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# A Meeting of Developmental Social Cognition and Criminal Jurisprudence and Law

Actual and potential intersections of psychology and criminal law exist at many levels and, within a particular level, may take different forms. For example, lessons from psychological science may be used to inform legal judgment and decision making; alternatively, legal judgment and decision making may serve to guide empirical research in psychology. Furthermore, within either of these broad levels, the principal psycholegal issue may vary according to substantive topic (e.g., how emotion is conceptualized or what, if any, effect race has on behavioral judgment) or analytic perspective (e.g., how and to what degree empirical science should affect legal processes). As such, any discussion at the interface of psychology and law has the inherent potential of quickly becoming quite complicated.

The degree of complication may be managed by clarifying the respective goals of psychology and law, identifying the preferred analytic approach toward understanding how these fields may interrelate, and clearly stating the specific substantive intersection of interest. First, although the respective goals of psychology and law are distinct, it should be understood that they are not entirely unrelated; in some important ways, they are, or at least have the potential to be, mutually complementary. In psychology, the goal is to discern, understand, predict, and explain individual differences in behavior and related forms of functioning (e.g., attention, perception, cognition, and emotion). Although psychologists utilize various tools and employ alternative methodologies in the systematic investigation of hypotheses or empirical questions of interest, psychological studies, whether of a correlational or experimental/causal nature, typically examine mean differences between alternative groups of participants or subjects. For example, a study designed to examine differences in reactivity between aggressive and nonaggressive individuals may explore whether there is a statistically significant (and meaningful) difference between the two groups' average heart rates when exposed to a mild provocation. In contrast,

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the goal of the criminal law is to negatively prescribe behavior, judge the wrongfulness and harmfulness of specified forms of conduct, and determine what, if anything, should be the response on the part of the government when it has been determined that criminal wrongdoing has occurred. Whereas psychology is interested in empirical issues (e.g., does  $x$  cause  $y$ ?), the criminal law is primarily concerned with normative ones (e.g., is  $x$  wrong and, if so, what needs to happen to eliminate the moral imbalance caused by  $x$ ?).

This is not to say, however, that the law is unconcerned with empirical matters, as much as it is to observe that such matters are often subsidiary. The law has a responsibility to concern itself with empirical matters when determinations of such matters are necessary to make proper judgments about core normative legal issues. For example, in the case of the crime of passion, the law may consider how wrongful the act is compared to the commission of the same act in cold blood with premeditation. However, the question of what effects high arousal and strong emotion have on individual mental functioning (e.g., control and rationality) is, by its nature, an empirical one. Therefore, the law has a responsibility to draw from scientific research that examines this cause (emotional arousal) and effect (undermined functioning) relation so that it may more properly assess the moral issue of how wrongful the act in question is, as well as the normative question as to what the response on the part of the justice system should be.

The idea that the law should draw from psychological science where and when it is faced with an empirical question of a psychological nature reflects a preferable analytic approach in psychology and law and the analytic approach that guides lessons and discussions that we are herewith concerned. Just as it is unwise to attempt to answer questions of morality with science, it is equally wrongheaded to attend to empirical questions with nonscientific methodologies that are traditional to philosophy and the humanities. Rather, a combination of methodologies is required in the case of the normative issue of morality to which empirical matters are of clear relevance. Such cases are not at all uncommon, and the law has, in recent years, become increasingly aware of and attentive to this reality. Questions that are, by their nature, empirical can only be answered via empirical investigation. It is just this simple. As such, when moral questions (e.g., how culpable is  $x$  actor for the commission of  $y$  act?) are directly related to empirical ones (e.g., to what degree are actors in  $x$ 's condition capable of controlling their behavior?), drawing from relevant findings in psychology becomes an absolutely critical step in the legal process.

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I am reminded of the words of political scientist and Professor James Q. Wilson: “Social science seeks to explain behavior, criminal law to judge it.”<sup>1</sup> Surely, the distinction Wilson clarifies is correct. Nevertheless, it should be asked how the criminal law may properly judge behavior unless it has been explained. That is, the criminal law has a responsibility to understand that which it is designed to judge. Without recognizing and being informed by the developmental science of antisocial conduct, I must insist that such a responsibility cannot be fulfilled.

Having discerned the respective goals of psychology and law and identified the preferred analytic approach, we turn to the specific substantive focus with which this volume is concerned. In doing so, the focus and reach of this volume should be clarified according to topics and issues that, although they could be misunderstood to be central to present interests, are purposefully excluded. This is not to disparage other schools of thought or the foci of other scholars or scientific programs of research, but rather to make clear at the outset what is, as well as what is not, the contribution of the present work.

Any introduction to the field of psychology and law (or psycholegal studies) may immediately give rise to certain well-established and important areas of scholarly research. Some of the more popular or commonly studied areas in psychology and law are these: eyewitness testimony,<sup>2</sup> expert witness testimony<sup>3</sup> and reliability,<sup>4</sup> jury selection,<sup>5</sup> jury decision making,<sup>6</sup> eyewitness line-ups,<sup>7</sup> and psychopathy.<sup>8</sup> Undoubtedly, contributions of enormous import from each of these areas have been made to the advancement of psychology and law as a

<sup>1</sup> JAMES Q. WILSON, *MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM?* 7 (1997).

<sup>2</sup> E.g., ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1979).

<sup>3</sup> E.g., Blake M. McKimmie, Cameron J. Newton, Deborah J. Terry & Regina A. Schuller, *Jurors' Responses to Expert Witness Testimony: The Effects of Gender Stereotypes*, 7 *GROUP PROCESSES & INTERGROUP REL.* 131 (2004).

<sup>4</sup> E.g., Steven Penrod & Brian H. Bornstein, *Generalizing Eyewitness Reliability Research*, in 2 *HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE* 529 (Rod C. L. Lindsay, David F. Ross, J. Don Read & Michael P. Toglia eds., 2007).

<sup>5</sup> E.g., JOEL D. LIEBERMAN & BRUCE D. SALES, *SCIENTIFIC JURY SELECTION* (2007).

<sup>6</sup> E.g., Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity and Its Influence on Juror Decision Making*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 254 (Neil Brewer & Kipling D. Williams eds., 2005).

<sup>7</sup> E.g., Gary L. Wells, *Police Lineups: Data, Theory, and Policy*, 7 *PSYCHOL. PUB. POL'Y & L.* 791, 791 (2001).

<sup>8</sup> E.g., Jennifer Skeem, Peter Johansson, Henrik Andershed, Margaret Kerr & Jennifer E. Louden, *Two Subtypes of Psychopathic Violent Offenders That Parallel Primary and Secondary Variants*, 116 *J. ABNORMAL PSYCHOL.* 395, 395 (2007).

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scholarly field of study. However, these are not topics with which this volume is substantially concerned.<sup>9</sup>

The contents of this volume may suggest that a new subfield of interdisciplinary jurisprudence be recognized, one that is perhaps aptly named *social-cognitive jurisprudence*. Social-cognitive jurisprudence may be broadly defined as “the application of social cognitive psychology to issues that are, by their nature, empirical and germane to legal philosophy and doctrinal law.”<sup>10</sup> Through a criminal-jurisprudence lens, social-cognitive psychology may be viewed as a vehicle by which empirical matters related to core moral philosophical issues (e.g., questions of functional capacity that are inherent to a retributive theory of criminal responsibility) may be addressed. Although this volume focuses on the intersection of developmental social cognition and criminal law, there is no reason, of course, to exclusively bridge developmental social-cognitive research with jurisprudential and legal issues located in this corner of the law.<sup>11</sup> That is, although the definition of social-cognitive jurisprudence that is here introduced accurately reflects the intersection that is focal throughout this volume, social-cognitive jurisprudence is no less applicable to other intersections between this area of scientific psychology and jurisprudence as an intellectual or scholarly pursuit and legal domain.

This term is introduced more out of an interest in exactness than for the purpose of terming a new subfield of study. As such, social-cognitive jurisprudence should be distinguished from other subfields of study that may otherwise be confused to share significant overlap. Perhaps the most popular and well-known of these has become “[t]herapeutic jurisprudence,”<sup>12</sup> which focuses on ways in which substantive law, legal procedures, and legal actors (e.g., judges and lawyers) may have a therapeutic (or healing, as opposed to antitherapeutic or harming) impact on individuals who have entered and are subject to the legal system. Unlike therapeutic jurisprudence, which is focused on mechanisms of therapeutic effect, social-cognitive jurisprudence is concerned with conducting and drawing from empirical research in order to illuminate jurisprudence, legal theory, and legal doctrine.

<sup>9</sup> Some of these areas of study will be addressed, however secondarily, in the context of larger discussions throughout this volume. For example, psychopathy is discussed in the context of moral development, biases, and deficits. See *infra* Chapter 5.

<sup>10</sup> Reid G. Fontaine, *On Passion's Potential to Undermine Rationality: A Reply*, 43 U. MICH. J.L. REFORM 207, 242 n.159 (2009).

<sup>11</sup> One can easily imagine applications to areas in civil law such as torts (e.g., intentional torts and negligence), property (e.g., property disputes), and contracts (e.g., issues of misrepresentation versus mistake), as well as numerous others.

<sup>12</sup> E.g., David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T. M. COOLEY L. REV. 125 (2000).

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Second is *psychological jurisprudence*, which focuses on how the law is perceived by citizens and how it impacts their lives on a day-to-day basis within the society it governs. Although multiple versions of, or perspectives on, psychological jurisprudence have been offered,<sup>13</sup> none reflect the science-to-law (and back again<sup>14</sup>) intersection intended by social-cognitive jurisprudence. A special note should be made to clarify that the information-processing perspective on psychological jurisprudence that has been offered in previous scholarship<sup>15</sup> is largely unrelated to how a paradigm of social-information processing – an inherently developmental model of social-cognitive functioning – is utilized in social-cognitive jurisprudence. Whereas the former is concerned with how the law may be designed and reframed so that it minimizes shortcomings in naturally problematic human processing of social information (i.e., how citizens understand the laws by which they are governed), the latter has to do with how the systematic study of how individual social-information processing in humans may inform our understanding of human functioning and capacities within contexts that have legal implications (e.g., how the science of cognitive capacity and dysfunction may inform a theory of excuses in criminal law). In these ways, the former reflects an interest in the path from law to psychology and the latter, at least with respect to the primary purposes underlying this current volume, is more focused on how psychological science may influence jurisprudential issues in legal doctrine.<sup>16</sup>

Social-cognitive jurisprudence, as it is here conceptualized, may be better said to have been derived, at least to some meaningful degree, from “social analytic jurisprudence,” a perspective that is typically credited to Professor Richard Wiener.<sup>17</sup> However, social-cognitive jurisprudence is more sibling (or perhaps cousin) than offspring in some ways. Wiener differentiated social-analytic jurisprudence from therapeutic jurisprudence and psychological jurisprudence on epistemological grounds. Wiener stressed that the study of law and psychology is an empirical science and, as such, social-analytic jurisprudence is unique in that it dictates that legal issues be analyzed from a

<sup>13</sup> See Mark A. Small, *Advancing Psychological Jurisprudence*, 11 BEHAV. SCI. & L. 3, 3–4 (1993).

<sup>14</sup> A broader explanation of social-cognitive jurisprudence articulates not only the need for psychological science to inform empirical issues in law, but the need for empirical issues that are posed by the law to guide scientific inquiry in social-cognitive psychology.

<sup>15</sup> See Richard L. Wiener, Barbara A. Watts & Dennis P. Stolle, *Psychological Jurisprudence and the Information Processing Paradigm*, 11 BEHAV. SCI. & L. 79, 80 (1993).

<sup>16</sup> Of course, social-cognitive jurisprudence is far from unilateral. Naturally, in reciprocal turn, legal doctrine should play a strong role in shaping theoretical and empirical inquiry in psychology.

<sup>17</sup> See Richard L. Wiener, *Social Analytic Jurisprudence and Tort Law: Social Cognition Goes to Court*, 37 ST. LOUIS U. L.J. 503, 505 (1993).

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“disconfirming epistemology.”<sup>18</sup> Social-cognitive jurisprudence should be distinguished from social-analytic jurisprudence, however, with respect to some critical points of interest. Social-analytic jurisprudence was advanced more with civil law than criminal law in mind.<sup>19</sup> This is not to say that its principles cannot be applied to empirical matters in criminal law, but that the perspective was developed outside of a general theory of punishment (as punishment largely pertains to criminal matters). In his 1993 foundational article, Wiener advanced his social-analytic jurisprudence in the context of negligent torts. Wiener specified that “[t]ort laws are not operational definitions of wrongdoings. They usually do not articulate, in concrete terms, specific actions or behaviors that are prohibited by law.”<sup>20</sup> This, of course, is quite different than in criminal law, where specific acts of wrongdoing are formally stated as legal prohibitions.

Social-cognitive jurisprudence considers the study of psychology and criminal law within a larger theory of wrongdoing and, as such, articulates that this area of inquiry is broader than empirical science allows. It is recognized that, although empirical matters may only be resolved via empirical science, criminal law reflects judgments about morality that cannot be addressed through scientific inquiry. Empirical science becomes relevant in criminal law only when and where answers to empirical questions are needed to better achieve, or at least approach, resolution to the larger moral issues in which criminal law is squarely grounded.

There are a number of reasons why the importance of social cognition, as an area of scientific study, needs to be recognized and rigorously explored in the advancement of interdisciplinary psychology and criminal law. Social cognition may be defined as the science of how social variables affect an individual’s mental functioning, and how cognitive processing mediates relations between environmental factors and human social behavior. Crime is, by its nature, a social condition. A crime does not need to be committed directly

<sup>18</sup> *Id.* at 511.

<sup>19</sup> In Wiener’s seminal article on social analytic jurisprudence, he articulated his perspective in the context of tort law. *See id.* at 515. For an application of social-analytic jurisprudence to other areas of civil law such as bankruptcy law, see Richard L. Wiener, Susan Block-Lieb, Karen Gross & Corinne Baron-Donovan, *Unwrapping Assumptions: Applying Social Analytic Jurisprudence to Consumer Bankruptcy Education Requirements and Policy*, 79 AM. BANKR. L.J. 453, 454 (2005). For an excepted case in which social-analytic jurisprudence is identified as the guiding perspective in criminal law analysis, see Steven J. Sherman & Joseph L. Hoffman, *The Psychology and Law of Voluntary Manslaughter: What Can Psychology Research Teach Us About the “Heat of Passion” Defense?*, 20 J. BEHAV. DECISION MAKING 499, 500 (2007).

<sup>20</sup> Wiener, *supra* note 17, at 515.

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against another individual for it to be social because any crime is a violation of the law that governs the society in which it is recognized, and in this way, any crime is naturally an antisocial act (or an act against society). Like all behavior from a psychological or cognitive-science perspective,<sup>21</sup> crime is viewed to be social-cognitively mediated – that is, antisocial behavior is the product of how one has processed (either consciously or nonconsciously) internal (individual) and external (environmental) information as it becomes available, or made meaning of various cues as they are presented within one's perceptual sphere.<sup>22</sup> As such, it is not surprising that independent research programs that assess social-cognitive functioning have shared notable success in accounting for individual differences in antisocial behavior across developmental periods and qualitatively distinct populations.<sup>23</sup>

Social cognition, as a psychological realm of functioning, broadly represents all mental processes that are either directly interpersonal (i.e., mechanisms underlying behavior at the level of personal exchange, such as conversation or fighting) or otherwise socially implicative (i.e., mechanisms underlying behavior at the level of society, such as voting or destruction of public property) by nature. Embodied within this volume is a statement of various mental capacities to which individual responsibility may be argued (and indeed has been argued!) <sup>24</sup> to be a correlative. These capacities include, but are far from limited to, social interpretation, controlled cognitive processing (or, more simply, psychological control), evaluative judgment, and rational decision making. Because the criminal's behavior is social-cognitively mediated, and because the criminal's underlying mental capabilities and state are central to determinations of personal responsibility and criminal culpability, social cognition may be identified as the nexus of psychological science and criminal law. As such, the term *social-cognitive jurisprudence* best reflects the utility of drawing

<sup>21</sup> The idea that only via cognition can environment be related to individual behavior is one that emerged in the 1950s and is the centerpiece of the cognitive revolution. Since this time, it has become a universally accepted perspective throughout the psychological and behavioral sciences. See generally George A. Miller, *The Cognitive Revolution: A Historical Perspective*, 7 TRENDS COGNITIVE SCI. 141 (2003) (outlining the evolution of cognitive science).

<sup>22</sup> See Emma J. Palmer, *Criminal Thinking*, in APPLYING PSYCHOLOGY TO CRIMINAL JUSTICE 147, 149, 151 (David Carson, Rebecca Milne, Francis Pakes, Karen Shalev & Andrea Shawyer eds., 2007); see also *infra* Chapter 2.

<sup>23</sup> See Kenneth A. Dodge, *Do Social Information-Processing Patterns Mediate Aggressive Behavior?*, in CAUSES OF CONDUCT DISORDER AND JUVENILE DELINQUENCY 254 (Benjamin B. Lahey, Terrie E. Moffitt & Avshalom Caspi eds., 2003); see also *infra* Chapter 2.

<sup>24</sup> See, e.g., Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 253 (2000) [hereinafter Morse, *Rationality and Responsibility*]; Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. LAW 289, 301–02 (2003) [hereinafter Morse, *Diminished Rationality*].



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from psychology where determinations of empirical matters are needed to properly frame criminal-law doctrine so that it may systematically advance and apply a proper theory of wrongdoing and criminal justice.

Theories of criminal justice may be distinguished by their respective justifications of punishment. Numerous justifications of punishment have been advanced. Retributive justice dictates that punishment needs to be directly proportional to the degree of wrongdoing to which an identified harm was caused. Any causation of a social harm for which the actor is responsible should be punished in proportion not only to the degree of harm caused (e.g., nongrievous injury versus death), but also to the level of reprehensibility with which it was performed (e.g., unintentional versus purposeful). In retributive terms, the commission of a criminal act is defined in terms of conduct that unjustifiably causes a moral imbalance between the actor and society; as a result, the actor is punished in exact accordance (no less, no more) with the degrees of blameworthiness with which he acted and the amount of social harm that he caused. Retributive justice is concerned with the moral properties of the criminal action as well as the identifiable social harm that results.

Deterrence, or crime prevention, is often touted as a justification of punishment. Specific deterrence refers to the ability of a punishment to reduce the likelihood the individual who is the recipient of the punishment will reoffend. In contrast, general deterrence refers to the ability of a punishment to reduce the likelihood of similar offenses by citizens at large. Of course, whether any individual punishment specifically or generally deters crime is necessarily uncertain at the time that it is rendered. Sentences based on a deterrence justification are predictive statements about hypothesized causal relations between punishment and future outcomes. In this way, the deterrence argument is future-focused or forward-looking and, as such, based on notions that are, in any individual case, unknowable. The justification of punishment via deterrence in any individual case, then, is more a justification via hope or expectation of deterrence than via actual deterrence.

Rehabilitation is another justification of punishment that is commonly espoused. Rehabilitation of criminals may be defined as the process or set of processes by which offenders are restored or improved so that they may be more functionally capable and thus more able and inclined to lawfully act in their pursuit of desired outcomes. Rehabilitation, however, is a specific statement about how specific deterrence may be accomplished. That is, by rehabilitating offenders, it may be expected that the offenders in question will be less likely to reoffend. As in the case of deterrence, any rehabilitation rationale is forward-looking and equally uncertain in that it is unknown in any individual case as to whether an offender is even amenable to rehabilitation,



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never mind whether she will in fact be rehabilitated such that she will be less likely to reoffend.

Other justifications of punishment that have been advanced include incapacitation (or incarceration), education, and denunciation. Incapacitation prevents criminals from reoffending by removing them from society and restricting their freedom. The education rationale rests on the mechanism of learning either by the punished individual specifically or citizens at large generally, or both. There are two ideas here. First, individuals who learn and understand that specified acts are prohibited will be better able to avoid enacting them. Second, education leads to social advancement and provides more opportunities to succeed and reducing the perceived need to reoffend to realize one's goals. Both ideas point to the fact that education is really a component of rehabilitation. Denunciation has been offered as a justification of punishment as either a means to deter reoffending via official recognition of wrongdoing and correlative experiences of guilt and shame or a way to maintain a sense of social cohesion and understanding that the social contract by which citizens are bound is legitimate. With the exception of the latter of the two rationales underlying denunciation, all of these justifications of punishment are specific statements of deterrence in that they all derive from a general interest in crime prevention.

Many of these proposed justifications of punishment are empirical statements, of course, or, at least, presume answers to empirical questions. For instance, the statement that punishment is justified when it deters future crime is, in effect, a statement that punishment can have the effect of crime prevention. This is, by its nature, an empirical statement. Likewise, implicit in the statement that punishment is justified in that it serves the purpose of denunciation via experiences of guilt and/or shame on the part of its recipient is a presumption of an empirical issue: that punishment causes in its recipient the type of emotion that is so meaningful that it significantly reduces his likelihood of reoffending. Similarly, justifying punishment via rehabilitation and education begs numerous empirical questions: (1) What kinds of criminals are amenable to rehabilitation? (2) What psychological mechanisms need be targeted such that legitimate rehabilitation may be realized? (3) Does punishment actually educate individuals, whether the individuals of interest are criminals or the noncriminal public, about the boundaries of lawful conduct? (4) If punishment does serve to educate, what are the psychological mechanisms by which individuals learn from their own or others' punishment? These questions can only be answered by empirical science. This practice of translating ideological statements of what justifies punishment into empirical statements of cause and effect should immediately make evident the range

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and importance of drawing from developmental social cognition in forming a proper theory of criminal justice and punishment.

Before exploring specific intersections of developmental social cognition and criminal jurisprudence and law, however, it is critical that a proper taxonomy of purposes of punishment be explicated, even if only in summary form.<sup>25</sup> All of the justifications of punishment introduced earlier may be categorized into two pure theories of punishment. The first justification, retribution, stands alone as its own theory. Retributive theory states that punishment is justified when it is proportional to the wrongdoing committed, where wrongdoing functions as a multiplicative term of degree of social harm by reprehensibility or moral wrongfulness of the act, or failure to act where there was a duty, that caused said social harm. Retributive theory views punishment as the mechanism by which moral balance may be restored after a responsible wrongdoer has upset it. Retributive justice dictates that the person who deserves punishment needs to be punished. The intrinsic wrongfulness of the actor's conduct alone justifies his punishment. This, in short, articulates the retributive concept of *just deserts*.

The rest of the asserted justifications of punishment (deterrence, rehabilitation, incapacitation, education, and denunciation) are utilitarian. Utilitarian theory views punishment in and of itself as inherently wrong. As such, utilitarianism does not share the retributive notion that punishment serves to restore moral balance in response to one's wrongdoing, but rather that punishment augments moral imbalance. Instead, utilitarian theory is concerned with social net gain. As such, infliction of punishment is only justified from a utilitarian perspective in the case that the future good that it causes (or, in practicality, is hoped or expected to cause) outweighs the bad that it naturally produces. For example, although punishment in and of itself is viewed to be naturally wrong, it is justified from a utilitarian perspective where it deters (or is expected to deter) an amount of future crime that outweighs its inherent wrongfulness. Strict utilitarianism dictates that innocent individuals should be punished and guilty individuals should go unpunished when such an action (or nonaction) will produce a social net gain or, in other words, an improvement in societal welfare. Because these scenarios – punishing the innocent and nonpunishing the guilty – upset the sensibilities of some individuals who are otherwise inclined to adopt utilitarian theory, utilitarianism

<sup>25</sup> For a clear and accessible discussion of specific justifications of punishment, pure theories of punishment, and mixed theories of punishment, see Michael S. Moore, *A Taxonomy of Purposes of Punishment*, in *FOUNDATIONS OF CRIMINAL LAW* 60 (Leo Katz, Michael S. Moore & Stephen J. Morse eds., 1999).