

## Probable Causation Bonus Episode 8: Erin Kelly

**David** [00:00:08] Hello and welcome to Probable Causation, the show about law, economics and crime. I'm your host, David Eil and my guest today is Professor Erin Kelly. Professor Kelly holds a Ph.D. in philosophy from Harvard University and is currently a professor of philosophy at one of my alma mater, Tufts University, and is the author of "The Limits of Blame Rethinking Punishment and Responsibility", which is the subject of our conversation today and available wherever you buy books. Professor Kelly, welcome.

**Erin** [00:00:34] Thank you very much. It's good to be here.

**David** [00:00:37] So first, I wanted to ask you how you got to this topic. You're trained in philosophy, but you really have a deep and thorough understanding of the law. Did you get that training in law during your training in philosophy or did you come by it another way?

**Erin** [00:00:52] I came to it later and I'm more or less self-educated on the law. However, the Harvard University Law School was generous enough to have hosted me as a visiting scholar a few years ago, so I audited some courses and that was very helpful. I learned a lot and it got me more interested in the law, especially criminal law. And I've also been teaching philosophy of law at Tufts University for quite a few years, which has given me an opportunity to explore some interesting questions about the law, about the nature of the legal system and its rules and principles, as well as ethical questions related to law, such as whether we have a duty to obey the law, how to think about the limits of law's legitimacy, the possible justifications of civil disobedience, and the justification of punishment. So law is a great topic for a philosopher because it has so many fascinating and deep metaphysical political and ethical issues.

**David** [00:01:45] Great. Let's get right to your book. And as I read it, the first major piece of your argument is to distinguish between wrongness and blame worthiness. How are those two concepts different?

**Erin** [00:01:57] Well, as I think about it, a judgment of blame worthiness focuses on the person. It's attentive to an individual's psychological characteristics or will values dispositions, and it's rather nuanced. Blame worthiness is an evaluation that aims to guide our response to a person who has done something morally wrong questions about whether and how to blame someone arise after the fact of wrongdoing and they make meaning of it. They concern the significance for interpersonal or social life of a given person's failure to meet moral standards of conduct. It also directs us towards conclusions about a person's responsibility for her moral faults. For example, we might say of some individual that what he did was unkind and that he didn't have to act that way. We might say that he chose to act as he did because he didn't have much respect for other people. And in saying these things, we're making a statement about who he is and we're holding him responsible for what he's like.

**Erin** [00:03:06] Now, an evaluation of wrongdoing, by contrast, focuses on an action and whether that action falls short of an interpersonal moral standard. Evaluations of wrongdoing rely, as I think about it, on only a thin sense of the person, something like the notion of a minimally rational human being. What I mean is that to judge that someone's done something wrong isn't to say anything very personal about the wrongdoer. It's more like a description of that person as a rational being who has violated a moral requirement. It doesn't provide much information about that person's character, motives or values.

**Erin** [00:03:48] That's because a person could engage in a morally wrongful action for many different reasons. To understand what a person's wrongful behavior says about him or her, that is, to assess that person's blame worthiness. We would have to dig into why that person has acted as she did. Still, a person's minimal rationality may be enough to establish that person as a candidate for guidance by legal norms and punishment for criminal behavior. A person's rational nature presents a basis for applying the relevant moral requirements of conduct to her. So criminal law is an example of a rule based action guiding system that incorporates some general standards of right and wrong. To establish that someone has broken the law, though, actually says very little about that person.

**David** [00:04:39] It seems like your main ideological opponent in this conversation is retributive justice, which is a different conception of how the criminal law should and I guess does work. What's retributive justice and how does it relate to wrongness and blame worthiness?

**Erin** [00:04:55] Retributive justice is the idea that wrongdoers deserve punishment. Retributivists believe that wrongdoers deserve to suffer for the wrongs that they've done. The idea is that people who've done something wrong should be made to feel bad for what they've done. And sometimes this idea of moral desert, of what they deserve is explained by reference to the metaphor of the scales of justice. Retributive harm it's thought balances the scales of justice after a moral transgression. Retribution essentially involves the notion of payback.

**David** [00:05:34] For you, you write that the notion of moral blame worthiness will not function well as the basis of legal guilt. Why is that so?

**Erin** [00:05:42] Retributive justice connects with the idea of blame worthiness in two ways. One is to say that the punishment a wrongdoer deserves is proportional to her blame worthiness.

**Erin** [00:05:54] So a person's blame worthiness, according to a philosophy of retributive justice, helps us to scale the punishment that a person deserves -- how much punishment and what kind? The other way that blame worthiness connects with retributive justice is expressive. The idea is that punishment expresses blame. It's a public expression of the blame a wrongdoer is thought to deserve.

**David** [00:06:18] And you write, by contrast, that the notion of moral blame in this will not function well as the basis of legal guilt. Why is that so?

**Erin** [00:06:27] I think punishment should be justified if it can be justified on the basis of public values. It should, as much as possible, represent a moral consensus. The wrongfulness of many crimes murder, rape and robbery, for example, is something most people agree on. But how blameworthy a criminal wrongdoer is for having committed a crime is something that's much more contested. For example, some people who commit violent crimes are mentally ill. Mental illness is sometimes understood to mitigate moral culpability. A mentally ill person who commits a crime is thought to be less blameworthy than a mentally healthier person who commits the same crime, but other people disagree. They think mental illness is a factor that aggravates blame worthiness.

**Erin** [00:07:18] A sick person with sick desires and motivations should be more strongly condemned. There's no moral consensus here, and that makes it a tricky business for the state to be in.

**David** [00:07:29] And so you're mostly concerned with American criminal law here. And you write in the book about the relationship between these ideas and the system of American criminal law and practice. Is American criminal law consistent with moral blame worthiness? Or could it be consistent with any one theory?

**Erin** [00:07:48] The assignment of criminal guilt might be consistent with moral blame worthiness. Someone who has committed a crime might reasonably be blamed by, for example, the victim.

**Erin** [00:07:59] But how much and in what way a person should be blamed? If we can make sense of fine tuning, the notions of blame and desert is not obvious from a finding of criminal guilt. The reason is, as I said earlier, a finding of criminal guilt often does not tell us much about the criminally guilty person. Someone is criminally guilty when there is sufficient evidence to conclude that the person has committed a crime. This usually requires establishing that the person committed a criminal act and did so purposefully or with an awareness of what he was doing. But a finding of criminal guilt doesn't usually depend on answering questions about why a person acted criminally. So the basis of his guilt doesn't tell us how to evaluate his thinking, motivations, character or personhood.

**Erin** [00:08:49] Furthermore, we might sometimes find that if we try to understand why someone committed a crime, we experience empathy for the person. We might decide that the person was confused or frightened or angry in ways that we can make sense of. And we might decide that his legal guilt is not a good reflection of his moral blame worthiness.

**David** [00:09:11] So as you said it for you, moral blame worthiness is a private matter and outside of the purview of the state, because there's no consensus for the state to act on why does moral blame worthiness in particular, require a consensus. And would you feel differently if juries had to sentence unanimously, for instance?

**Erin** [00:09:31] That's an interesting question. I think that assessments of criminal wrongful behavior should be made on the basis of considerations that all reasonable members of a society could accept. I think this is important for establishing the state's authority to punish when it comes to many common crimes agreement about their wrongfulness is not difficult to establish.

**Erin** [00:09:56] So there's a lot of consensus that certain wrongs should be criminalized. Maybe not when it comes to the possession of drugs or weapons, but at least regarding violent crime -- murder, rape, robbery, aggravated assault. In other cases, when there's no consensus, for example, if there's real disagreement about whether the possession of drugs or weapons should be criminalized, this casts doubt on the authority of the state to carry out punishment for these crimes. Many people don't view it as legitimate for the state to lock people up for drug possession. This undermines confidence in the law and in law enforcement. So achieving consensus on these matters is important, and when it is lacking, we should be wary of punishing when law enforcement does not represent shared values, when it's not collectively authorized, this is a problem.

**Erin** [00:10:48] If juries decided on criminal sentences and did so based on shared ideas about a convicted person's blame worthiness. This would be an argument in favor of punishment as blame. There is, in fact, some evidence that people converge in their judgments about appropriate sentences. But if we were to dig into people's perceptions of mitigating factors, for example, the personal history of an offender's own victimization,

factors of mental health and social circumstances like poverty and racial alienation, I wonder whether that consensus wouldn't begin to unravel.

**David** [00:11:26] You write also that deserving punishment is not like deserving to win a talent competition or leadership award. So there's this asymmetry between deserving punishment and deserving reward. But I think there has been some focus in the contemporary conversation around unearned privilege and kind of questioning whether the rewards that society doles out are, in fact, deserved. Is it appropriate also to destabilize our notions of merit and deserves an acknowledged achievement as much as deserved punishment? And would it be a loss to society to lose or diminish celebration of achievement in the way that some people retributive us might feel that it's a loss to society to abandon collective blaming?

**Erin** [00:12:15] You make a good point.

**Erin** [00:12:16] Let's think about that. Unearned privilege is privilege that's not deserved. Unearned privilege is apparent, but not real achievement. And it shouldn't be celebrated. Celebrating real achievement. Achievement that reflects a person's talent, efforts and skills makes sense. Real achievement is achievement that reflects qualities we value. I suppose sometimes it may be difficult to tell whether accomplishment involves genuine talent, whether it's earned or unearned, but it's not, generally speaking, mysterious or so it seems to me. We can and do recognize that display of talent and ability. Deserved blame and punishment is harder to substantiate. That's because deserving blame and punishment depends on the complex idea that a person has done something they shouldn't have done and could have refrained from doing. Or if it's a case of inaction, or supposing that a person has failed to do something they should and could have done.

**Erin** [00:13:21] Negative dessert, if we can call it that, involves a counterfactual judgment, a judgment that a person could have acted in a way that they didn't, in fact, act. It involves judging that a person has an ability they didn't display to do the right thing and this can be hard to assess. I mean, how do we know that it's true? It raises skeptical puzzles that don't arise when someone, in fact displays a special talent or accomplishment. I don't think abandoning collective blaming involves a loss. We can still judge and reject wrongdoing. We can uphold moral standards of conduct, protect and affirm people's rights, and continue blaming as we see fit in personal life.

**David** [00:14:08] So going back to this question of whether someone could have acted differently than how they did, it seems like this involves a kind of difficult distinction to make between impediments that are imposed on them from the outside and emotional disturbance that's not part of their core personhood in some sense. And then on the other hand, something that does attach to their personhood, that is their fault in some sense and not a limit on them that's imposed from the outside. Is that a problem with the concept itself, or is it just another reason that it's difficult to achieve so-called social consensus on these issues and therefore the state shouldn't be involved?

**Erin** [00:14:45] You're right. It's a deep question and a difficult one to answer. I'm not sure it can be answered well. I agree that sometimes we think a person's wrongful conduct doesn't represent who they are as a person, and other times we decide it does. It's possible that these judgments are influenced by how much we understand and identify with the difficult thoughts or circumstances that a person failed to manage well. So this is treacherous territory for the criminal justice system because of the potential for these evaluations to be biased. So here's another complication. Suppose we agree that

someone's wrongful acts speak to who she is as a person. Whether she's morally responsible for what she is like is a further question. Maybe she has a flawed character that was formed by experiences for which she's not responsible. Then she may not be responsible for what she's like as a person. This often seems to be the case when a person is disturbed, but we might also question more generally how much each of us is responsible for what we are like as persons, since our characteristics are the product of many factors beyond our control and they can be very difficult to change. There's room for skeptical doubt about how to draw the limits of moral competence.

**David** [00:16:08] Would a focus on the wrongfulness of an act rather than the blame worthiness of the individual prevent an accused person from proffering evidence at sentencing that would mitigate their blame worthiness and therefore their sins? That's the kind of evidence that is at least sometimes brought out at sentencing hearings today. The hardships a person has faced that they were out of their control and led them to the acts that are being punished for. If we separate it's wrongness and blame worthiness would that part of the process just disappear entirely?

**Erin** [00:16:42] To some extent it would. I think if we reject the idea that punishment is a form of moral blame, however, there's still going to be room for testimony that in some cases, blame would do no good because the person is conscientious or has changed or for some other reason is not a threat to others. We may have reasons to think that even though a person is guilty, punishment is not necessary and we can choose other forms of accountability.

**David** [00:17:11] And you write also that in that vein, the punishment is properly directed only to people for whom it would rationally count as a disincentive, and that incarcerating purely for incapacitation has to be a small group, that a criminal justice system will be viable only if that incapacitated group is small. Why is that the case and how small is small? What are the limits of incapacitation?

**Erin** [00:17:40] What I meant is that a legal system can't function well as a purely coercive system. The law depends on it being the case that most members of society are motivated to comply with it for reasons other than the fear of punishment. Of course, there'll be some people for whom this is not true, but our institutions are unstable. If that group of people is not small, I can't put a number on it.

**Erin** [00:18:06] Let's call them anti-social people who disregard the rights and claims of other people and are resistant to change. They're a threat to others. We have moral reasons to restrain such people from doing harm, but we should treat them humanely and with dignity.

**David** [00:18:23] There's a case recently, a couple of years ago, Larry Nassar, the physician who abuse many gymnasts and female athletes at Michigan State, and the judge in that case I'll put a link to it in the show notes so the listeners can listen to it for themselves. The judge in that case gave a an impassioned statement at sentencing that some viewed as going beyond the role of the judge, but the many people who viewed the doctors actions as really horrific felt that the judge's statement was satisfying to listen to and and cathartic for them. Do you think that statements like that by an agent of the state go beyond the limits of blame? What about, for instance, statements by victims at sentencing hearings, which also kind of give voice to the harms that have been inflicted in a government form?

**Erin** [00:19:16] I think it does go beyond the limits of blame. For a judge to speak, as Judge Aquilina did. She tells Nassar that he does not deserve to walk outside of a prison ever again, and she calls sentencing him to 175 years in prison a privilege. She also emphasizes that rehabilitation is not possible in his case, which is something I don't think she knows. Of course, what Larry Nassar did is so outrageous. It's easy to feel sympathetic to the judge's statements, but I think there's a danger in the judge's position that goes beyond her speech to Nassar. She casts herself as a moral authority, as someone whose job it is personally to blame and condemn, and as someone who's in a position to judge whether a person can ever change.

**Erin** [00:20:05] I don't think we want to credentials legal authorities in this way or encourage them to present themselves as moral and psychological experts. I also think it's dehumanizing to treat a person as someone who is incapable of change, even if in some cases we have reason to suspect it's true. I think we should be careful not to dehumanize people who are convicted of crimes. Victim statements are less troublesome because, unlike judges, victims are not obligated to be impartial. It may also be good for victims to have a public opportunity to confront the person who robbed them and to express their thoughts and feelings. Still, when these statements influence a defendant's sentence, there's a danger that these statements can be prejudicial. A defendant may end up with a longer sentence because that defendant's victim was passionate and articulate. There are other avenues we could create for victims to speak to perpetrators.

**Erin** [00:21:10] The restorative justice movement has developed a thoughtful approach outside of courts of law, where victims and offenders can participate in a guided conversation focused on understanding the crime and on healing. There's evidence that the practice of restorative justice is beneficial to both victims and offenders.

**David** [00:21:29] Keeping again in the area of sexual assault. Of course, it's been a big focus on college campuses for at least a few years now. And there's some evidence to suggest that university policies that advice students to take preventative measures like drinking less, being more cautious about being alone with potential attackers and so forth, are effective at reducing the incidence of sexual assault. But then some other people view these suggestions as blaming the victim and shifting moral responsibility to someone who doesn't deserve it, and putting burdens on someone to change their behavior in order to adapt to the antisocial behavior of other people. Do you think that it's appropriate for institutions like universities to suggest this sort of caution and preventing wrongdoing, even if the wrong during their preventing is not their own?

**Erin** [00:22:26] Yes, I do, because college administrators have a responsibility to keep students safe and teaching people how reasonably to avoid victimization is a way to try to keep them safe. It would be a problem if that were the only way if universities didn't also take proactive measures to confront sexual assaulters and hold them accountable. Assuming universities are also committed to doing that, it may be helpful to teach people ways to keep themselves safe from attack. It can be a way to educate people about a realistic threat. It doesn't excuse those attacks. It calls attention to the danger of sexual assault.

**David** [00:23:05] I want to also talk about the relationship between criminal law and tort law for the non-lawyers in our audience a tort law is the civil system to claim damages for harm suffered by the plaintiff. But it typically does not involve blame worthiness. You don't get some kind of record for civil offenses like you did for criminal offenses. You touched on this in the book and suggest that this could be possibly a kind of model for criminal law.

But I think there are two important distinctions that I want to get you to speak on. One is that in tort law, the remedy is a zero sum transfer from one party to the other, as one party pays the other party money. Whereas of course, in in criminal law, we've got a negative some punishment. Then the second is that in tort law, defendants always have at least some money. That's the reason that they're being sued. Defendants who don't have money commonly referred to as judgment proof in the sense that even if you get a verdict against them, they're not going to be able to pay you what the court says they owe whereas in criminal law, of course, most defendants are indigent. So is it right to understand the criminal justice system as essentially offering to the wrong parties the opportunity to blame and punish as a consolation prize for not being able to sue and get money? And in that case, the comparison to tort law demonstrates not that separating blame and wrong is possible, but the punishment and payment are substitutes, and there must be one or the other.

**Erin** [00:24:36] Hmm. Interesting question. I think whether blaming and punishing a criminally guilty person benefits the wronged person more than alternative possible responses is not obvious. Some victims desire retribution others don't. Many victims are very concerned that the person who who harmed them not harm other people. Victims don't want other people to suffer in ways that they have suffered. Putting offenders in prison is not an effective way to get them to change and to commit themselves to not harming other persons again, it doesn't work well, and most people who go to prison will reenter society at some point, usually as persons who are more damaged than when they went into prison. This is not good for anybody. It's not a consolation prize.

**David** [00:25:30] You write that a focus on wrongdoing as opposed to blame worthiness as you're advocating, would avoid some of the worst abuses of the criminal justice system. So you mentioned. Salem witch trials, fabricated rape charges against black American men in particular, who have been perceived as threats to white women, extreme sentences for drug offenses. Why would it be the case that focusing on wrongdoing as opposed to blame worthiness would avoid those kinds of excesses?

**Erin** [00:25:58] I think a criminal justice system that's focused on evidence of wrongdoing would be more successful at containing the irrational fear of crime and the prejudicial manipulation of public fears in a way that harms members of disfavored groups.

**Erin** [00:26:12] Excessive fear of crime seems to be driven more by the demonization of criminal types than by evidence of actual crime rates and the profile of ordinary prisoners. I suspect that a public culture that is more evidence driven in its approach to crime could more easily contain these excesses.

**David** [00:26:33] And likewise, of course, primary concern of many people who study criminal law and criminal legal system of the United States is mass incarceration, which isn't always driven by the same kinds of flagrant abuses like in the Salem Witch Trials, but nevertheless is a serious and pressing social problem. Do you think that this focus on wrongness and closer attention to evidence would result in less incarceration also?

**Erin** [00:27:01] I don't think that focusing on wrongdoing versus blame would be enough. I think we have to address some big social problems of injustice, poverty, racial injustice, need for health care for many people, and so on. I think we also have to think differently about punishment. I think we have to think in less maximal ways. We should think about what the goals of punishment should be and whether these goals are compatible with treating criminal lawbreakers fairly and with respect. I believe that rejecting retributive

thinking could help us, though, to rethink the ethics of punishment, and we have some thinking to do.

**David** [00:27:43] Final question. Many of our listeners are researchers or aspiring researchers in social science. You've already offered to them. So many valuable insights in your book and in this interview, and I hope that you'll give them an opportunity to return the favor. What's one question that you wish social scientists would spend more of their time on?

**Erin** [00:28:03] Understanding ethical ideas and the public culture, what they are, how they got there, what function they serve, how responsive, ethical thinking is to evidence. I'd like to know more about the sociology and the psychology of ethical concepts. For example, how people think about the justification of punishment. And related to that, how people create and distribute stigma. I wish more social scientists would study that.

**David** [00:28:30] My guest has been Professor Erin Kelly. Her book is "The Limits of Blame Rethinking Punishment and Responsibility." Professor Kelly, thank you so much.

**Erin** [00:28:38] Thank you so much for having me and for all your excellent questions. I really appreciate it.

**Erin** [00:28:47] You can find links to all of the research we discussed on the show on our website [probablecausation.com](http://probablecausation.com). You can also subscribe to the show there or wherever you get your podcasts to make sure you don't miss a single episode. Big thanks to Emergent Ventures for supporting the show. And thanks also to our Patreon subscribers. The show's listener supported. So if you enjoy the podcast, please consider contributing via Patreon. You can find a link on our website. Our sound engineer is Jon Keur with production assistance from Hayley Greishaber. Our music is by Werner and our logo was designed by Carrie Throckmorton. Thanks for listening and I'll talk to you soon.