

Character Judgments, Criminal Responsibility, and the Role of Excuses

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Abstract

This essay examines the issue of criminal liability from the viewpoint of the character theory of responsibility, with particular attention being paid to the role of excuse-based defences. Two different versions of the character theory are examined and compared: the traditional character theory and the utilitarian motivational theory of responsibility. Following a brief overview of the distinction between justification and excuse in common law jurisprudence, the two versions of the character theory are discussed and their implications are highlighted. The essay concludes that the traditional character theory, with its emphasis on moral blameworthiness, offers a better basis for understanding the nature of criminal responsibility in relation to offences which also constitute moral wrongs. The utilitarian motivational theory, on the other hand, may be given priority when considering the question of responsibility in relation to offences in which the element of moral blame is absent, minimal or questionable.

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Introduction to the Theory of Justification and Excuse

In legal systems rooted in common law, establishing criminal liability requires demonstrating harmful behavior (*actus reus*) alongside a guilty or culpable mental state (*mens rea*). Additionally, criminal liability assumes that there are no legal defences available. Yet, referring to these defences collectively as 'defences' might be misleading because it implies they form a uniform group with shared traits or underlying principles. However, similar to offences, the overarching principles applicable to defences in criminal law differ from one case to another. Generally, legal defences are categorized into two types: justifications and excuses. In the case of a justification-based defence, the defendant argues that under the specific circumstances of their case, what would typically be considered a criminal act should instead be viewed as lawful or legally permissible.⁽¹⁾ On the contrary, excuses do not challenge the act's wrongness or illegality. Yet, if a defendant presents a valid excuse, they cannot be deemed at fault or responsible for committing the offence.⁽²⁾

The difference between justification and excuse is rooted in the distinction between primary (or prohibitory) norms and norms of attribution. Primary norms establish basic behavioral standards that society's members must follow to avoid legal penalties. These norms are paired with justification norms, which permit deviations from primary norms under specific conditions. On the other hand, the norms of attribution do not alter the primary norms but provide moral reasons for absolving someone who has breached a legal prohibition. As George Fletcher points out:

(1) Self-defence is often referred to as an example of a justification-based defence. Consider on this matter: Robinson (1975); Funk (1999); Omichinski (1987).

(2) An example of an excuse-based defence is insanity. On the topic of legal excuses consider in general: Kadish (1987); Horder (2004); Moore (1985); Nowell-Smith (1970).

Wrongful conduct may be defined as the violation of the prohibitory norm as modified by all defences that create a privileged exception to the norm. The analysis of attribution turns our attention to a totally distinct set of norms, which do not provide directives for action, but spell out the criteria for holding persons accountable for their deeds. The distinction as elaborated here corresponds to the more familiar distinction between justification and excuse.⁽³⁾

Criminal law aims to do more than just penalize offenders; it also seeks to underscore and bolster the values and norms of society. Therefore, it ought to have the means to delineate the reasons why some individuals charged with crimes may be exempted from criminal responsibility.⁽⁴⁾ Describing a defence as a justification suggests that the behavior in question is either approved of or, at the very least, tolerated. Conversely, referring to a defence as an excuse highlights that the person's actions, while not blameworthy, are still wrongful and against the law. The difference between a justification and an excuse is not only morally significant but also has crucial practical consequences. For instance, it is accepted that someone who aids another in committing a crime should be deemed an accessory, even if the main perpetrator may have a legitimate excuse. However, if the main accused can successfully argue a defence based on justification, then a supposed accomplice would not be held criminally responsible. Actions that are legally justified or authorized cannot be met with resistance, and it is generally permissible for others to

(3) Fletcher (1978, p. 458).

(4) According to Moore (1985, p. 1144), by moral values and expectations we mean those "attitudes of resentment, moral indignation, condemnation, approval, guilt, remorse, shame, pride and the like, and that range of more cognitive judgments about when an actor deserves moral praise or blame."

support someone whose actions are considered justified. In contrast, since excuses do not change the wrongful nature of the deed, it is allowable for someone to defend themselves against an attack by someone whose aggression is deemed excusable.⁽⁵⁾

Professor George Fletcher offered an important lead in re-awakening interest in the theory of justification and excuse in common law jurisdictions. He argues that the judges' tendency to abstract the judicial decision from the individual case in order to formulate general rules of law resulted in the overlooking of the fundamental character of criminal law as "an institution of blame and punishment."⁽⁶⁾ Fletcher posits that the act of condemning and punishing criminals inherently involves a negative judgment of their moral character, based on their breach of criminal laws. Furthermore, Fletcher contends that the common law's use of 'reasonableness' as a universal criterion for addressing legal conflicts diminishes the important difference between justifying an act and excusing it. He describes this approach as a 'flat' legal discourse, where the resolution of legal issues is solely dependent on adhering to a singular standard. As he explains:

The reasonable person enables us to blur the line between justification and excuse, between wrongfulness and blameworthiness, and thus renders impossible any ordering of the dimensions of liability. The standard 'what would a reasonable person do under the circumstances?' sweeps within one inquiry questions that would otherwise be distinguished as bearing on wrongfulness or blameworthiness. Criteria of both justification and excuse are amenable to the same question.⁽⁷⁾

The increasing body of research on the theory of justification and excuse, along with

(5) See Fletcher (1978, pp. 761-762); Alldridge (1983, p. 666).

(6) Fletcher (1978, p. 467). See also Fletcher (1974).

(7) Fletcher (1985, pp. 962-963).

its regular citation in legislative enactments and judicial decisions, indicates a revived interest in the advantages of this perspective on criminal liability.⁽⁸⁾

The Traditional Character Theory of Responsibility

The character theory of responsibility posits that our moral judgments primarily focus on the enduring and interconnected mental and ethical qualities that constitute an individual's character, including their beliefs, values, desires, sensibilities, and tendencies. These character traits, along with how they are expressed through behaviour, are shaped by a person's upbringing, moral education, life experiences, and introspection. This theory is linked to the Scottish philosopher David Hume (1711-1776) and his concept of moral sense. In Hume's view, which reflects a form of intuitionism common in 18th-century British philosophy, witnessing certain behaviours elicits feelings of pleasure or discomfort, allowing an observer to differentiate between right and wrong actions. These emotions not only facilitate ethical discernment but also motivate moral actions. Hume suggests that moral sense is directed more at the character revealed through actions rather than the actions themselves. As he remarked, "actions are objects of our moral sentiment, so far only as they are indications of the internal character, passions and affections; it is impossible that they can give rise either to praise or blame, where they [do not proceed] from these principles."⁽⁹⁾ As actions are expressions of certain character

(8) As Stanley Yeo (1988, p. 227) has pointed out: "The criminal theory concerning justification and excuse can no longer be ignored by the courts. Its primary contribution is consistency in the development of the law, a goal which the courts themselves proclaim as most desirable. Without the theory to guide the courts, aspects of the law of self-defence, duress, necessity and, until only recently provocation, have developed in an inconsistent fashion." See also Botterell (2009, p. 191).

(9) Hume (1949, p. 108). See also Hume (1888, pp. 477 & 575). For closer look at Hume's theory consider Bayles (1976); Mackie (1980); Gill (2006); Reed and Vitz (2018).

traits in their authors, judgements of blame or praise ultimately pertain not to actions as such but to the character traits or attitudes that bring them about. This perspective on responsibility suggests that individuals are somehow accountable for their own character traits. It's assumed that people have the capacity to recognize and influence the traits and dispositions that drive their rational decisions in behavior. This belief in individuals' ability to control their character traits is what enables the assignment of responsibility.⁽¹⁰⁾ As Peter Arenella points out:

A character-based conception of moral agency could be used to explain why moral agents possess the capacity to think, feel, interpret and behave like a reasonable person. ...[T]his character model would locate [a person's] moral culpability in his earlier failure to do something about a character defect that clearly could impair his ability to make the right moral choice in certain circumstances. We blame him for not acting like a reasonable person because we believe he is morally responsible for not doing something about those defective aspects of his character that prevent him from acting like one.⁽¹¹⁾

This assertion implies that the fundamental reason for holding individuals responsible and blameworthy is their lack of action regarding the personality traits or mindsets that lead them to partake in ethically incorrect behavior.

The character theory of responsibility claims that the imposition of criminal

(10) Aristotle believed that we are responsible for our characters because we are capable of choosing to be the persons we are (*Nicomachean Ethics*, III, 1111b31-1112a17). According to a weaker version of this approach, although initially we have no control over the processes through which our characters are formed, we later on develop an ability to maintain or shape our characters through our choices. For a fuller account of this view as it relates to criminal responsibility see Pincoffs (1973).

(11) Arenella (1994, p. 257).

liability and punishment may be morally justified only when the wrongful act reveals a flaw in the actor's character.⁽¹²⁾ The law mandates the demonstration of certain mental states, namely intent, recklessness, and negligence, as evidence of guilt in criminal acts, reflecting various attitudes toward the norms or interests of society. While these attitudes can be fleeting or variable, the legal system operates on the assumption that specific behaviors, combined with certain mental states, indicate an undesirable personality trait or mindset. For example, someone who intentionally commits a crime is seen as having a deliberate wish to inflict the harm proscribed by the law, showing a clear disregard for the consequences of such harm. On the other hand, someone who recklessly causes a banned situation to arise—aware of the significant risk but indifferent to the outcome—exhibits a less objectionable character, not wishing for harm but not concerned if it happens. The degree of blame and, thus, the punishment one deserves increases with the severity of the attitude toward the potential harm, based on how likely it is to happen and how undesirable the person's attitude is towards it.

The theory of character posits that criminal responsibility and subsequent punishment are contingent upon two interconnected criteria: the notion of just deserts and the requirement of voluntariness. The principle of just deserts is founded on the belief that the unique aspect of criminal punishment is its function as an expression of moral condemnation. This moral condemnation extends beyond mere disapproval of the wrongful deed to include disapproval of the offender's character, as demonstrated through the act of committing the crime. In the words of George Fletcher:

An inference from the wrongful act to the actor's character is essential to a retributive

(12) As Nicola Lacey (1988, p. 68) remarks, "it is unfair to hold people responsible for actions which are out of character...[and] fair to hold them so for actions in which their settled dispositions are centrally expressed."

theory of punishment. A fuller statement of the argument would go like this: (1) punishing wrongful conduct is just only if punishment is measured by the desert of the offender; (2) the desert of an offender is gauged by his character - i.e., the kind of person he is, (3) and therefore, a judgment about character is essential to the just distribution of punishment. ⁽¹³⁾

Fletcher posits that we blame a person who committed a wrongful act only if the act reveals what sort of person the actor is, that is, only if we can infer from the commission of the wrongful act that the actor's character is flawed. From this perspective, the primary goal of penal sanctions is retributive justice: to impose suffering on those deemed morally culpable. Some advocates of retribution adhere to a deontological rationale, insisting on a direct correlation between just deserts and punishment. By drawing on Kant's categorical imperative that a moral agent must be treated as an end in himself and not as a means to an end, they argue that it is right to give people what they deserve, irrespective of the desirable or not consequences for society that such a response may entail, because this is what justice demands. ⁽¹⁴⁾ Others have embraced a relative concept of desert, connecting punishment to justice in how society allocates benefits and burdens. ⁽¹⁵⁾ If the theory of character posits that just deserts should be centered around traits of character instead of actions, then why is it considered inappropriate to directly punish individuals for possessing a bad character? As Fletcher explains:

[T]he limitation of the inquiry to a single wrongful act follows not from the theory of

(13) Fletcher (1978, p. 800). A similar approach has been adopted by Feinberg (1970, p. 126). See also Glover (1970); Bayles (1982).

(14) See Kleining (1973, p. 67).

(15) Consider, e.g., Morris (1973).

desert, but from the principle of legality. We accept the artificiality of inferring character from a single deed as the price of maintaining the suspect's privacy. Disciplining the inquiry in this way ... secures the individual against a free-ranging enquiry of the state into his moral worth. ⁽¹⁶⁾

In the framework of character theory, the concept of just deserts is contingent on the requirement of voluntariness. This idea suggests that voluntariness is broad enough to cover all situations where an individual is deemed in command of, and thus accountable for, their actions. Voluntariness is understood in two ways: firstly, as the individual's control over their physical actions, that is, the capacity to act deliberately; and secondly, as the ability to make and execute choices. The first interpretation connects voluntariness with conscious behaviour as essential for assigning authorship-responsibility, while the second ties it to behaviour that is both conscious and freely chosen. Within the character theory, voluntariness as a criterion for moral responsibility inherently involves both authorship-responsibility and the freedom to choose.

The necessity for voluntary action means that an individual can only be held accountable for a crime if they had the ability to control their actions. Conditions that excuse responsibility do so by removing the element of voluntariness, preventing the usual deduction that a wrongful deed reflects a defective character, and thus stopping the assignment of moral blame as a basis for criminal liability. For instance, a defendant who caused harm due to a reasonable error in judgment about a situation does not demonstrate a negative character quality and, as such, cannot be morally or

(16) Fletcher (1978, pp. 800-801). According to Ronald Dworkin (1977, p. 11), "The government may restrain a man for his own or the general good, but it may do so only on the basis of his behaviour, and it must strive to judge his behaviour from the same standpoint as he judges himself, that is, from the standpoint of his intentions, motives, and capacities."

legally blamed for the resulting damage.⁽¹⁷⁾ Should the error in judgment by the accused be deemed unreasonable, it could result in a conviction for an offense rooted in negligence. This scenario suggests that the individual did not recognize that their actions posed a significant and unjustifiable risk, which they ought to have been aware of, indicating a problematic trait that warrants a measure of culpability. Such a lapse in recognizing and adhering to the required level of care demonstrates a lack of concern for the well-being of others, an attitude that is considered negatively by society. On the other hand, an individual who acts with intent under duress, such as threats or coercion that they cannot realistically avoid or counter, is not seen as having a character flaw that would make them morally or legally accountable, as their actions are not ‘morally voluntary’. Nevertheless, if it is determined that the individual contributed to or did not avert the situation leading to their coerced state, this might lessen but not completely eliminate their responsibility for the offence. This is because their role in creating or not preventing their predicament suggests a character flaw.⁽¹⁸⁾

Critics argue that the character theory of criminal responsibility offers an incomplete perspective on criminal law. They contend that modern criminal law goes beyond penalizing actions that exhibit immoral behavior indicative of a bad character. It is noted that there is an increasing number of offences in which the element of moral stigma is absent or diluted almost to a vanishing point. For these offences, criminal liability serves primarily as a method to regulate or manage specific types of social behavior. Unlike the more severe crimes, which carry a moral condemnation (known as *mala in se*), these ‘regulatory’ offences (also called *mala prohibita*) do not

(17) As George Fletcher (1978, p. 161) remarks, "mistaken beliefs are relevant to what the actor is trying to do if they affect his incentive in acting. They affect his incentive if knowing of the mistake would give him a good reason for changing his course of conduct."

(18) See on this issue Robinson (1985).

inherently involve moral fault.⁽¹⁹⁾ Regarding the latter offenses, attributing moral blame—drawing a conclusion about a person's character based on a wrongful act—cannot serve as the criterion for establishing criminal liability. Consequently, these offenses are not covered by the character theory of criminal responsibility.

The theory of character encounters a challenge in determining the limits of public, shared, or societal morality, against which behaviour is judged as immoral or potentially unlawful. Patrick Devlin suggests that the measure of public morality lies in the intensity of ordinary people's reactions. Behavior that triggers strong reactions of intolerance or outrage among the average members of society indicates a threat to collective moral standards, warranting possible criminalization. Devlin believes that by gathering a panel of average citizens to morally assess specific actions, one can uncover the prevailing standards of common morality.⁽²⁰⁾ However, as pointed out by those who critique Devlin, the sentiments of the general populace might not necessarily be ethical but could instead reflect biases. The approach Devlin suggests for identifying a shared moral code is criticized not only because it might not eliminate prejudice but also because it might not achieve consensus on contentious moral matters.⁽²¹⁾ Therefore, in cases of criminal offenses based on actions with a contentious moral foundation, it seems challenging to claim that criminal responsibility is attributed to a defect in the individual's character. In fact, it might be the reverse, especially if the majority of society believes that certain behaviors should not be deemed immoral and hence should be decriminalized. Furthermore, even when

(19) In common law jurisdictions the large majority of these offences fall in the categories of strict and absolute liability offences, i.e. offences requiring a minimal only degree of fault or even no fault at all on the person's part.

(20) Devlin (1965, pp. 22-23).

(21) For an evaluation of Devlin's position see, Hart (1963); Dworkin (1966); Hughes (1962); Sartorius (1972). And see Allan (2017).

there is consensus on the immorality of certain actions, it is not justifiable to deduce that a single act reflects a permanent flaw in someone's character. Legal accountability can be applied to individuals of good character who, in a moment of weakness, consciously choose to act against the law in a manner not typical for them. The fact that committing a crime may be atypical for the person involved does not exempt them from facing criminal charges.

However, the general credibility of the traditional character theory of responsibility should not be dismissed for these reasons. While it is accurate that legal penalties are not consistently applied to behavior that is morally reprehensible, it is important to recognize that the basis for criminalization lies in the harm principle. This principle dictates that only conduct that causes or threatens to cause societal harm should be criminalised.⁽²²⁾ The harm principle underlies the classification of certain behaviors as criminal acts. However, the concern of the character theory is not with the process of making or repealing criminal laws. Instead, it concentrates on a distinct issue: whether an individual who has inflicted one of the proscribed harms merits criminal sanctions. The main objective of this theory is to establish a framework for addressing the question of blame within the scope of criminal justice, aiming for alignment with our collective ideals of justice and equity. When evaluating this issue, the character theory presupposes that every harmful deed reflects an undesirable character trait, regardless of whether such behavior is typical or atypical for the specific individual involved.⁽²³⁾ Therefore, if an individual with an otherwise flawless reputation suddenly succumbs to the temptation to take another person's purse, their typically positive character will not matter in relation to their legal responsibility for committing theft.⁽²⁴⁾ The character theory is concerned with negative character traits only insofar as they are reflected in harmful conduct, so it is

(22) For a fuller discussion of the harm principle see Raz (1986, esp. ch. 15).

incorrect to believe that criminal punishment is administered merely for having a bad character. ⁽²⁵⁾ Despite our varying opinions on what behaviour is considered immoral and socially unacceptable, when it comes to most criminal acts, being morally at fault is still an essential (but not the only) criterion for punishment to be justified. Hence, for these offences, the traditional character theory of responsibility is both plausible and in alignment with current criminal law practice.

The Utilitarian Motivational Theory of Responsibility

Contemporary utilitarian philosophers have proposed an approach to criminal responsibility that has attracted considerable attention in recent years. At the heart of this perspective lies consequentialism, a principle that assesses human institutions based on the positive or negative outcomes they generate for society. This approach falls under the theory of 'rule utilitarianism', emphasizing the impact of adhering to specific rules or upholding certain societal structures, instead of evaluating the outcomes of individual actions. ⁽²⁶⁾ Drawing on the concept of general welfare,

(23) As Joel Feinberg (1970, p. 192) explains, "When we say that a man is at fault, we usually mean only to refer to occurrent defects of acts or omissions, and only derivatively to the actor's flaw as the doer of the defective deed. Such judgments are at best presumptive evidence about the man's general character. An act can be faulty even when not characteristic of the actor, and the actor may be properly 'to blame' for it anyway; for if the action is faulty and it is also *his* action (characteristic or not), then he must answer for it. The faultiness of an action always reflects some discredit upon its doer, providing the doing is voluntary."

(24) Depending on the seriousness of the offence committed, previously good character is usually considered as a factor in mitigation of the sentence imposed for the offence.

(25) As Jeremy Horder (1992, p. 133) points out, "the character conception of culpability is parasitic on (a version of) the harm principle. It is therefore also focused on actions, the harmful actions proscribed under the harm principle. This naturally and properly limits the aspects of character that will be relevant to culpability."

utilitarians call for the development and evaluation of social institutions, especially the criminal justice system, on the basis of the principle of maximum efficiency. This principle suggests that when deciding among various policy options or organizational frameworks, the preference should be towards those expected to yield greater overall benefits for society.⁽²⁷⁾ From this perspective, utilitarians believe that the development and assessment of the criminal justice system should be directed by its societal function, which is to decrease the occurrence of behaviour that is detrimental to society.

In contrast to the traditional character theory of responsibility, the utilitarian perspective does not consider moral fault as an essential condition for criminal liability and punishment. This is because not every criminal act is inherently morally wrong. Furthermore, many utilitarians regard the retributivists' notion of just deserts as nothing more than a social utility requirement in disguise.⁽²⁸⁾ In this context, the notion of 'moral stigma' associated with a criminal conviction is deemed important for enhancing overall deterrence, a primary goal of the system, thus playing a crucial role. Additionally, confining criminal liability to individuals who are morally culpable for their actions assures law-abiding citizens that their decisions are valued. On the other hand, subjecting individuals to criminal penalties when the public perceives

(26) In general, a distinction is drawn between act utilitarianism and rule utilitarianism. Act utilitarianism is based on the idea that the moral rightness or wrongness of an act is to be assessed by reference to the bad or good consequences of that act itself. Rule utilitarianism, on the other hand, claims that the rightness or wrongness of an act must be determined by reference to the goodness or badness of the consequences of the rule which requires that everyone should perform that act under similar circumstances.

(27) As Brandt (1994, p. 100) remarks, "[informed rational persons] would prefer a legal/moral system the currency of which in the society would maximize general benefit - general happiness, if you like. In other words, a rule-utilitarian system."

(28) See, e.g., Seidman (1984).

them as undeserving of such censure erodes trust in the legal system and, in turn, diminishes its ability to deter crime.

Utilitarians argue that the criminal justice system would be open to criticism if it accomplishes its objective – the prevention of socially harmful behaviour – at too great a cost. Since criminal punishment entails suffering or negative repercussions that reduce overall well-being, its application can only be considered justified if its advantages surpass the drawbacks. Additionally, it should be the last resort, used only if no alternative strategies or systems can achieve similar outcomes more efficiently.⁽²⁹⁾ One way to ensure that the criminal law system meets this requirement is to recognise as part of the system a set of legal excuses because "a correct system of excuses would tend to exempt from punishment those cases in which the usefulness of punishment is likely to be outweighed by the advantages of not punishing."⁽³⁰⁾ In this context, acknowledging legal excuses is another essential aspect of a criminal law and justice system that focuses on enhancing overall well-being, rather than simply punishing offenders.

For utilitarians, criminal law primarily serves as a tool for social education. Its main goal is to foster a motivation among individuals to refrain from behaviors that could harm society. The degree of motivation needed does not have to exceed that

(29) According to Bentham, the imposition of punishment is inappropriate in the following cases: a) when it is unfounded, i.e. when the act for which it is imposed caused no harm, or when the harm it caused was less than the harm it prevented; b) when it is ineffective, i.e. when it will contribute nothing to the prevention of harm; c) when it is unprofitable, i.e. when the harm which the punishment entails is greater than the harm which it aims at preventing; d) when it is unnecessary, i.e. when it is not the most economical way of preventing the relevant harm-causing conduct. See Bentham (1982, pp. 173-175). For a general account of the utilitarian theory of punishment consider Ten (1987, pp. 7 ff.); Lyons (1965); Bayles (1968); Dressler (2018, pp. 16-17).

(30) Nowell-Smith (1970, p. 611).

which enables an average person with normal resolve to overcome any opposing desires or impulses under specific conditions. From this perspective, it is contended that when an individual commits a crime, this suggests a flaw in their motivation. When speaking of defects in motivation here we mean "those stated or implied by the prohibitions (in statutes or precedents) of a given legal system...".⁽³¹⁾ Criminal liability and punishment are justified only when a failure in motivation can be inferred from the commission of an offence. As Richard Brandt points out:

A rational and informed person, if he were to be given a choice among possible systems of criminal justice for the society in which he expects to live, would opt for a system exempting from punishment those persons who have committed an unjustified unlawful act, but did not thereby manifest any defect of standing motivation or character.⁽³²⁾

The theory under consideration is supplemented by the proportionality principle, which mandates that the severity of punishment for a crime should be proportionate to the gravity of the motivational flaw demonstrated by the criminal behavior. Therefore, if someone inflicts harm deliberately, their action shows a deeper motivational flaw than that of someone who causes the same harm through recklessness or negligence.⁽³³⁾ This implies that the law's dependence on *mens rea*, or the necessary mental state for a criminal act, reinforces the warrant for deducing a

(31) Brandt (1994, p. 104). Brandt notes, further, that "the law may be bad law, in which case the 'defects' will not really be defects from any point of view other than that of bad law. The law is always subject to improvement from the standpoint of reflective morality" (idem).

(32) Brandt (1994, pp. 124-125).

(33) According to Brandt (1994, p. 98), "[T]he movement of the law from motive to intent may be more verbal than real, since a person's intent reflects his motivation."

flaw in motivation or character from an illegal act.⁽³⁴⁾

According to proponents of the motivational theory, criminal responsibility and punishment hinge on the notion of voluntariness. If someone acts involuntarily, they are not held criminally liable because their actions show no failure of motivation, and thus, there is no need for punishment to correct their motivation. The normal inference from a *prima facie* criminal act that the actor's motivation is faulty is blocked when the actor, due to an excusing condition, cannot be deemed to have acted voluntarily. In this context, criminal responsibility revolves around answering two key questions: (1) did the accused cause harm that is legally prohibited by failing to act as any reasonable person with normal capacities would have acted in the circumstances? (2) could the accused, considering their mental state and physical abilities, have prevented causing such harm? Answering these questions requires a common-sense understanding of how people are expected to behave in specific situations, although some consideration of the accused's individual traits and mental state is usually necessary.

According to the motivational theory, if a person causes harm due to a reasonable mistake of fact—i.e., a mistake that could not have been avoided given the circumstances—they cannot be held criminally responsible because there is no indication of a motivation flaw. However, if the mistake is unreasonable and avoidable, they may be found guilty of a negligence-based offence because such a mistake can be said to manifest a motivation defect, i.e., disregard for a legally protected societal interest. When a defendant raises the defence of compulsion or duress, they admit to committing the offence with the required intent but argue that they did so because their will was overpowered by wrongful threats. The success of this defense hinges on the nature of the offence and the seriousness of the threatened

(34) On the issue of character and character traits see Brandt (1970).

harm. Based on these factors, whether the defendant's act reflects a flawed level of motivation can be determined. Therefore, according to the prevailing definition of duress in common law jurisdictions, only if the actor faces an immediate and unavoidable threat of death or serious bodily harm, which a person of reasonable firmness would not be able to resist, and only if the offence does not involve taking a life, can it be said that the act does not demonstrate a motivation flaw on the part of the actor. Additionally, it is acknowledged that an accused who exposes themselves to the risk of compulsion through their own fault cannot rely on the defense. For instance, if the accused willingly joins a criminal group engaged in violent acts, knowing the risk of being pressured to commit offences, their plea of duress will fail. In such cases, the inference of flawed motivation at the time of joining the criminal organization justifies holding them criminally liable and subjecting them to punishment.

The utilitarian theory of responsibility has been subjected to the criticism that it does not preclude, in principle, the punishment of excusable offenders. The theory prioritizes general deterrence as the primary aim of criminal punishment. Critics assert that just because the threatened punishment of excusable offenders may not deter them from committing crimes, it does not necessarily mean that actually punishing these individuals will not deter others. H.L.A. Hart and others have suggested that there could be scenarios where the benefits of deterring potential offenders through the punishment of excusable individuals outweigh the associated costs.⁽³⁵⁾ Some proponents of utilitarianism have countered this critique by suggesting that punishing someone who is excusable and thus innocent creates a logical inconsistency since punishment, by definition, implies guilt.⁽³⁶⁾ However, their

(35) See Hart (1968, pp. 72-83); Fletcher (1978, p. 813); McCloskey (1968).

(36) See, e.g., Quinton (1969).

primary point has been that overall, the drawbacks of penalizing offenders with valid excuses would surpass any rise in general deterrence that might occur. This is because widespread awareness of such a practice would inevitably erode public confidence in the legal system as a whole.⁽³⁷⁾

It is submitted that while the utilitarian perspective on excuses may arrive at the correct outcome, it does so for the wrong reasons. The notion that excusable individuals should not be punished is not solely because it would be ineffective or counterproductive to do so, but rather because of the inherent injustice inflicted upon an innocent person. People are not mere components of a social machine and their behavior subject to manipulation; rather, they possess the capacity for self-control. Consequently, those capable of exercising self-control bear responsibility for their actions and are thus liable to be praised or blamed based on the moral quality of their deeds. Criminal accountability and punishment cannot be solely justified through a utilitarian cost-benefit analysis, devoid of considerations of just deserts and other moral principles associated with retributive justice.⁽³⁸⁾

Concluding Remarks

The theories of responsibility explored in this essay start with the idea that criminal responsibility is conditional: if an accused successfully presents a legal excuse, they cannot be held criminally accountable. A significant portion of the discourse surrounding criminal responsibility centers on the concept of involuntariness. The theories offer different explanations regarding how involuntariness, as the grounds for

(37) See Brandt (1959, p. 492).

(38) For an illuminating analysis of the interconnection between desert and social utility see Feinberg (1970, pp. 55 ff).

excusing, negates criminal liability. These explanations reflect broader philosophical differences concerning the nature and objectives of a criminal justice system. The traditional character theory argues that excuses prevent assigning legal culpability by asserting that a wrongful act does not manifest a flaw in the actor's moral character. Conversely, the utilitarian version of the character theory contends that when an excuse is validly claimed, the wrongful act does not demonstrate a socially undesirable motivation or attitude. Both theories share the presumption that criminal responsibility focuses not solely on wrongful actions but on undesirable character traits that lead to such actions. However, they vary in their approach to the connection between moral culpability and criminal responsibility. The traditional character theorist sees moral blame as a prerequisite for criminal liability, while utilitarians do not consider moral blameworthiness essential for criminal liability, although many see just deserts as essentially a social utility requirement. Although both theories have influenced and continue to influence criminal law doctrine, neither provides universally accepted or conclusive solutions to all potential issues. Consequently, when addressing important doctrinal issues or making decisions regarding criminal policy, aspects of both theories may come into play. It is argued that the traditional character theory, with its emphasis on moral culpability, offers a more robust framework for understanding the assignment of criminal responsibility and the role of legal excuses in relation to offences that are both legal wrongs and moral wrongs (referred to as *mala in se*). Conversely, the utilitarian motivational theory may take precedence when considering criminal responsibility concerning offences lacking significant moral stigma (*mala prohibita*), or whose moral basis remains debatable.

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