns not only our dispositions to act . . . but also our dispositions to have the *feelings* that are appropriate.¹⁵³

IV. Conclusion

So what will Michael do next? Having written book-length treatments of two of the three *prima facie* elements of criminal responsibility (action and causation), there is no question that those who teach and write in the area of criminal law expect him to finish the trilogy with a book on the mental states that define criminal culpability. But beyond this tall order, it is hard to predict what will spark Michael's fancy so as to inspire him to surround his desk with haphazardly stacked piles of new books. As others enter their seventies with aspirations to play golf and enjoy their grandchildren, Michael accepts professional commitments at a rate that requires him to work hours that would challenge the most ambitious of young law associates. Ever the master at advancing his written projects within the small cracks of each day, Michael scribbles paragraphs on restaurant napkins, on the backs of train tickets, and within frayed novels that he is still reading while trekking through remote regions in the Himalayas. Inasmuch as the trajectory of his insatiable curiosity remains as unbounded as his energy, one can only predict that as he watches his four beloved children emulate his own commitment to living a purposeful life, Michael will continue to seek out new mountains of the mind.

¹⁵² See Lawrence Bonjour, *The Structure of Empirical Knowledge* (Cambridge: Harvard University Press, 1985).

¹⁵³ Feinberg and Coleman, *Philosophy of Law*, 685.

Modest Retributivism

*Mitchell N. Berman**

I. Introduction

Michael Moore is a giant of legal philosophy. Over the course of an academic career that already spans more than four decades yet shows no signs of abating, Moore has made profound contributions to our collective understanding of such diverse matters as moral realism and its implications for law, the relationship between law and psychiatry, the theory of action that undergirds Anglo-American criminal jurisprudence, the nature of legal interpretation, and, most recently, the metaphysics of causation. Very probably, though, Moore has achieved his greatest fame and influence as a theorist and proponent of a retributivist justification for criminal punishment.

When Moore's first papers in punishment theory appeared in the early 1980s, retributivism was only starting to recover from what had become, by mid-century, its near-total repudiation in respectable philosophical circles. Within a generation of Moore's arrival, however, scholars were widely contending—albeit more in horror than satisfaction—that retributivism had re-emerged as the dominant account of the moral justifiability of the infliction of criminal punishment.¹ Regardless of whether that is an accurate description of the state of theory in the early twenty-first century (and I confess to some skepticism), that retributivism has enjoyed a remarkable revival cannot reasonably be questioned. Nor can it be seriously doubted that Moore himself bears greater responsibility for the retributivist renaissance than does any other scholar. Moore is the foremost living retributivist among Anglophone moral theorists and philosophers of law.

My goal in this chapter is to critically assess the form of retributivism that Moore has advocated with rigor and acuity, and to great success. Plausibly, and only to a first approximation, the core retributivist claim—the claim that distinguishes retributivist views from their non-retributivist alternatives—holds that it is intrinsically valuable or right to furnish wrongdoers with the negative consequences that they deserve. But Moore claims much more for a wrongdoer's negative desert than this. That is, he

* A distant predecessor to this paper was presented at the Colloquium on Moral versus Political Perspectives on the Criminal Law, held at Berkeley Law in October, 2013. I am very grateful to the organizers and participants at that event for helpful reactions, and especially wish to acknowledge debts to Antony Duff, Alon Harel, Leora Katz, Chris Kutz, Sandra Marshall, Seana Shiffrin, Victor Tadros, and Arthur Yates. I am indebted as well to: David Dolinko for excellent written comments on a draft; the editors of this volume, Kim Ferzan and Stephen Morse, for inviting me to contribute; and our honoree, Michael Moore, for all that he has taught me. I feel deeply privileged to hold the Chair at Penn Law that Michael previously held and to which he brought great honor and distinction.

¹ See, e.g., Mirko Bagaric and Kumar Amarasekara, "The Errors of Retributivism," 24 *Melbourne University Law Review* 124 (2000), 126.

attributes significantly greater normative force to the noninstrumental value or rightness of furnishing a wrongdoer with his negative desert than is necessary for a view to qualify as retributivist. I will call Moore's retributivism "robust retributivism." An account that resides at nearly the opposite pole of retributivist logical space may be labeled "modest retributivism." In this chapter, I sketch robust and modest retributivism and aim to make the latter more eligible, principally by raising doubts about Moore's arguments for each of the components that jointly comprise the former. My ambition is neither to defend modest retributivism nor to defeat robust retributivism. It is to establish that retributivism embraces a greater diversity of possible and even plausible views than Moore himself allows—including views that, in a fairly straightforward sense, are considerably more moderate than the version that Moore has defended.

II. The Core of Retributivism

Any simple definition of retributivism will be contestable. That acknowledged, it is widely agreed that, for a justification of punishment to qualify as retributivist, a wrongdoer's negative desert must play some significant role in the justificatory account.² Very probably, little can be said about the particular nature of desert's role, or about how it figures in the logic of the justificatory argument, without taking sides in intra-retributivist disagreements. Accordingly, if any claim can be fairly identified as core or central to retributivism, let alone definitional of it, that claim must be formulated in quite general or vague terms.

Commentators reflect this point when describing retributivism as the theory, say, that punishment must be justified "in terms of" a wrongdoer's negative desert.³ Yet that is perhaps a little *too* general or vague. Consider the most commonly espoused version of a "mixed theory"—the view (to a first approximation) that punishment is justified if and only if it produces net good consequences and is not inflicted on persons who lack negative desert.⁴ Such a view justifies punishment by reference, in part, to an offender's negative desert and therefore would count as retributivist if mere reference to desert were sufficient to render a justification of punishment retributivist. And, sure enough, John Mackie's name for this view—"negative retributivism"⁵—held for a number of years. Increasingly, however, philosophers of punishment find it more accurate or illuminating to locate this position outside of retributivism, many preferring Antony Duff's apt label for this view: "side-constrained consequentialism."⁶

² Doug Husak makes the same observation in his contribution to this volume. See Douglas Husak, "What Do Criminals Deserve?" (this volume).

³ C. L. Ten, *Crime, Guilt, and Punishment* (New York: Clarendon, 1987), 46.

⁴ I say this is only a first approximation of the view because those who reject wholly objective conceptions of moral justification would likely add some sort of epistemic qualifiers, possibly at two places. A partially subjectivized variant of this version of the mixed theory might maintain, for example, that punishment is justified if and only if it is *reasonably expected* to produce net good consequences and is not *knowingly* inflicted on persons who lack negative desert, or is inflicted only on persons whom the punishing authorities *believe in good faith* to deserve it, or something along these lines.

⁵ J. L. Mackie, "Morality and the Retributive Emotions," 1 *Criminal Justice Ethics* 3 (1982), 3.

⁶ R. A. Duff, *Punishment, Communication, and Community* (New York: Oxford, 2001), 11.