Well everyone, I think we are going to start, and pardon the frog in my throat here. I'm Greg Hicks, by the way, serving as interim Dean, and it's my great pleasure to welcome you all to the Harry M. Cross Distinguished Visiting Professor Lectureship and Lecture.

This is the second Cross lecture we will have this year. The first was delivered by Professor Roberta Karmel visiting from Brooklyn Law School, a distinguished professor in the field of corporation law and securities law. And Peter Arenella is our very distinguished speaker today. After saying a little bit about the Harry M. Cross Lectureship, I'll introduce Peter here.

This was the very first professorship, the Cross professorship, established here at the law school, in recognition of one of the school's great scholars and great teachers, Harry Cross, to honor his contribution to legal education and to the bench and bar over many years. He was a graduate of this law school in the Class of 1940 and joined the law school very shortly thereafter in 1943. He was a national authority on community property law and on property law generally.

He was also very well-known for his involvement with Husky athletics over the years. He was the faculty rep to the NCAA and actually served as the president of the NCAA. And then for a very long time, he was the custodian of the University of Washington's Malamutes.

He was the 'Husky' parent in a way. He and his wife looked after and took to many games, over the years, the Huskies. He served as acting Dean and as Associate Dean. And his sons are all lawyers and are carrying on that tradition: Harry M. Cross, Jr., Bruce Cross, and Kim Cross.

This professorship, as I said, was the very first established, and it was done largely with a gift from Jack Macdonald who was one of Harry's classmates and great admirers. Other contributors to the professorship are Perkins Coie law firm, the Karr Tuttle firm, Preston, Gates & Ellis, and the Williams, Kastner & Gibbs law firm.

And the professorship, as we know, is intended to bring nationally recognized teachers and scholars to us each year, to teach and to enliven our scholarly community and our scholarly exchange. And we could not have done better than persuading Peter Arenella to come to us from UCLA.

He's been on the faculty there since 1987, having received his B.A. from Wesleyan and then a J.D. from Harvard. He is an esteemed specialist in criminal law and criminal procedure. He also teaches seminars on moral agency focusing on the whole idea of
criminality and criminalization and what it signifies in society. He has worked in the philosophical field of moral agency and published in legal journals and specialized philosophical journals, and has generated considerable commentary among scholars around the country and around the globe.

He's also called upon frequently to comment on matters involving criminal law for the media. He is very well-known for his media commentary in the O.J. Simpson trial and many other settings as well. He has been teaching really gloriously this winter term and will be teaching criminal law again in the spring. And it's just my great honor and distinct pleasure. Peter, please come to the podium. Professor Peter Arenella.

[applause]

Prof. Peter Arenella:

Thank you. First, I would like to thank the people who funded the Cross visiting chair. It's been a wonderful opportunity for me to get away from Los Angeles and enjoy Seattle, and more importantly, the Washington students who I've fallen in love with.

The only problem is that I have to go back to UCLA in the fall and deal with a group of students who, frankly, feel a little bit more entitled to have their own view of what good teaching is. I've really, really appreciated the generosity of the students that I've dealt with so far. And I'm hoping that my advanced 'Crime' procedure students we just finished with haven't spoiled me for the first year. I'm hoping the first years will be just as good.

I've really had some difficulty, more than usual, frankly, thinking about how to frame this talk because my work lately, the last two decades, has really been in the field of moral philosophy. I write now more for moral philosophers than policy decision-makers inside the criminal justice system, and the work that I'm concerned with really is ultimately normative critique of retributivist justifications for criminal punishment.

In essence, while utilitarian justifications explain most of the policy decisions made by our legislatures, or at least they think utilitarian decisions are being made - cost benefit calculations about what they can afford and what can be done to control crime and protect the community - the retributivist 'just deserts' retribution justification for punishment is frankly the major legitimation device used by courts and legislatures.

It explains how while we protect the community, we're giving convicted criminal offenders their 'just deserts.' Because, you see, we've shown not only that they've done some terrible act and caused or risked some social harm, but they're also morally culpable for what they've done. And because the law allegedly determines before conviction that a defendant is morally responsible for his criminal action that means that we've demonstrated their moral culpability, their 'just deserts.' So, they're getting somewhat what they actually deserve - that's the claim of retributivist theory for criminal punishment.
First, as a practicing criminal defense attorney and then as an academic, I have never thought that this view was morally defensible - and not because of some deterministic account of human action. Moral philosophy, in my view, that focused on moral responsibility had reached a dead end, I think, in the 20th century.

A great deal of time was spent essentially looking at deterministic views of human action: notions that what people do, they have to do; they have no meaningful control over their actions. They experience it, as such, but in reality, all of their actions, all of their choices, all of their decisions are fully determined by causal antecedents over which they have no meaningful control.

And then groups of determinists began to argue with each other: There were incompatibilists who took this position. There were what are called 'soft' determinists who suggested that a deterministic view of human action could be consistent with a notion that people are fairly blamed for what they did.

But, that was the majority of the literature up until the 1990s, frankly. None of that literature, in my judgment, actually addressed what I considered to be the threshold question - in any account of when it's fair to blame people for what they do, for they're characters, for the morally defective attitudes displayed by their wrongful acts - and that is whether individuals first qualify as moral agents.

Now, what do I mean by moral agency? I mean a concept that explains why an individual is an appropriate addressee of community moral norms and a suitable object for 'deserved' - and that's critical - deserved attributions of moral blame, either for his acts, for the defective attitudes displayed by his acts, or for his bad character. That's what I mean by moral agency.

Aristotle took the concept seriously. There were some very important character philosophers of the 18th and 19th century. And while they didn't use the terminology of moral agency, they talked about the importance of moral norms being understood and being internalized. But, the bottom line is, after Kant things really went down a rat hole in this particular field, from my perspective, and the concept of moral agency was completely ignored.

What that meant is criminal law theorists, at the close of the 20th century, who were doing work about criminal-law excuse theory and who had either dabbled in moral philosophy, and a few of them who had Ph.D.s in moral philosophy, for the most part embraced the sort of conventional wisdom that they were taught and then applied that to their criminal law culpability theory.

And in essence, the debate inside legal academia, among this small crowd of people, raged between some who insisted that the hard determinists were right and that no one really had meaningful control over their actions, and what I've labeled in my work the rational-choice theorists who basically derived their account of fair blaming by focusing on
the fact that maybe we've had some meaningful control over our actions because of our rational choice capacities.

The soft-determinist camp in moral philosophy became the compatibilists in legal academia who would defend a retributivist justification for criminal punishment. In other words, the debate was largely derivative of the ongoing debate in the moral philosophy field.

Now, there were some, I think, notable exceptions in the philosophy field. I could name a few, but I'm not sure that would serve my purposes. There were a few philosophers who, some were character theorists, and that led them to take the concept of moral agency seriously. George Wallace wrote a terrific book around 1993 in which he suggested that there is this threshold concept that people were simply ignoring. And there were a couple of us outliers in the criminal-law legal-theory field who began to talk and take seriously the notion that there was this conception of moral agency that had to be addressed.

Now, I don't want to give a false picture of the debate, because the legal theorists who were relying on conventional moral philosophy did, in the '90s, begin to talk about moral agency. But, what they did is they derived their concept of what it was to be as moral agent solely from their account of how people can control their actions. In short, for them, the concept of moral agency was derivative. It derived from their account of when it's fair to say that someone has control over their actions.

What, of course, was left was any discussion at all about, if you had meaningful control over your actions, why does that show, by itself, that you're capable of making a moral choice about what you do, or a moral evaluation about what you do. And so some of began to write about how there was this threshold, a priori concept of moral agency that had to be addressed regardless of the substantive moral norms that you were talking about - whether they addressed a person's character, whether they addressed a person's attitudes, or simply a person's actions.

So that's a sort of brief discussion, trying to give you a sense of the intellectual history and launching my work in that context.

What I'm doing now, having written about moral agency, having suggested that there are a series of capacities that have nothing to do with control over behavior, a series of moral emotions - empathy, shame, guilt, the capacity for empathy, some analysis of what empathy really means, which includes not just an effective state of caring about the interests of other people but also some cognitive ability to look at something from another person's perspective.

And then there are arguments made about how to make any moral choice, really, where one has to care, some way, about the interests of another human being, that there must be some minimal capacity for empathy before one can actually care about someone else's interests when they conflict with your own and have the ability to give that other person's
interests some significant weight and salience in any moral decision that you make.

My work focuses a little bit more, though it talks about empathy, on what it takes for a moral agent to become a fully accountable moral agent, and what's the difference between, say, an 11 or a 12-year-old child and a 16, 17, and 18-year-old child, in terms of this issue of moral agency. And I suggest that before one can become a fully accountable moral agent, you need some minimal - and I emphasize the word minimal - capacity, one, to understand your basic character strengths and weaknesses.

And of course, any parent in this room knows that it's a long process for an adolescent to even begin to figure out who the heck he is in terms of his character. And once that process has gotten off the ground, it's also a long haul to get your adolescent children to begin to try to subject who they are to some critical self-reflection, to some minimal ability to distance themselves from their immediate desires, goals, and impulses, and just back up for a second so they don't act impulsively on them, especially when they're facing peer pressure, which has a tremendous influence on adolescent choices and actions and behavior, to step back just for a moment and ask themselves some questions about their immediate goals and desires.

And my work suggests that this capacity to develop a sense of one's character and then this capacity for critical self-reflection is actually essential to explaining not only the major moral-psychology tasks for adolescent development but also to explain how one progresses into becoming a fully accountable moral agent.

Now, having said all of that, what's the relevance of any of this to the criminal law and to the issue on the table today about the impact of our willingness now in society to subject children as young as six to serious adult criminal liability?

Over the past two decades, there's been a dramatic change at the legislative level, where states, looking at horrific cases of young children committing murder, or young adolescents committing murder, many states have now decided to treat them as adults, not to put them inside the juvenile-justice system but to take them immediately into the adult criminal-justice system.

And the poster children for this movement, of course, come from many urban centers, such as Los Angeles. All I have to do is tell you some horrific story of some 13 or 14-year-old gang-banger who deliberately takes human life as a ritual process to get initiated in a gang, and then ask, "Gee, do you really want to see that person in jail only for three or four years, until he reaches the age of majority at 18 - or in some states, up until 25? Or do you want real social control, real punishment?"

The answer that every legislature that has responded to this question, not surprisingly given who their constituents are, is "We want these kids locked up way beyond their juvenile years, because they're predators, they're dangerous, and we want protection from them."
Unfortunately, what's happened is that legislatures have responded to this threat by passing laws that lead to either automatic adult criminal liability, once the child commits a very serious felony, whether it's murder, rape, armed robbery, or there's what's called a waiver hearing. But, the waiver hearing is a cruel joke, for any lawyer who performs in it, because the only questions asked in the waiver hearing are is there probable cause to believe a serious felony has been committed, and does the individual who's committed it, basically, know the difference between right and wrong - a test that the average six-year-old can pass.

So, what we have now is a very generic movement to lower the age of adult criminal liability, motivated by a very understandable desire to give adequate social protection and prolonged prison sentences to a certain class of youthful predator.

The problem is anyone who studies homicides committed by children and adolescents, as Frank Zimring has done very well at Berkeley, soon finds out that the gang-banger poster child for the movement is not the typical case. Indeed, Zimring's work shows - and this is the value of empirical scholarship - it is somewhat helpful to know what the problem is. And it turns out, like life always turns out to be, that the problem is so much more complex and nuanced than what we first thought. There is no typical youth-homicide killer. The gang-banger is one example, but actually not the norm. And in fact, most children and adolescents who kill, kill people they love, kill people they're intimate with, whether it's a girlfriend, a boyfriend, a lover, an abusive parent. If there is any norm at all, that comes closer to it. And even that isn't the norm.

But, here's the real irony. The legislatures are thinking that they're doing something to promote a good, adequate measure of social control. But, what they're doing is ruining the lives of many children who actually are redeemable, if any minimal effort was paid to them, and they're incarcerating for long periods of time children and adolescents who actually don't need that type of incarceration to protect the rest of us. And that's, from a utilitarian perspective, a tragedy.

But, I don't care about the utilitarian perspective. My work concerns whether there's a gross injustice occurring here, an injustice in the sense that we're engaging in magical thinking, that if we impose adult criminal liability that these children suddenly become adults and that we are giving them anything close to their just deserts.

And the concept of moral agency, that I've only briefly outlined in this talk, is used in an essay that I'm about to publish to suggest a reason why none of these children qualify as fully accountable moral agents. They're not even close to it.

Depending on the age of the child, there are a variety of different capacities that haven't begun or are not in place or haven't been adequately developed, whether it's a 9-year-old or a 12-year-old or a 13-year-old. In essence, the argument is we are imposing adult
criminal liability on people who have not yet reached full moral-agency status. Because they're not fully accountable moral agents, the notion that they justly deserve the community's moral condemnation is just a lie. It's just a lie.

That's the basic argument of the piece. The work on moral agency that I'm doing has ramifications way beyond this issue. The insanity defense that we've recognized for many, many centuries has come under critique.

It's been criticized since its inception, frankly. But, it's come under a great deal of criticism over the last 20 years by even liberal scholars, who seem to believe that the reason we excuse people "found insane" is because of some notion that mental illness has caused them to do what they did. And they quickly point out that poverty, bad parenting - there are so many other, better causes of criminal behavior than mental illness.

And of course, they're absolutely right. The problem is that's not why we have an insanity defense. It has nothing to do with mental illness causing criminality. It actually has to do with the fact that severe mental illness - I'm talking about any severe psychosis, whether it's paranoid schizophrenia or bipolar manic depression - has, actually, a tremendous impact on the moral capacities that I outline in my account of what it is to be a moral agent.

Just think about a simple moral decision, a very simple moral decision. And I'm going to use, first, a child making it, and then an adult who's severely mentally ill.

The child example - and I don't want to go over my time - comes from a girl in Michigan named Sarah. She was 12 years old at the time of the killing. She lived with her mother, who was fully disabled. They were on welfare. She had dropped out of school at 10 to take care of her invalid mother. So, she was out of school. She was not getting any real parenting by that time because her mother was so disabled by her illness.

By the time she was 12, the state welfare agency had gotten around to sending a nurse to help her a little bit with the care of her mother, so she started to go back to school a little bit. And she got a boyfriend, named Leo, 21 years old.

She entered the marvelous world of sexuality, began to have sex at 12 with her boyfriend, Leo. And for her, that was the first time in her life that she really was enjoying her life. Unfortunately, Leo was homeless, and because of the nurse's presence, they couldn't have sex at her home.

Leo suggested that they steal the nurse's car, and that way they could have sex in the car. And Sarah said, at 12 years old, "Well, that would be wrong. I don't think that's a good idea." Leo said, "If you don't help me steal the car, I'm going to leave you." This was all Sarah had in her life of any positive meaning at all, and she decided to go along with the plan to steal the nurse's car.

The next day, they got into the car with the nurse, as the nurse was leaving the home.
as the nurse was driving home, and they were supposedly hitching a ride to go somewhere in town, Leo, in the backseat, shot the nurse in the back of the head, killing her instantly.

Their incredible planning activity did not involve anything about what would happen after the shooting. Indeed, it’s not clear that Sarah even knew he was going to shoot her. But, let’s put that aside. Let’s assume Sarah had some sense that maybe he was going to commit some act of violence to steal the car. I want us to assume that.

The car almost went out of control. Sarah was in the front seat. She held onto the wheel so there wasn’t a car crash. And then Leo vomited at the gore he had caused. They got out of the car, and they decided that they might get caught so they’d better leave the car and the body. And they walked back to their house, had sex outside, and then were arrested. That was their plan.

Now, under the dominant view of moral agency that the criminal law seems to embrace, she’s a moral agent. She knew stealing the car and doing something bad to the car owner was wrong, clearly knew it was wrong. I think she probably knew it not just cognitively, but at some effective level, at some emotional level, and she showed that understanding by saying no initially. But, she decided to give into her boyfriend, because pleasing her boyfriend was more important to her, at that moment in her development, than anything else she could think of.

So, here was her choice. Many legal theorists talk about, "It's just not hard not to kill people, or rob people or rape people. Not hard." So, the moral demands of the criminal law are minimal. Therefore, the suggestion is, they're very easy to comply with. Well, that's true if you're a middle-class, upper-class person writing your tome of moral philosophy in a situation where there aren't many opportunities to do bad things, or any real necessity to do so.

But, the point simply is that Sarah never actually thought of her choices, at the time she made her decision, as, "Oh, should I kill this nurse or not?" That wasn't what she was thinking about. What she was thinking about was, "If I don't go along with my boyfriend's plan to steal this car, I'm going to lose him." And that was about the extent to what she could actually think about. Her capacity to frame the question was almost nonexistent. She framed it in terms of her immediate context and her immediate desires and goals.

News bulletin: this is how all children actually frame their "moral choices." It's not actually aberrant. This is normal, maturational development. Obviously, there are aberrant factors in my story, about the choice being offered, about what the boyfriend asked of her and her situation. But, in terms of how she actually went about thinking about the choices, she framed the question in a manner that most 12-year-old children would frame it.

Now, I'm not saying most 12-year-old children would kill their nurse or steal the car. Mine wouldn't. Clearly not. Of course, it's unlikely my children would ever be in exactly the context she was in. But, putting that aside, I'm not saying she had a hard choice and that's
why we should excuse her. I am saying that we should excuse her because she hasn't been given the opportunity to develop the type of requisite skills and abilities that are needed for someone to make an appropriate moral decision in that context. And she completely lacked those skills.

What's really tragic is she was treated as an adult. She's now serving a 45-year prison sentence in an adult Michigan prison system. She was interviewed three years after the killing, at the age of 15.

So she had now had three more years of normal moral development, albeit in prison, and a reporter asked her to talk about the crime and would she do anything differently. Had she thought about this? Had she learned something? And her response was rather revealing. She said, "Yeah, I learned something. I learned that my boyfriend didn't love me. I now understand that if he loved me, he never would have asked me to do such a terrible thing."

Now, think about this. Is there any sense about the victim, the nurse, about the consequences of what she's done to another human being here? She's a little bit better than she was about thinking about her own self-interest, I suppose. There's a little increase in her sophistication.

[laughs]

There's a lot still lacking, at the age of 15, even though she's made some progress in terms of figuring out what's rational for her own self-interest.

But, she was a rational chooser. She had the capacity for rational choice. Therefore, she's a fully accountable moral agent in the eyes of the criminal law. What I want to suggest to you is it's not even close to a defensible proposition.

Now, let me give you one more example about how this applies in the insanity defense. There's a case called Arizona versus Clark. It was decided by the Supreme Court just a couple of years ago. It involved a young man, an adult, suffering from paranoid schizophrenia. And part of his delusional belief system was that there were aliens who had come to his town in Arizona and were basically inhabiting most - not all, but most - of the people of his town, and that these aliens who were inhabiting human bodies were going to hurt him.

He believed that if he played his radio at a sufficiently loud volume, either at home or in his car, he would scare them off. That was part of his delusional thought system. And an officer was called in because he was driving his car with the radio blasting. And an officer was called to respond, and this young man murdered the officer, thinking he was an alien.

Now, he tried an insanity defense, as well as a partial defense of diminished capacity. And without boring you, the case turned on this diminished-capacity issue. That's what the United States Supreme Court responded to.
But, what I find more interesting is the insanity defense in this case, because you can't have a clearer case of a severe mental illness that is robbing someone of almost every moral capacity I can think about, apart from rational choice. And yet, under the law of Arizona, and in most states in this country, it wouldn't be a surprise if he lost his insanity defense.

He did. Why? The prosecutor argued that he made a rational choice about his actions. He showed some awareness that what he did to the officer was wrong, because he tried to conceal his wrongdoing afterwards, which he did. So, he had some understanding that what he did was wrong and some ability to show, by his post-crime actions, that he was aware that he had done a wrong thing, and that's why he was hiding from authorities after the murder.

There wasn't a great deal of expert testimony denying that all of these delusional thought patterns were actually present. He had a long history of institutionalization in mental hospitals. This isn't the fabricated insanity defense that everybody worries about. The evidence of his severe mental illness and its prolonged existence in his life was beyond doubt. But, the test in Arizona was: did he know what he was doing was wrong, even though he was mentally ill? Yes, he did. Therefore, he's responsible.

Again, I remind you, that test would make most six-year-old children responsible in the eyes of the law, even if they were suffering from a mental illness.

It's a cruel joke that the criminal law maintains the fiction that criminal responsibility, criminal liability is commensurate with just deserts and moral culpability. It's a lie.

And that doesn't mean that we shouldn't have a criminal law system that protects us. I'm not critiquing utilitarian justifications for what we do. I'm suggesting that we try to please ourselves. In protecting us from dangerous people, we also try to reassure ourselves that we're also giving people their just deserts. And I want to suggest to you that most of the time, we come very, very far from that ideal, both in our legal doctrine and in our legal practices. Thank you.

[applause]

Prof. Arenella:

Did I go over? Oh, please. Yeah, I'd love to take questions.

Greg:

I'd like to ask Peter if he'd be willing to take a few questions. This is really very absorbing. Please.
Prof. Arenella:

Someone's got to ask me about Leo. Yeah.

Audience Member:

I'm not going to ask you about Leo.

Prof. Arenella:

Aw.

Audience Member:

How do you talk to policymakers, legislators, executives, district attorneys, the people who make these choices? The excuse you made here is received well by us, but I think it would not be received well...

Prof. Arenella:

Deaf ears. I would never bother with such a speech in front of - I've testified at legislative committees, both at Congress, at the state level, all across this country. I never give this speech. No, I approach them as a good utilitarian would.

I testified before a California legislative hearing about a year and a half ago. And what I wanted to do - it wasn't my work; it was Zimring's work - I wanted them to read the damn book about the empirical facts. Because legislators, whether they're good at it or bad at it, for the most part, they're not concerned about the justice or injustice of what they're doing to the defendant, and they never will be.

They're concerned about crime control, adequate social protection of their constituents. So, the best argument to make at any legislative branch is a good utilitarian argument about what are the costs and what are the benefits of the various options you're considering.

And it turns out there's a powerful - and Zimring makes it in his book - utilitarian critique of this generic lowering the age of adult criminal liability. We're getting a little bit of added social protection, where we need it, for a very small group of youthful, violent predators who will kill again or do something else terrible again. But, for that, we're incarcerating a massive number of adolescents and children who don't really need such long incarceration.

And worse, we're turning a good number of that group into people who are going to be much more dangerous once they're released. And they do have to be released. And legislatures now are becoming a little bit more amenable to the issue of what happens
when they're released, because of the economic collapse. They just don't have the funds to incarcerate as many people as they were able to a decade ago.

So, my honest answer to you is I would never, ever make any justice-based argument to any legislative body. It would be a waste of time. Yeah.

Audience Member:

Would you say about more about your view of deserts? You seem willing to speak about just deserts. And may I also ask that you do it in a certain way? And that is that you think about positive deserts. Because I think, in some ways, it's easier to get our deserts straight if we think about positive deserts and then switch to negative and see what we have to say there.

I've taught deserts to students a lot of times, and they're pretty skeptical if I go in with negative deserts. But, if I go into it with positive deserts, they are a little more friendly to the idea. So, I tell them stories of people doing wonderful things over an extended period, and having a feeling of gratitude and feeling that it'd somehow be wrong if you didn't respond to the wonderful things they've done for you.

One more thought. I guess I've thought that my teenage children often did things that were deserving of praise, and deserving of praise not just as reinforcement but actually that they were thoughtful and did something good. I certainly have thought about this idea that you need to have the capacity for self-reflection and self-reform. And I don't imagine that they, or even I now, have fully developed this capacity...

Prof. Arenella:

No. That's why I use the word minimal.

Audience Member:

It's a very limited capacity that we have.

Prof. Arenella:

Exactly.

Audience Member:

But still, I mean they may have gotten some distance. And so I guess I was comfortable thinking that they had positive deserts.

Prof. Arenella:
OK.

Audience Member:

And of course I mean not so much was at stake; I'm not at all disagreeing with your results.

Prof. Arenella:

No, I understand. Just a couple of things, the first dumb thing I'm going to say: I don't want you to interpret as I'm not interested in your question. I find it fascinating, actually. But, in terms of the work that I do, the criminal law as an enterprise simply is not an enterprise that concerns positive deserts. Right? So, understand that I haven't given as much thought or care or even reading to issues of positive desert, because it just doesn't speak to the field that I have to address, which is negative desert.

Having said that, I don't want to give you the impression that I am defending a concept of agency that is not progressive. I'm not defending that. And indeed in my work and in the piece that I'm writing right now, I talk about the process by which children: What makes children, first of all, potential moral agents? What are the capacities and skills that a young child needs to even qualify as a potential addressee of community moral norms?

And once you answer that question, you have to answer the question of how someone who is not a moral agent, who's a potential moral agent, begins to develop these moral capacities over time. And that at some point - and that's in some sense an arbitrary decision of the writer - they reach "full moral agency" for the purposes of a particular type of blaming system and for the purposes of a type of substantive morality.

Because obviously, we can speak of substantive morality that demands so much of us, like a substantive morality that requires virtue of us. If you want to talk about what it is to be a moral agent who's capable of achieving a state of virtue, it's going to have to be a much more ambitious account of capacities than most of us possess. Obviously the criminal law, I'm not worried about that.

In terms of your question of positive deserts, the only - because I have not given this careful thought. I have to go back to my own parental practices which are consistent with yours. And I would say that what those practices suggest is that as one becomes a developing moral agent, a developing moral agent can deserve - not just have a utilitarian reason for doing it - can actually deserve some forms of both negative desert blaming and praising, and it's a graduated process.

In fact, one of the difficult jobs frankly of parenting, I think, with adolescents is trying to figure out when you're blaming where it's very much a moral educational lesson; it's utilitarian. And when you're blaming, where you really want to convey to your child that you deserve the blaming or the praise, and I think it's a tough judgment, because it's not a static process. It's a dynamic process and a part of the process you're responsible for.
That's another reason I have a real problem with the rational choice account, because it assumes that moral capacities are these constitutive gifts that one is born with, basically. Yes, there has to be some neurological development, but that's it?

My view of moral agency is that it's a burden to be a fully-accountable moral agent. It's not something that any of us choose at all. And it's dependent on a series of factors over which we have no control as to whether we ever develop into fully accountable moral agents.

But again, the quick answer to your question is I think that minor forms of blame and praise can be deserved, because you have a potential and then a developing moral agent. And it just depends on what the particular practice is to be. To make a judgment, is this really deserved? Or is this more I'm just saying this to get them to a further point?

That's the best I can do off the top of my head, but I share your reaction of students. Students love to talk about positive desert, like most human beings. Better to be praised than blamed. Yeah?

Audience Member:

If for example, the 12-year old adolescent lacks the moral agency altogether, because she's framing - I mean that's not the right question - she's framing. Wouldn't that though be the reason to not move someone out of the criminal justice system? If they were retained in the juvenile criminal justice system, as opposed to take them out of the system altogether. I mean if there's a lack of moral agency, why are we still fighting? Why are we sentencing? And where are the government controls?

Prof. Arenella:

OK, a couple of responses. First the juvenile justice system was never premised on the assumption that blaming, negative desert, was an important aspect of it at all. And in fact, it was based on the assumption of progressive reformists in the early 20th century. Children were qualitatively - they didn't use terms like moral agency, but they have the common intuition of many parents - children simply aren't like adults in so many basic ways.

And so when children commit crimes, it's sort of not particularly useful from a utilitarian perspective to hit them with adult criminal liability, negative blaming from the community and potentially prolonged confinement. So, the juvenile justice system is based not on any notion of moral responsibility or moral culpability at its start. It's a purely utilitarian enterprise. And the question is, what does the best job of "addressing the child's needs" so that they won't recommit crimes?

Now, having said that, the current juvenile justice system is just the junior varsity of the adult criminal justice system. There is no rehabilitation. There is no reform effort. There is
no money for any significant attempt to do anything. It's basically another prison for a shorter period of time.

In some of these prisons, there are dedicated state employees, who at an individual level, do wonderful work with some of the children being confined and help some of these children. Most, very little is done, and they are incarcerated until they're released.

Some of the children released so hated the incarceration that that alone gives them an incentive not to re-offend. Most find incarceration more comforting than the miserable lives they leading before incarceration. So, incarceration serves no social purpose apart from letting society know that a price was paid, which is a real important purpose.

Because people don't want to see even juvenile criminality unpunished. It's very clear that there's a punitive impulse in all of us when any serious crime occurs, whether it's a child or an adult. And a good utilitarian has to satisfy that; so punishment for its own sake.

Audience Member:

What would be your moral sense? What rehabilitation...

Prof. Arenella:

Would be effective?

Audience Member:

... in the case of developmental state. I mean...

Prof. Arenella:

Well, two points. Even though the juvenile justice system isn't about desert, I'm not suggesting that it wouldn't be appropriate from a utilitarian perspective to develop programs that would encourage things like empathy towards the other. A massive problem - I mean from my perspective most real moral evil comes from our ability for selective empathy, selective empathy.

In the way that if you think about Nazi Germany and the attempts that Nazi propaganda made to dehumanize the Jews, well think about why do they have to dehumanize the Jews? Why was that so necessary? It was necessary; because to do terrible cruelty to others, you won't be efficient at it if you really do have some sense that the other is you, that the other shares some human bond with you. So, dehumanization is necessary for efficient cruelty. But, the very act of dehumanization shows you what the underlying moral impulse is that's in all of us.

So, I'm not suggesting that it wouldn't be a good thing to have programs in the juvenile
And indeed people, just using their own common-sense intuition, actually have developed such programs. They get gangs from neighborhood A and B together in a juvenile prison camp and force them into some cooperative exercise. It usually starts off very badly, because there's a great deal of hostility obviously between the two groups. But, over time, if the counselor is effective, they actually...

[missing transcript 43.30 - 52.15]

Prof. Arenella:
... The first piece I published in a law review, not in a philosophy journal, that lawyers and law professors got their hands on. Was a long monograph in UCLA in ninety something and it was about a psychopath.

And because I wrote it for my students, I wanted my students to get engaged, so I wrote most of it as a dialogue. So, instead of a rigorous philosophical argument, I wrote it as a long dialogue between a psychopath, an adult psychopath, and a trial judge. Who is defending the rational choice account of moral agency.

And my brilliant psychopath, the point of his argument was that he wasn't a moral agent - under any defensible view of moral agency. Defensible meaning my view or the view of the philosophers whose work I greatly admire and respect and have learned from.

So, his argument of course all through this dialogue was look, it's not that I don't have empathy. I don't, and I want to be clear that it's not about, in my work, it's not about whether you empathize with your victim. When you commit a crime, you're not engaging in an act of empathy. All criminals, including all morally accountable criminals, don't show empathy at the time of their criminal act.

So, the issue isn't empathy at the time of the crime, the issue is something else. It's the capacity for empathy. I want to emphasize that. Now, once you understand it's the capacity for empathy - not that it was displayed when a person commits a criminal act - then the question becomes how do you know? There's an empirical question. How do you know whether someone has a capacity for this feeling?

And the literature suggests the best answer to that as to this moral emotion is the actual evidence of its display at a very, very early age. And in fact, they have studies that suggest that the sort of precursor to empathy is shown by infants as young as one and a half, two.

And I'm not saying this is real empathy, but it's the emotional precursor. When an infant hears other infants crying, they start to cry. That's not empathy, because there's no
cognitive component. There's no sense of myself versus the other yet. So, I'm not saying that's empathy.

But most moral psychologists would acknowledge that there's usually signs of actual, the affective emotional component of empathy at a very early age, three, four and five. And that the cognitive component as the brain develops begins to get displayed early on too.

So, if you have someone who shows no actual evidence of ever displaying either the affective feeling, much less the cognitive component of it all through his childhood, you've got a very good argument that that person simply is hardwired differently for whatever reasons that we don't understand and lacks the capacity. That's point number one.

So, that would be how I would ask for a demonstration because you can't rely on psychiatry or psychologists who viewed most of my clients as psychopaths, and all of them had empathy. They just had selective empathy and they never showed any feeling, concern for the criminal justice people they dealt with. The police, the probation officers, oftentimes even their defense lawyers.

But, if you saw them with their child or with their girlfriend suddenly you saw empathy. So, most criminals I would say that I represented and that exist in the real world, are not psychopaths, no matter how the media describes it. They're just not.

Now, let me get to the core question, if there is someone who has never evidenced the actual emotion ever, and everyone who exams the person agrees, this person doesn't have this capacity, he's not hardwired this way. Under my theory, he's not a moral agent. He doesn't deserve any moral blame in the sense of deserving moral blame. And the key is this notion of desert.

You can say that we feel good blaming him. Blame serves lots of utilitarian purposes, it's important to also reinforce community norms that he's breached. But, if you're asking does he actually deserve it, how can he deserve being blamed for not showing the appropriate moral attitude when he's incapable of experiencing it?

It's like blaming a martian who comes down and decides to kill a group of people because it's an interesting science experiment for whatever. I mean, I could give you science fiction examples. I just don't think that's a large class of people and I think the media overuses the term. But, yes, I would not blame them.

But, I also would argue this, I'd far prefer to see the criminal justice system deal with them. Because think about what the alternative mechanism, of course, of social control is, involuntary civil commitment.

And one of the reasons I am now happy with a lousy second best rational choice account of moral agency for the criminal law in the adult system is that if we didn't have that, if we lost the ability to use coercive social control over some very dangerous individuals, we're
not going to release them. They’re going to be confined in the alternative system of civil commitment.

But, the problem is if you open up civil commitment to the psychopath, the definition of who can be subjected to involuntary civil commitment is going to expand. And that I don’t want to see for liberty protective reasons. Yes, Michael?

Michael:

You said a couple of things about age that were contained in the article. [inaudible 57:27] And even well until the 20th century, most humans that were alive were. In other words, the human race has largely been a race of children. And that the idea of separating children from adults is largely Western, largely rich, largely industrial and largely in the last hundred years.

Prof. Arenella:

Yes. I agree with all of that.

Michael:

So would that mean that your idea of moral agency is largely inapplicable... So, that talking about moral blame in societies... [inaudible 58:14] Capital punishment laws who were writing well before people lived beyond the age of 18. I'm just curious about how you feel about the fact that most humans have been children. Does that mean that only very recently this moral agency is even an issue worth talking about?

Prof. Arenella:

[laughs] I'm not sure I accept the empirical proposition that in the 19th century everyone died by the time they were 18.

Michael:

No, in many parts of the world. In poor cultures average life expectancy is very, very low. Go back 3,000 years...

Prof. Arenella:

I take your point. I take your point. I do. And I think that for my enterprise what's relevant about your point, for my enterprise, is I have to acknowledge that whatever age I pick is going to be somewhat arbitrary. And not just for the reasons I was discussing with Kelly. Because the age in which children are trained with certain skills is very much culture dependent. I think that's absolutely right.
Indeed, I would argue that we prolong - in our culture now, we actually have gotten to a place where we culturally prolong adolescence; much longer than we did say just when I was a child in the '50s. And so that very age, actually an argument could have been made that in the 19th, to take your point of the age contingency. I could make an argument that in the 1950s, there was a better argument that most children worked for a living outside of the home for economic necessity reason.

If working is another social context in which you obviously learn and experience something very different than simply being a child taken care of by your parents. And you grow up a little bit from it and you learn certain things including self management skills, because you have people who have power over you who don't care about you. And that's a real incentive to begin to learn some character management skills.

So, I take your point and I would agree that the time aspect, the age aspect, is very, in terms of when these skills come into place, some of them that I'm talking about are very much culture dependent. And therefore it would be a different age at a different time. I agree with that.

Now having said that, I don't know what to say about before the 20th century because I'm only addressing the criminal justice system now. I'm not really concerned about the blaming practices of the 17th or 18th century. So, I just don't know what to say about that.

But the basic point you're making that not every one of the capacities I'm talking about are simply neurological, some of them are very much culture dependent. I agree. I think that's right.

Greg:

If I could maybe invite us all to go down in [inaudible 1:01:02] room. I think there's probably going to be more conversation and questions.

Prof. Arenella:

Sure. I'd be happy to.

Greg:

So there's refreshments...

[applause]